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| **Neutral Citation No: [2024] NI Master 18**<br><br>***Judgment: approved by the Court for handing down (subject to editorial corrections)*** | **ICOS No: *18/93139***<br><br>***Delivered: 19/06/24*** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION**

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**BETWEEN:**

**OONAGH MCALEER**

**Plaintiff**

**- v -**

**THE CONGREGATION OF OUR LADY OF CHARITY OF THE GOOD SHEPHERD**

**First Defendant**

**- and -**

**REGIONAL HEALTH AND SOCIAL CARE BOARD AS SUCCESSOR IN TITLE TO THE WESTERN HEALTH AND SOCIAL SERVICES BOARD**

**Second Defendant**

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**Mr Anyadike-Danes, leading Ms Herdman, instructed by Phoenix Law for the plaintiff.**
**Ms Simpson, leading Mr S Smith, instructed by Directorate of Legal Services for the second defendant.**

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**MASTER HARVEY**

*Introduction*

[1] There are two applications in this action, firstly the second defendant's ("the defendant") application dated 24 January 2024 to strike out the entirety of the plaintiff's claim pursuant to Order 18 rule 19 (a), (b), (c) and (d) (the summons incorrectly cites (c) twice in error) of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules") and the plaintiff's application dated 22 March 2024 for leave to amend the statement of claim pursuant to Order 20 rule 5 of the Rules. The defendant also seeks that any remaining issues be dealt with pursuant to Order 33 rule 3 and/or the overriding objectives of Order 1 rule 1A.

[2] The defendant's summons was previously listed for hearing on 6 March 2024. The hearing was adjourned to allow the plaintiff to make a formal application to amend the statement of claim, after receipt of discovery, and seek to address the issues raised in the defendant's summons. The cause of action in this case dates back to 1980. The initial statement of claim is dated 9 July 2021, with two draft proposed amendments on 29 February 2024 and with the application on 22 March 2024.

[3] The helpful written and oral submissions from respective counsel were of assistance to the court. The parties also referred me to various authorities which I have considered even if not expressly mentioned in this judgment.

***Legal principles***

[4] Order 20 rule 5 provides that:

> "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. The Court's discretion in this regard is very wide and the guiding principle is the consideration of what is considered just in all the circumstances of the case."

[5] In considering an application for an amendment to pleadings the court is entitled to have regard to the merits of the case if they are readily apparent and are so apparent without detailed investigation into the facts or law per *Kings Quality Ltd v AJ Paints Ltd* [1997] 3 All ER 267). In The *Front Door (UK) Ltd (t/a Richard Reid Associates) v The Lower Mill Estate Ltd* [2021] EWHC 2324 at [29] the court considered that an application to amend should be refused if it is clear that the proposed amendment has no real prospect of success. As stated in *Slater & Gordon (UK) Ltd v Watchstone Group plc* [2019] EWHC 2371, for proceedings to be amended, the party seeking the amendments must show that they have:

> "a real, as opposed to fanciful prospect of success…A claim does not have such a prospect, inter alia, where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance and (b) the claimant does not have material to support at least a prima face case that the allegations are correct."

[6] In *Loughran v Century Newspapers Ltd* [2014] NIQB 26 Gillen J set out the principles to be applied at paras 35-37 of:

> "[35] A pleading may be amended by leave at any time. The guiding principle is that it will be allowed in order to raise or clarify the real issues in the case or to correct a defect of error, provided that it is bona

> fide and there is no injustice to the other party which cannot be compensated in costs (see Beoco v Alfa Labil [1995] QB 137 and Valentine (Civil Proceedings, The Supreme Court) at 11.18). However, as a general rule, the later the application to amend, the more likely it is to be enquired into and the greater risk is that it will be refused."

[7] An amendment may introduce a new case, but not a case which is unarguable (*Chan-Sing-Chuk v Innovision Ltd* [1992] LRC (Com) 609 (Hong Kong CA).

[8] An amendment may be allowed notwithstanding that the effect will be to add or substitute a new cause of action outside the relevant period of limitation 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. A cautionary note was struck by Waller LJ in *Worldwide Corp LTD v G P T Ltd*, December 2 1998 CA when he said:

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants?"

