Neutral Citation No: [2021] NIMaster 11 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **[2021] NIMaster 11** ***ICOS No:*** ***Delivered:*** **22/12/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

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BETWEEN:

JAMES O'BRIEN

Plaintiff;

and

JULIAN QUINN and DONAL HERON

Defendant.

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MASTER McCORRY

[1] By summons dated 3 April 2020 the defendant sought leave pursuant to Order 20, rule 5 of the Rules of the Court of Judicature (NI) 1980, to amend the defence and counterclaim in terms of an "amended, amended, amended defence and counterclaim" served on an unspecified date in 2020. The defendants have been ordered, by Unless Order, to provide further and better particulars to the defence and counterclaim and instead chose to provide the particulars sought by the plaintiff by further amending the already twice amended defence and counterclaim. The plaintiff takes objection to much of the proposed amendments.

[2] It is appropriate at the outset to note that the defendant's management of this case, with particular reference to the pleading stage, is an example of how not to competently and expeditiously conduct litigation. The writ of summons was issued on 16 January 2014, the statement of claim was served on 19 March 2014 and the defence and counterclaim followed on 28 May 2014. Unfortunately that was the last timely step by the defendants and was followed by a period of over six years during which the plaintiff sought to compel them to properly plead their defence and counterclaim, requiring successive notices for particulars or requests for clarification. There were numerous interventions by the court, including three Unless Orders, ending with the proposed amendment for which the defendants now seek leave. The present application would not have been necessary had the defendants conducted

the litigation, and complied with the rules and orders of the court, in the manner which the court and other party is entitled to expect.

[3] The action arises out of the dissolution of a solicitors' partnership on 1 April 2011. Under the terms of the dissolution agreement the plaintiff was to receive £85,000 of which he was paid just £20,000. He claims the balance of £65,000 plus interest, which at the date of hearing amounted to a total sum of £78,353.60. The defendants defend their failure to pay the sums agreed in the dissolution agreement on the basis that the plaintiff had breached the agreement in a number of respects. They allege that: he had continued to work as a solicitor within 15 miles of the practice; he had attempted to harm the goodwill of the practice; he had held onto, and refused to return, certain case files; he had contacted clients of the practice to solicit work. On 11 August 2011, five months after the dissolution, the plaintiff resigned from the Roll of Solicitors to enable his call to the Bar.

[4] The defendants' defence was repeated as part of the counterclaim which additionally alleged that the plaintiff had failed to disclose certain claims or potential claims or liabilities in breach of the agreement and had withdrawn money from the partnership account. However, initially these allegations were pleaded as bald assertions without any particularisation, leading to the protracted interlocutory process to which I have already referred. Various notices requesting particulars were served resulting in the production of further particulars and amendments to the defence and counterclaim, under compulsion of court orders. A final notice for particulars was served in September 2019 in answer to which the defendants on 18 January 2020 served an "amended amended amended defence and counterclaim". The plaintiff objected to much of the proposed amendments on the general grounds that where the court has, by orders including Unless Orders, prescribed a time for the defendants to provide particulars of their claims in the defence and counterclaim, it is an abuse of process to attempt to circumvent the time limits on those orders by introducing new particulars by way of further amendment of the substantive pleadings. They also object on the grounds that the proposed amendments introduce new claims outside the primary limitation period which ended on 1 April 2017, and raise specific technical objections to specific amendments. In the face of those objections this summons for leave to amend was issued on 3 April 2020.

[5] The principles to be applied in applications pursuant to Order 20, rule 5 are not disputed, nor is the case law relating to the definition of "cause of action". Order 20, rule 5 provides:

> "(1) Subject to Order 15, rules 6, 7 and 8, and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend the writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

(Order 15, rules 6, 7 and 8 concern change of parties and is not therefore relevant to this application.)

> "(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so."

(Paragraphs (3) and (4) concern amendments correcting the name of a party or altering the capacity in which a party sues and are not relevant to this application.)

> "(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment".

[6] With respect to the limitation question Article 73 of the Limitation Order (NI) 1989 provides:

> "(1) For the purposes of this Order, any new claim made in the course of any action is to be treated as a separate action and as having commenced …. (b) …. on the same date as the original action."

