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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **24/06/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM

THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

PAUL AND SELENA TWEED

Appellants:

-and-

J & E DAVY, T/A DAVY

Respondent:

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Before: McCloskey LJ, McFarland J and Rooney J

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Representation

Plaintiffs: Mr David Ringland QC and Mr John Kerr, of counsel, instructed by McCartan Turkington Breen Solicitors
Defendant: Mr David Dunlop QC and Mr Richard Shields of counsel, instructed by A&L Goodbody Solicitors

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McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] The plaintiffs are, for the purposes of these proceedings, private investors. The defendant is a financial services firm engaged in the business of providing investment advice and selling financial products. In June 2007 the defendant sold one such product to the plaintiffs. By writ of summons issued on 05 June 2013 the plaintiffs initiated proceedings against the defendant. The Writ is indorsed with the following claim:

> "*The Plaintiffs' claim is for … damages for loss and damage sustained by them by reason of the misrepresentation, negligence, negligent misstatement, breach of fiduciary duty and breach of contract of the Defendant, its servants or agents, in and about the provision of investment and financial services advice to the Plaintiffs.*"

The writ further claims a declaration, costs and interest.

The Dispute between the Parties

[2] The case comes before this court arising out of the plaintiffs' quest to amend the writ in the following terms:

> "*The Plaintiffs' claim is for ……. damages for loss and damage sustained by them by reason of the misrepresentation, negligence, negligent misstatement, breach of fiduciary duty,* ***breach of statutory duty, the unlawful promotion, sale or marketing of a financial product*** *and breach of contract of the Defendant, its servants or agents, in and about the provision of investment and financial services advice* [and the sale of a financial product] *to the plaintiffs.*"

The proposed amendment is in the terms of the highlighted words. The significance of the additional words in parenthesis, inserted by the court, will be explained *infra*.

[3] We shall further explain *infra* why, in the court's view, the real thrust of the contentious amendment is to add the new cause of action of breach of statutory duty. This is the main issue in contention between the parties. It is contentious because if the plaintiffs are not permitted to make this amendment any claim based on breach of statutory duty will be statute barred. Conversely, if the amendment is authorised by the court the defendant will be deprived of a limitation defence.

[4] The foregoing analysis flows from a combination of the relevant statutory provisions and rules of court. The starting point is the statutory prescription that the limitation period for a cause of action in breach of statutory duty, which is of course a tort, is six years from the date on which it accrued, per Article 6(1) of the Limitation (NI) Order 1989 (the "*1989 Order*"):

Article 73 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 been commenced –*

(a) if it is a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b) in relation to any other new claim, on the same date as the original action.

(2) Except as provided by Article 50, by rules of court, or by county court rules, neither the High Court nor any county court may allow a new claim within paragraph (1)(b), other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Order which would affect a new action to enforce that claim. For the purposes of this paragraph, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

(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 specified in paragraph (4) are satisfied, and subject to any further restrictions the rules may impose.

(4) The conditions referred to in paragraph (3) are the following –

(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; and

(b) as respects a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action."

[5] The complementary rules of court are contained in Order 20 of the Rules of the Court of Judicature ("the Rules"). Rule 5 provides insofar as material:

"(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 his 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.

(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 that it just to do so.*
>
> *.....*
>
> *(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 a 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."*

The Amendment Application

[6] This action has been limping along since its inception. The pleadings closed some six years following the issue of the writ. The action has not yet been set down for trial. The writ recently attained its eighth anniversary. Most recently, in an uncharacteristic flurry of interlocutory activity, one of the Queen's Bench Masters, by order dated 17 January 2020, granted leave to the plaintiffs to amend the Writ. The ensuing order, issued in the name of another Master, is defective, failing to specify the terms of the authorised amendment or to attach anything of an explanatory nature, such as a draft amended writ.