***Order 18 Rules of Court of Judicature***

[9] Order 18 of the Rules, where relevant to this action, is in the following terms:

> "…
> *Facts, not evidence, to be pleaded*
> 7.–(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.
> (2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.
> (3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party unless the other party has specifically denied it in his pleading.

(4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.
(5) A party must refer in his pleading to any statutory provision on which he relies, specifying the relevant section, subsection, regulation, paragraph or other provision, as the case may be.
…
*Particulars of pleading*
12. - (1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words-
(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 condition of the 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.
…
(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.
(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party-

(a) where he alleges knowledge, particulars of the facts on which he relies, and

(b) where he alleges notice, particulars of the notice.

(5) An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.
…
*Striking out pleadings and indorsements*

> 19.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, 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).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

***No reasonable cause of action***

[10] This court recently set out the principles to be applied in relation to strike out applications in *Askin, White and Byrne v Chief Constable & Ors* [2024] NI Master 7, some of which are relevant to this case. Any application pursuant to Order 18 rule 19(1)(a) must be determined on the face of the pleading without evidence. As was observed by Gillen J in *Rush v PSNI & Ors* [2011] NIQB 28 for the purposes of the application, all the averments in the statement of claim must be assumed to be true.

[11] The court may look to evidence to consider whether the pleading can be cured by an amendment: *Cooke (F) v K Cooke and M Cooke* [2013] NICh 5 (Deeny J). In *Lonrho v Al Fayed* [1992] 1 AC 448 the court held that, on an application to strike out an action on the basis that it discloses no reasonable cause of action, the cause pleaded must be unarguable or almost incontestably bad.

[12] In *O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary* [1997] NI 403 the Court of Appeal stated that an order of the nature sought in this case was only to be used in "plain and obvious" cases. They concluded that it should be reserved for cases where the cause of action was "obviously and almost incontestably bad" and that an order striking out should not be made "unless the case is unarguable."

[13] It has been held that rule 19 and the inherent jurisdiction to strike out proceedings does not offend against ECHR article 6, because a right to a fair trial does not require a plenary trial where the plaintiff clearly does not have a case to make: *McAteer* v *Lismore* [2000] NI 471 (Girvan J).

[14 In *Aine and Daniel McAteer v PSNI and Craig* [2018] NIMaster 10, the Master at para 8 observed:

> "The purpose of the striking out provisions is essentially to protect defendants from hopeless litigation. But it may not be invoked to deprive plaintiffs of their right to bring an arguable matter before the courts."

[15] What is clear from the authorities is that it is a power used in exceptional cases given it denies the plaintiff an opportunity to have the case heard on its merits.

[16] In the case of *E (a minor) v Dorset CC* [1995] 2 AC 633 at 693 -694 Sir Thomas Bingham indicated that judges are uneasy about deciding legal principles when all the facts are not known, but that:

> "…applications of this kind are fought on ground of a plaintiff's choosing since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases."

[17] The case of *Rush* involved a claim of negligence against the police arising from the Omagh bomb atrocity. An application was brought to strike out the claim on the ground that it disclosed no reasonable cause of action or alternatively that it was vexatious or frivolous. At paras 10-12 Gillen J, overturning the strike out, stated:

> "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.
>
> Evidence by affidavit is admissible so that the courts can explore the facts under Ord 18 r. 19(1)(b)-(d). Thus I am entitled to rely on the affidavit of Mr Murray on behalf of the defendants. However a court at this stage must be careful not to engage in a minute and protracted examination of the documents or the facts of the case. I draw attention to the comments of Danckwerts LJ in *Wenlock v Moloney* [1965] 2 All ER 871 at 874G where he said of the comparable English rule under Order 18 rule 19 (as it then was):
>
> > `There is no doubt that the inherent power of the court remains; but this summary

> jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, and affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to an abuse of the inherent power of the court and not a proper exercise of that power.'
>
> The alternative ground relied on by the respondent in this case under O18 r19(1)(b) is that the amended statement of claim is frivolous and vexatious. By these words are meant cases which are obviously frivolous and vexatious or obviously unsustainable. The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the court" (per Jeune P in *Young v Holloway* (1895) P 87 at 90."