(This is commonly referred to as the "relator back" principle.)

> "(2) Except as provided by Article 50, or by rules of court, neither the High Court nor any County Court may allow a new claim within paragraph (1)(b) … to be made in the course of any action after the expiry of any time limit under this Order which would affect a new cause of action to enforce that claim.
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> (3) Rules of court and county court rules may provide for allowing a new claim to which paragraph (2) applies to be made as there mentioned, but only if the conditions in paragraph (4) are satisfied, and subject to any further restrictions the rules may impose."

The relevant condition at paragraph (4) is:

> "(a) as respects a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action".

Thus the Order reflects what was already provided at Order 20, rule 5, paragraph (5) of the Rules of the Court of Judicature, namely that amendment may be allowed even after expiry of the relevant limitation period, as long as the new cause of action arises out of the same or substantially the same facts.

[7] In *Mercer Ltd v Ballinger* [2014] EWCA Civ 996, [2014] 1 WLR 3597, at paragraph 37, the court observed that "the same or substantially the same is not synonymous with 'similar' although this is often used as shorthand". In *Metcalfe v Chief Constable* [1991] NI 237 (CA) the plaintiff originally sued for false imprisonment but was permitted to amend to add claims for misfeasance in public office and malicious prosecution because the new claims, despite the fact that they were otherwise time barred, were supported by the same facts already pleaded in respect of the original claim for false imprisonment. In *Eastwood v Channel 5 Video Distribution Ltd and Another* [1992] NI 183, the plaintiff was allowed to add a claim in slander in an on-going libel action, which the court considered to be merely placing a "new legal label" on the same set of facts. In *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, the Court of Appeal considered that it would be unjust to refuse the plaintiff leave to amend to add a new cause of action where pursuing it by separate proceedings would be caught by the rule in *Henderson v Henderson*. Stuart Smith LJ said at page 147C:

> "The guiding principle in giving leave to amend is that all amendments should be allowed at any stage of the proceedings to enable all issues between the parties to be determined, provided that the amendment will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

And at G:

> "There is a factor which has to be considered on the other side of the scale. Unless the plaintiff was permitted to add this alternative claim, it would be unable to bring a separate action to pursue the claim. This is because of the doctrine in *Henderson v Henderson* (1843) 3 Hare 100, that save in special circumstances the court will not permit the same parties to reopen that same subject of litigation in respect of matters that might have been brought forward, only because they have from negligence, inadvertence or accident, omitted this part of their case."

See also *Talbot v Berkshire County Council* [1994] QB 290:

> "In my view it would be a considerable injustice to the plaintiff, if in truth it has a valid claim on the alternative basis, if it were not permitted to advance it."

[8] The classic definition of "cause of action" by Brett J in *Cooke v Gill* (1873) LR 8 CP 107 at 116 is:

> "cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse".

A more recent proposition by Millett LJ in *Paragon Finance v Thakerar* approved Diplock LJ in *Steamship Mutual Underwriting Association Ltd v Trollope & Colls Ltd* (1986) 6 Con LR 11 where at page 30 he stated:

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

In essence therefore the definition is that a cause of action is a set of facts giving rise to a claim. The basic principle is that all such amendments should be permitted which are required to plead the full case and the issues to be determined, unless the proposed amendment would introduce a new cause of action outside the relevant limitation period. The proposed amendment will be allowed if it is based on the same or largely the same facts. If it is a new claim then the Article 73 relator back principle applies and therefore the court must consider the limitation issue at the amendment stage.

[9] At hearing the defendant addressed the plaintiff's objections to amendment under three headings: abuse of process, contravention of Unless Orders and limitation. With respect to the first the defendants submit that there is no reported example where leave to amend was refused as an abuse of process, unless it caused such significant prejudice that it could not be compensated by costs, which, they say, is not the case in this instance. In response the plaintiff points to the chronology and reiterates his point that the particulars now provided ought to have been provided years ago. Whilst it was not specifically argued by the plaintiff it seems to me that the defendants' submission may not be as straight forward as counsel suggests. One can draw an analogy with the question whether the court can exercise its Order 18, rule 19 power to strike out pleadings in order to enforce Order 18, rule 7. This 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 of claim must be as brief as the nature of the case permits."