[7] Notwithstanding the foregoing, this court, by recourse to case management directions, eventually ascertained at the outset of the hearing that the effect of the order of 17 January 2020 was to permit in full the amendments which the plaintiffs were then seeking. In this way the writ was to be permissibly amended in the following terms, with the additional words highlighted:

> "*The Plaintiffs' claim is for ……. damages for loss and damage sustained by them by reason of the misrepresentation, negligence, negligent misstatement, breach of fiduciary duty,* ***breach of statutory duty, the unlawful promotion or marketing of a financial product*** *and breach of contract of the Defendant, its servants or agents, in and about the provision of investment and financial services advice to the plaintiffs.*"

This linguistic formula replicates what is set forth in [2] above, with two qualifications. First, it does not contain the court's insertion in parenthesis. Second, it omits the word "*sale*." The plaintiffs' wish to extend the scope of the permitted amendment by the inclusion of this single word was conveyed to the court at the commencement of the hearing.

[8] The defendant challenged the order of 17 January 2020 by Notice of Appeal of the same date. The proceedings ambled along thereafter. For reasons which are unclear, while the appeal gave rise to a judgment of the deputy High Court Judge delivered on 27 March 2020, the related order is dated 11 January 2021. There is a further (unreasoned) order dated 18 January 2021 giving leave to appeal to this court and, pursuant thereto, the Notice of Appeal is dated 27 January 2021.

The Judgment under Appeal

[9] The judgment does not indicate whether the appeal succeeded, in whole or in part, or was refused. What was the outcome of the defendant's appeal against this order? Given that the appeal to this court is brought by the plaintiffs, it is evident that the defendant achieved some measure of success. In the judgment under appeal to this court it is stated *inter alia*, by oblique reference to what appears to be a draft amended writ, that the contentious amendment consisted of adding the words "*… breach of statutory duty, the unlawful promotion or marketing of a financial product …*" after "*breach of fiduciary duty*" and immediately before "*and breach of contract …*" ie reconfiguring the writ in the terms set forth in [7] above.

[10] The crucial conclusion of the deputy judge was that formulated in [16] of his judgment namely –

> "*… Selling a financial product is separate and distinct from the provision of advice …*
>
> *The Tweeds sued Davy as an advisor not as vendor of a financial product.*"

In this way the first conclusion made was that one of the causes of action expressed in the Writ was the provision of negligent advice. The deputy judge then formulated the following self-direction, by reference to Order 20, Rules 2 and 5 of the Rules and Article 73 of the 1989 Order 1989:

> "*Any new cause of action should not be allowed by the court unless (1) it arises out of the same facts (or substantially the same facts) of providing the allegedly bad advice and (2) the court is satisfied that it is just to do so.*"

[11] At this juncture it is necessary to reproduce in full [20] of the judgment:

> *"Turning to the two new heads of claim proposed in the writ. Although the Tweeds wish to promote a complaint about mis-selling (and certainly do so in the Statement of Claim), I consider that neither of the proposed additional heads necessarily asserts a sale by Davey. Instead, I have concluded that they represent additional heads of claim or causes of action arising out of the advice provided by Davey to the Tweeds.*

> *(1) The unlawful promotion or marketing of a financial product. It seems to me that this can be said to arise out of the same (or substantially the same facts) regarding the advice given by Davey to the Tweeds. Accordingly, it meets the proximate fact consideration.*
>
> *(2) Breach of statutory duty. Insofar as what is complained of is advice provided by Davey that is said to constitute a breach of a duty owed under statute, it seems to me that this would also meet the proximate fact consideration; it arises out of the same (or substantially the same) facts concerning the "investment and financial services advice" given to the Tweeds."*

This was followed by the further discrete conclusion at [21]:

> *"With regard to considerations of "justice" to which I have regard under Order 20 Rule 5(1), I am satisfied it would be appropriate to allow the amendment within the constraints I have identified. Mr Humphreys QC proposed two aspects of supposed prejudice to Davey: (1) the denial of a limitation defence and (2) the mere passage of time since 2013. The first echoes the grounding affidavit of the solicitor for Davey but I am not persuaded since it is necessarily inherent in the jurisdiction to allow a new cause of action that relates back to the issue of the writ: see Eastwoood at page 285D. As for the second, no particular prejudice was mooted in the affidavit for Davey and Mr Humphreys QC was frank in confirming that there was no particular prejudice claimed."*

The omnibus conclusion of the court was this:

> "*Consequently, I have decided it is appropriate on the material before me to allow the two causes of action in the proposed amendment to the Writ but within the constraints I have identified: they relate to advice by Davy and not a sale of a financial product to the Tweeds.*"

[12] The effect of the decision of the deputy judge may be summarised thus:

(i) The addition of "*breach of statutory duty*" was permitted.