[18] In another claim arising from the Omagh bombing *Breslin and others v McKenna and others Ruling No. 4 [extraneous matter in pleading]* [2008] NIQB 5, Morgan J heard an application by two of the defendants for an order, inter alia, that the plaintiffs' claim be struck out or stayed on the basis that it disclosed no reasonable cause of action and failed to comply with rules of court. The claim related to the defendants' alleged responsibility for the bombing. He observed, at paras 9-10 and 13-14:

> "[9] The court's power to strike out a claim in whole or in part is exercised pursuant to the supervisory jurisdiction of the court. It is a draconian remedy which prevents the opposing party proceeding with its claim despite the absence of a hearing on the merits. Accordingly it is a power which will be exercised sparingly. The jurisdiction to stay may not have the same draconian effect but does have the effect of at least temporarily bringing the litigation to a halt thereby delaying a hearing on the merits. It also, therefore, is part of the supervisory jurisdiction which protects the defendant from an oppressive claim.
>
> [10] The essential object of pleadings is to ensure that the opposing party is aware of the case which he has to meet and that he is not embarrassed by a pleading which is

> scandalous or oppressive. A party is entitled to raise any issue of law and in certain cases is required by Ord 18 r 8 to do so. A party ought not to plead the evidence by which he intends to prove his claim.
> …
>
> [13] I accept that there are proper criticisms to be made of the form of the plaintiffs' pleading. The plaintiffs have clearly pleaded some of the evidence on which they intend to rely in the statement of claim contrary to the Rules of the Supreme Court. The court's task is to ensure that the pleading does not thereby become oppressive. In my view in this case the effect of the pleading is to alert the defendants to the way in which the plaintiffs will seek to make their case and thereby enable them to prepare more effectively to defend it. Apart from the assertion that the pleading is scandalous I have seen no basis for any prejudice affecting these defendants. Indeed, an appreciation of the evidence on which the parties intend to rely in a sizeable case of this nature enables the court to manage the case so as to ensure that no prejudice is caused to any party at the hearing. This may also be necessary in order to secure the attendance of relevant experts for each of the parties in the course of the hearing.
>
> [14] The issue is not whether the defendants have identified breaches of the rules of pleading but whether the circumstances found by the court adversely affect the right of all parties to a fair hearing on the merits. I find no evidence of such prejudice and accordingly consider that it would not be a proper exercise of the supervisory jurisdiction to strike out or stay the plaintiffs' pleading on that basis. The efforts of all parties should be on ensuring that they are ready for the trial which will commence on 7 April 2008."

[19] In a very recent case in this jurisdiction, the Court of Appeal for Northern Ireland in *Magill v Chief Constable* [2022] NICA 49 affirmed the principles to be applied in strike out applications on the basis that there was no reasonable cause of action. McCloskey LJ endorsed the decisions in *O'Dwyer* and *E (A Minor) v Dorset CC*, at para 7, stating:

> "(i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.
> (ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.

> (iii) In approaching such applications, the court should be cautious in any developing field of law…
> (iv) 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.
> (v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.
> (vi) 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… We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim in limine."

[20] At para 27, the court noted this was a finely balanced case, adding:

> "It is otiose to add that this decision, a purely interlocutory one, betokens no forecast of ultimate success for the plaintiff. The final outcome will be determined by the future course of these proceedings which will include discovery of documents and, possibly, interrogatories and admissions."

[21] I was referred to the case of *HXA v Surrey County Council and YXA v Wolverhampton County Council* [2022] EWCA Civ 1196 in which Baker LJ gave guidance regarding pleadings, and when the Court should strike out claims for failing to disclose a cause of action:

> "[86] Before considering the issues, I return briefly to the way in which the two claims have been pleaded. Without being unduly critical, I must record that the task facing this Court, and 1 At [69] 2 Takhar v Gracefield Developments Ltd and others [2020] AC 450 353 4 I am sure the courts below, has been hindered by the manner in which both claims have been pleaded.
>
> [87] Particulars of Claim must include a concise statement of the facts upon which the claimant relies: see CPR 16.4. In each of these two cases, the claim is that the defendant owed a duty of care at common law to protect the claimant from harm from parents or others in the household. In each case, it is said that the defendant assumed responsibility for protecting the claimant from that harm. In that context, the claimant should therefore identify the facts which are alleged to amount to an assumption of responsibility and the scope and extent of the alleged duty. Put simply, the claimants must identify clearly and concisely what it is said that the defendant has assumed responsibility for, and

what facts are relied upon as establishing that the defendant has assumed that responsibility. In addition, the claimant should identify the dates upon which the alleged duty arose and, if relevant, the period or periods during which the duty was owed. The claimant must also identify the facts and matters said to establish breach, causation and loss.