[10] The Supreme Court Practice (the "White Book" 1999 edition) at paragraphs 18.7.4 (the need for compliance with the Rules of Court) and 18.7.10, which emphasised the words "contain, and contain only" in rule 7 (1). At 18.7.4 it states:

> "These requirements should be strictly observed (per May LJ in *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 at 1352). Pleadings play an essential part in civil actions, and their primary purpose is to define the issues and thereby to inform the parties in advance of the case which they have to meet, enabling them to take steps to deal with it; and such primary purpose remains and can still prove of vital importance, and therefore it is bad law and bad practice to shrug off criticism as a `mere pleading point'. (See per Lord Edmund-Davies in *Farrell v Secretary of State for Defence* [1980] 1 WLR 172 at 180; [1982] 1 All ER 166 at 173. At 18.7.10 it states: The words `contain only' emphasise that only such facts which are material should be stated in a pleading. Accordingly, statements of immaterial and unnecessary facts may be struck out (Davy v Garrett (1878) 7 Ch D 473; *Rassam v Budge* (1893) 1 QB 571; *Murray v Epsom Local Board* (1897) 1 Ch D 35 and see also rule 19). Unless, however, statements are ambiguous or otherwise embarrassing, the Court as a rule will not inquire very closely into their materiality (*Knowles v Roberts* (1888) 38 Ch D 263 at 271). The question whether a particular fact is or is not material depends mainly special circumstances of the particular case. Thus knowledge, notice, intention, and, in a few cases motive, are in some cases material, and if so, must be pleaded as facts and with proper particularity. The legal relation in which parties stand to one another should generally be stated."

[11] These cases related to strike out of immaterial fact which obscure a pleading or causes embarrassment or delay and is thereby arguably an abuse of process, but the basic thrust of the rules remain, that the court may enforce the rules of pleading and that clearly must include the requirement that proper particularisation of the claim is provided. To see the rationale for this one need only ask what is the purpose of pleadings in the first place. It is of course to enable the other party to an action to know the case they have to meet, firstly in terms of their own pleading and then at trial. It follows that a pleading which does not satisfy the requirements in Order 18, rule 7, whether it obscures the pleading by including immaterial fact, or as in the present case, by failing to provide proper particulars, it has the potential to prejudice

and delay fair trial because there is a lack of clarity as to what case one or other party is actually making. It seems to me that the Court is entitled therefore to take into account a protracted history of failure to provide proper particularisation of the case, even in the face of repeated court orders to compel, including Unless Orders, when considering a significantly late application for leave to substantially amend the pleading. It seems to me that this applies in respect of the defendants' submissions in respect of both the history of contravention with court orders and abuse of process. The plaintiff's objections to amendment are not therefore to be blithely ignored as the defendants, in effect, propose. See Lord Edmund-Davies in *Farrell* cited in the foregoing paragraph.

[12] I turn then to the question of limitation. This gives rise to two points. Firstly, the defendants argue that limitation cannot arise in respect of a defence but only to the counterclaim. However, the plaintiff points out that the counterclaim expressly repeats the defence and what is alleged in it and the two cannot therefore be divided. There is no material difference between the two as any alleged breach of the agreement dissolving the partnership by the plaintiff, pleaded in the defence, also triggers rights under the counterclaim. This of course does not apply where there is a pleaded cause of action in the counterclaim as opposed to particulars of a defence, so something such as a specific allegation that the plaintiff continued to work as a solicitor, in breach of the agreement, would be a cause of action rather than a particular of defence. That then gives rise to the question, whether it is a new cause of action, and if it is, does it arise out of the same or substantially the same facts as the causes of action already pleaded. If it is a new cause of action but arises from the same or substantially the same facts then amendment may be allowed and the relator back principle applies. If it is a new cause of action which does not arise from the same or substantially the same facts then it is time barred and to allow the amendment would deprive the plaintiff, as defendant to the counterclaim, a limitation defence.