(ii) The addition of the words "*the unlawful promotion or marketing of a financial product*" was also permitted.

(iii) These two amendments were confined to the advice provided by the defendants to the plaintiffs.

(iv) Thus the plaintiffs' quest to extend the writ so as to bring within its embrace the sale of a financial product by the defendants to them was refused.

(v) It would be in the interests of justice to amend the writ in the limited terms determined by the judge.

The Rules and Practice

[13] The components of the relevant legal framework in addition to those identified in [4] above are the following. By Order 6, Rule 1 of the Rules every writ must be in one of the specified Forms. Rule 2 provides:

> "*Before a writ is issued it must be indorsed –*
>
> *(a) With a Statement of Claim or, if the Statement of Claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required, in the action begun thereby.*"

We consider the purpose of this rule to be to ensure that the defendant is notified, in summary terms, of why he is being sued. The central requirement is that of concision. In this way excessive formality and detail are eschewed. The requirements for a properly formulated writ may be viewed through the prism of the notably contrasting requirements for a Statement of Claim.

[14] The time-honoured practice in this jurisdiction is to indorse a general writ in lean terms. Three central requirements, reflected in well-established practice, are identifiable. The first is to specify the cause or causes of action advanced by the plaintiff. The second is to add a linguistic formula sufficient to identify the asserted legal relationship between the parties. Each of these aims is commonly achieved in the span of a single sentence. The third is to specify the relief sought.

[15] Negligence is probably the cause of action most frequently specified in a generally indorsed writ in this jurisdiction. Negligence can cover a broad range of legal relationships and is unavoidably sensitive to the particular factual matrix. Three illustrations will suffice. Where the plaintiff is contending that the defendant is a tortfeasor who caused him damage arising out of a road traffic accident, this is conventionally captured in the linguistic formula of "*… the negligence of the defendant in and about the driving, supervision, management and control of a motor vehicle*" or closely comparable words. Where the plaintiff is contending that the Defendant is the tortfeasor who caused him damage at work, this is normally reflected in the

linguistic formula "*… negligence in and about the employment of the plaintiff*". Turning to the present case, where the plaintiff is contending that the defendant is a tortfeasor whose negligent advice caused him damage, this is typically captured in the linguistic formula "*… negligence in and about the provision of professional advice to the plaintiff*" or something kindred. Furthermore, in general terms where the plaintiff invokes the cause of action of breach of contract or breach of statutory duty, whether singly or in tandem with negligence or otherwise, while this will be specified in a generally indorsed writ, the actual endorsement will differ little, if at all, from the three illustrations provided.

[16] It is the understanding of this court that where a generally indorsed writ is framed substantially in the terms of the three illustrations above, this will rarely elicit a protesting response from the defendant, such as an application to strike out the writ for want of particularity or an application requiring the plaintiff to indorse the writ with greater specificity. The reasons for this must surely lie in the limited prescription of Order 6, Rule 2(a) coupled with the intrinsic difference between a generally indorsed writ and a statement of claim. In every case the question whether a generally indorsed writ is compliant with the rule will be one of balance and degree.

The Limitation Rules

[17] The limitation provisions which lie at the heart of the dispute between the parties have been considered in previous cases. The fundamental question which arises is whether a plaintiff's proposed new cause of action arises out of the same, or substantially the same, "*… facts as are already in issue on any claim previously made in the original action*". As the court pointed out during the hearing, the word "*facts*" is not to be literally construed since a writ, in common with a statement of claim, contains alleged facts. The task of the court is to ascertain the factual matrix on which the extant cause of action is (or causes of action are) based and to determine whether a proposed new cause of action arises out of the same, or substantially the same, factual matrix.