[88] In the present cases, the particulars of claim were deficient. They did not include a concise statement of the facts upon which the claimants relied. Instead, they each set out a lengthy "sequence of events". In YXA's case, the date on which the local authority started accommodating the child under section 20 is stated to have been 28 April 2008 at paragraph 5.2(g) of the Particulars of Claim but August 2007 at paragraph 6.10. In both cases, it has not been easy to discern the precise basis on which it is claimed that there was an assumption of responsibility. In addition, while the Civil Procedure Rules do not prohibit the pleading of law, that is unnecessary in cases such as these where the legal structure is clear (broadly, duty of care, breach, causation and loss). In my view, it was unnecessary to include selective quotations from cases and other legal material which are relied upon, or which try to anticipate potential defences. The appropriate place for those citations is in a skeleton argument."

[22] After appeal, the Supreme Court discussed the need to set out the legal basis for a claim and the costs which could be wasted if the action went to trial, stating:

> "[104] It follows that our primary disagreement with Baker LJ is with his central reasoning that this is an unclear and still developing area of the law such that one ought not to strike out at a stage before the facts have been established. We also reject the idea, see para 85 above, that these matters are better dealt with by focusing on breach of duty or causation. Where it is clear that the pleadings do not disclose circumstances giving rise to a duty of care, the waste of costs inherent in an unnecessary full trial on breach and causation can be sensibly avoided.
>
> It is not sufficient simply to set out a chronology and, from this, require a Court to infer negligence. Legal elements of the claim must be properly articulated so that the defendant (and Court) can understand the precise legal basis of a claim."

***Abuse of process***

[23] In addition to no reasonable cause of action, the defendants seek a strike out of the plaintiff's claim on this ground also. In *Ewing (Terence Patrick) v Times Newspapers Ltd* [2010] NIQB 7 Coghlin LJ, delivering the judgment of the court, at para 37 stated:

> "As Lord Phillips, MR, noted in *Jameel v Dow Jones and Company* [2005] QB 946:

> `An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field then to referee any game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.'
>
> Today it is necessary to clearly bear in mind the overriding objective contained in Order 1 rule 1A of the Rules which requires the court to take into account not just the interests of the parties before the court but also the interests of other litigants and the overall administration of justice including the potential for the costs, expense and time to escalate out of all proportion. In my view such an approach is consistent with the proportionate observation of the Article 6 rights of individuals."

[24] Under the inherent jurisdiction and Order 18 rule 19(1)(b)-(d), evidence by affidavit or otherwise is admissible; the court can explore the facts fully but should do so with caution: *Mulgrew* v *O'Brien* [1953] NI 10, at 14 (Black LJ).

[25] In *McDonald's Corp v Steel* [1995] 3 All ER 615 involving a defamation action, the Court of Appeal considered the correct approach to an application under Order 18, rule19(d) to strike out a pleading for abuse of process and held at (623):

> "The power to strike out is a draconian remedy which is only to be employed in clear and obvious cases…it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of being proved."
>
> Neill LJ further held that unless the defence or the particulars could be described as "incurably bad" because there will be no evidence to support them, the pleadings "should be left until trial."

***Scandalous, frivolous or vexatious/ prejudice, embarrass or delay the trial of the action***

[26] Examples of pleadings struck out as scandalous or embarrassing are:

> "the defendant admits liability but has no means to pay (*Connor* v *Kelly* [1957] Ir Jur Rep 41),
>
> A plea that the writ was irregularly served (*Maher* v *Hibernian Development* (1906) 36 ILTR 212),

> The opposing party is of bad character (*Devonsher* v *Ryall* (1877) IR 11 Eq 460),
>
> An unintelligible pleading (*Mulgrew* v *O'Brien* [1953] NI 10,
>
> The amount claimed is too trivial (*Hannay* v *Graham* (1883) 12 LR Ir 413) where a general minimum of £2 was set for High Court actions, which would now be about £500,
>
> Ambiguity (*Franklin* v *Walker* (1870) IR 4 CL 236),
>
> Stating conclusions of law without facts (*Potts* v *Plunkett* (1858) 9 ICLR 290, at 300),
>
> Mixing together separate claims (*Hoban* v *McPherson* (1905) 39 ILTR 15)."