[13] The proposed amendment to which the plaintiff takes greatest objection to is found at paragraph 4(vi) of the amended, amended, amended defence which at paragraph 12 in the counterclaim, are repeated as part of the counterclaim. This consists of a series of particulars of a range of allegations in detail not previously provided. The plaintiff concedes that paragraphs 4(ii), 4(iii) and 4(v) are already set out in replies to particulars (paragraph 4(iv) is deleted) and also consents to amendment of paragraph 4(vi)(a), (b), (g) and (h) as these relate to causes of action already pleaded. It objects to the proposed amendments at paragraph 4(vi)(c), (d), (e), (f) and (i) on the grounds that they introduce new causes of action out of time, and raises a specific challenge to paragraph (i) on the ground that it seeks to introduce a part of the counterclaim previously struck out by consent. I will deal with it first.

[14] Paragraph 4(vi)(i) details an allegation that the plaintiff had deposited into his own, rather than a partnership account, a cheque relating to costs which had been paid by a client named Mr Corbett in 2008. This only came to light in 2011 when Mr Corbett responded to a bill of costs sent in April 2011. This was sorted out between the plaintiff and Mr Corbett but at the time of the dissolution of the partnership the

plaintiff would have been aware that this represented a potential liability to the firm but did not disclose it. This allegation, without particulars, had originally been pleaded at paragraph 15 of the counterclaim which had stated:

> "The Plaintiff did deposit monies for the partnership of James O'Brien & Co into his own personal account".

The defendants had previously consented to the paragraph being struck out because taken with replies to particulars there was no support for such a cause of action. It is not disputed that the facts which the defendant seeks to plead in the amended sub-paragraph (i) relate to the same allegation, however they argue that this is simply a case of abandonment and restoration, relying on The White Book 1999, paragraph 20/8/32: *Knox & Dyke Ltd v Holborn BC* [1931] 71. However, the plaintiff contends, and I agree, that this was not a simple case of abandonment and restoration but a judicial act striking out the allegation at paragraph 15, by consent, and it cannot now be re-introduced by amendment of the defence. That proposed amendment is not therefore allowed.

[15] I turn then to paragraphs (vi)(c), (d), (e), and (f). The plaintiff says that these are all newly pleaded causes of action, pleaded for the first time after the expiry of the primary limitation period. They each relate to potential liabilities for the firm of which the plaintiff would have been aware at the time of the agreement but which he did not disclose to the defendants as he was obliged to do, so that they did not become aware of them until later: in the case of (c), (e) and (f) in September or October 2011, well after the agreement. However, I do not except that these are in fact new causes of action but rather constitute further particulars, arising out of the same or similar facts as the causes of action already pleaded. They should of course have been particularised a long time before, and it is that failure to do so, in the face of persistent attempts by the plaintiff to obtain such particulars, that the real offence lies, justifying the plaintiff's assertion that to plead them now amounts to an abuse of process.

[16] The question therefore, is whether or not at this stage amendments which would otherwise be permitted because they relate to matters arising out of the same or similar facts, should be disallowed because the delay is such that it amounts to an abuse of process? It is arguable that to disallow them on the ground that the delay amounted to abuse of process would be inconsistent where the plaintiff has already consented to some of the amendments, which were also late or out of time, but the difference is that those had been particularised earlier whereas those to which the plaintiff maintains an objection, were not. Those amendments are significantly delayed, and in default of previous orders of the court, but there is no evidence to suggest that this additional delay will prejudice the plaintiff at this stage in a way which cannot be compensated by costs. The court must also keep in mind the dictum of Stuart Smith LJ in *Beoco Ltd v Alfa Laval Co Ltd*, as to the guiding principle:

> "The guiding principle in giving leave to amend is that all amendments should be allowed at any stage of the

> proceedings to enable all issues between the parties to be determined, provided that the amendment will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

To put it another way, leave is granted on payment of any costs occasioned, unless the opponent will be placed in a worse position than he would have been in if the amended pleading had been served in the first instance. In those circumstances, but with some disquiet, I grant the defendants leave to amend the amended, amended, amended defence and counterclaim in the manner proposed save for the amendment to paragraph 4(vi)(i) which is not allowed.

[17] In view of the defendants' conduct in the management of this case, and despite the fact that they have been substantially successful in their application, to allow them the costs in the application, which was necessitated because of their default, would be unjust. I therefore award the costs of the application, and any other costs occasioned by the defendants' amendments, to the plaintiff and I certify for counsel.