[18] In this jurisdiction one of the decisions belonging to this sphere most frequently cited is *Metcalfe v Chief Constable of the Royal Ulster Constabulary* [1991] NI 237. Kelly LJ, delivering the judgement of the court, stated at page 241f:

> "*Whether a new cause of action arises out of the same facts or substantially the same facts as the old, would appear to be a simple and straightforward matter to determine. It does not require any further refinement or formula for its application.*"

He added that the citation of other judicial decisions is "*… of limited value because of their factual differences*". He distilled guidance from the statement of Davies LJ in *Dornan v Ellis* [1962] 1QB 583 at 593:

> "*The story that is now set up by the plaintiff is the same story as that set up all along … what is now sought to be done is not to make out a new case of negligence, but to persist in the old story and invite the judge at the trial to approach it, to interpret it, from a different angle or aspect. It is a different approach to the same story …*"

[19] We do not propose to refer to any other reported decision in this judgment. While Mr Dunlop QC on behalf of the defendant invited the court to join him on a detailed excursus through the recent decision of the English Court of Appeal in *Libyan Investment Authority v King* [2020] EWCA Civ 1690, the court found this an arid exercise as it entailed, in substance, an attempted comparison between the present case and one which is factually very different. The strictures of Kelly LJ resonate in this context. Furthermore, as a matter of precedent, this court is not bound by decisions of the English Court of Appeal.

[20] The approach of Mr Ringland QC on behalf of the plaintiffs was the more appropriate one in the circumstances. His concise submissions recognised that the decisions in *Metcalfe* and *Dornan* provided sufficient jurisprudential guidance to the court in determining this appeal.

Our Decision

[21] The plaintiffs' application to amend is driven by the recognition that the writ has three deficiencies which they seek to rectify:

(i) It does not invoke breach of statutory duty as a cause of action.

(ii) *Ditto* "*the unlawful promotion or marketing of a financial product*".

(iii) It makes no mention of the sale of any financial product by the defendant to the plaintiffs.

Given the passage of time, the Article 73 test must be applied to each aspect of the contentious amendments pursued by the plaintiffs.

[22] This requires the court to ascertain the factual matrix of the plaintiffs' case as formulated in the unamended writ. We consider that four central features of the court's task must be highlighted. First, this is not a fact finding exercise. Second, this is a court of interlocutory jurisdiction, as were the two courts at first and second instance. Third, the exercise is one of evaluative judgement. Fourth, the court is not concerned with the merits of the contentious amendments. Thus any temptation to assess what of value or substance they would add to the plaintiffs' case or to predict the outcome of the litigation must be firmly resisted. In every case the court will adopt a panoramic approach, with substance normally prevailing over form.

[23] The materials available to the court in ascertaining the factual matrix underlying the pleading in the unamended writ will differ according to the litigation sensitive context. In the present case it is the duty of the court to consider, and evaluate, everything in the appeal bundle, bearing in mind particularly that the defendant makes no objection to any aspect of its contents. Two particular features of the present context are the existence of a detailed Statement of Claim and a plethora of affidavits sworn by both parties. One finds in the narrative of the former the concise allegation that the defendant sold to the plaintiffs a financial product in June 2007. The factual matrix is amplified in later paragraphs, which describe the first contact between the parties, the terms of the communication which this entailed, the representations allegedly made by the defendant and the advice allegedly provided by the defendant. All of this unfolded within the framework of meetings and telephone conferences involving the parties, culminating in the sale of the financial product in question.

[24] The proliferation of affidavit evidence before the court is referable to previous interlocutory proceedings involving the defendant's unsuccessful attempt to set aside the writ and the service thereof on the ground that the High Court does not have jurisdiction to adjudicate on the plaintiffs' claim. A convenient resume of the claims and denials, punch and counter-punch which the parties have traded in their affidavits is found in the decision of Master McCorry in the "no jurisdiction" application given on 07 September 2018. This court has considered the affidavits to which this summary relates. A further summary of some utility is contained in the judgement of McAlinden J on appeal, at [4] - [12]. There is one particular feature of the factual summary contained in these two judgments. In each the basic story includes the financial investment made by the plaintiffs which, on their case, represents the financial product sold to them by the defendant. The affidavits, considered in their totality, disclose that the fact of the contentious investment is undisputed.

[25] The deputy judge, in his reasoning and conclusions, did not engage with either the Statement of Claim or the aforementioned affidavit evidence. The analysis which the judge proceeded to undertake was commendably careful. However we consider that it was unnecessarily intricate and, ultimately, artificially narrow.

[26] In the judgement of this court there is no material distinction between the story underlying the unamended writ and the story which will underlie the writ in the event of any of the proposed amendments being approved. The story involves an unbroken chain of events which has two stand out features, namely the provision of investment advice and the sale of a financial product by the defendant to the plaintiffs. The two are inextricably linked. The plaintiffs' case, reduced to its core, is that the defendant provided them with expert financial advice, the culmination whereof was the sale to them of the contentious financial product. We consider this analysis irresistible. Thus we concur in substance with the decision of the Queen's Bench Master and differ with respect from that of the deputy judge.

[27] The foregoing conclusion is not, however, dispositive of this appeal without more. Rather, it is incumbent on the court (a) to address separately the individual elements of the contentious amendments and (b) to exercise our discretion whether to permit any amendment of the writ.

[28] First, it is necessary to consider the proposed amendment of the writ which would entail the addition of the words "*breach of statutory duty*" immediately following "*breach of fiduciary duty*". As highlighted during the hearing and in the court's formal direction which followed immediately thereafter, we consider that, from the outset, this proposed amendment has suffered from a want of elementary specificity. Until compliance of the direction of this court was effected neither the identity of the relevant statutory measure nor the relevant provisions thereof had been specified.

[29] The court is now aware that it is the plaintiffs' intention to formulate this discrete amendment in these terms: breach of sections 21, 150, 238 and 241 of the Financial Services and Markets Act 2000 as it applied in 2007. Section 21 imposes certain restrictions on the promotion of financial investments the effect whereof is that conduct of this kind is unlawful unless the specified requirements are observed. Section 150 makes provision for a cause of action at the suit of a private person who suffers loss as a result of the contravention by an authorised person of a "rule." Section 238 is couched in terms similar to section 21, directed to conduct entailing an invitation or inducement to participate in a collective investment scheme. By virtue of section 241 the cause of action established by section 150 applies to the contravention by an authorised person of a requirement imposed by section 238.

[30] We emphasise that the merits of these proposed amendments are not a matter for this court. In the abstract, if any of them was on its face a misuse of the process of the court that would be an obviously material factor in how the court should exercise its discretion. However, this is not suggested. We are satisfied that the analysis in [26] above applies fully to this discrete cohort of proposed amendments.

[31] In the light of this necessary illumination the proposed amendments are authorised. Their full particulars are not required in the writ. These will, rather, be contained in an amended Statement of Claim (see *infra*). We would add that, in our view, neither the Queen's Bench Master nor the deputy judge should have permitted these amendments without first ascertaining their content, as this court has done. This essential step now having been completed, we consider for the reasons given that this amendment should be permitted.

[32] Second, we disallow the inclusion of the words "*the unlawful promotion, sale or marketing of a financial product*" immediately following the words "*breach of statutory duty.*" Our reason for doing so is that, as tentatively ventilated by the bench during the hearing, we are satisfied that these words do not give expression to a cause of action which the law recognises.

[33] Third, arising out of the foregoing the court will permit a further amendment of the writ in the "*in and about*" clause, in these terms:

> "*… in and about the provision of investment and financial services advice* ***and the promotion, marketing and sale of a financial product*** *to the plaintiffs.*"

There will be an opportunity to address the court on the foregoing formulation before its final order is determined.

[34] Finally, in common with the deputy judge and for the reasons given by him we are satisfied that it is in the interests of justice to permit the amendments in the terms specified above.

Conclusion

[35] The plaintiffs have discharged their burden of persuading the court that the writ should be amended. The amendments permitted by the decision of this court differ from those authorised by the order of the Master and that of the deputy judge in the manner indicated. The plaintiffs' appeal succeeds to the extent specified in consequence. The court orders that an amended Writ and Statement of Claim be served within four weeks of the order consequential upon this judgment. The issue of costs will be addressed separately.