***Limitation as a preliminary issue***

[27] The defendant's application is also pursuant to Order 33 rule 3 which is in the following terms (emphasis added):

> "Time, etc, of trial of questions or issues
>
> 3. The Court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of law, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated."

[28] The extension and/or disapplication of the limitation period, and the factual issues relevant thereto, may be tried by a judge as a preliminary issue: *Moane v Reilly* [1984] NI 269.

[29] The power to determine a preliminary point should be sparingly exercised. It is often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided. The practice of allowing preliminary points frequently adds to the difficulties of an appellate court and may increase the cost and time of legal proceedings. Unless a point of law, if decided one way, is going to be decisive, a preliminary point will rarely be appropriate: *Ryder v Northern Ireland Policing Board* [2007] NICA 43 [2008] NIJB 252; *Delaney v John Eastwood & Sons* [1948] NI 66.

[30] An issue of law should only be tried as a preliminary issue if the legal point is short and easily resolved, and the factual issues are complex, and should be designed to lead to judgment for one party or at least to a material shortening of the issues at the trial: *Donaldson v Chief Constable* [1989] 7 NIJB 21, at 27-9.

[31] Though the issue be described as one of law, it may be necessary to hear some factual evidence: *Deighan v Sunday Newspapers* [1987] NI 105, at 107H (Carswell J).

[32] Trial of a preliminary issue of law must be based on facts which are proved or at least agreed for the purpose of the preliminary issue: *McCabe v Ireland* [1999] 4 IR 151.

***Overriding objective***

[33] The overriding objective at Order 1 rule 1A also informs the exercise of the Court's discretion:

> "1A. – (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate to –
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
>
> (3) The Court must seek to give effect to the overriding objective when it –
> (a) exercises any power given to it by the Rules; or
> (b) interprets any rule."

***Amendment to the statement of claim***

***Background***

[34] I note the writ was issued on 28 September 2018. There was pre-action correspondence served in March 2016 stating the baby was "put up for adoption without her consent and approval" and also states "it would appear the documents were signed but it is unclear of how or when these documents were signed as no advice, guidance or help was provided to her." The letter of claim in April 2017 states, "at no time did she sign any form giving consent for the adoption of her son and at no time was she given any advice or guidance in respect of the adoption of her son." It further states the consent form was "allegedly witnessed by Ms Hassard," an employee of the second defendant at the time and contains the allegation "her son (was) forcibly removed from her care without her consent.". There is reference to a "form of consent" witnessed by Ms Hassard. I note the psychiatric reports obtained

by the parties. The report of Dr Bell of 18 May 2015, states "she was never asked to consent to the child being taken away." The report of Dr Francis Naylor of 27 July 2022 sets out the history from the plaintiff and mentions "removing her baby" and that she woke up after having giving birth to find her baby "absent." Similarly, she told the defendant's psychiatric expert, Dr Armstrong who reported on 16 April 2023 "I don't know who took him or why they would so that." He concludes "she offers a surprisingly consistent picture".

***The explanatory memorandum***

[35] At the heart of the plaintiff's claim is an allegation her baby was taken from her without her consent. The initial pleaded allegation was that her signature on the consent form was forged. There is now a dispute between the parties as how the explanatory memorandum came to be referred to as a form of consent with the plaintiff now asserting, she did not have the consent form when the pre-action letters were served, the writ issued or the statement of claim was served. The plaintiff's solicitor avers in her affidavit of 28 April 2024 that the plaintiff first saw the consent form document on 22 February 2024 after a sensitive and lengthy discovery exercise conducted under a ring of confidentiality. It transpires the plaintiff now contends the consent form referred to was actually the "explanatory memorandum." It is common case the latter document was indeed signed by Ms Hassard and was not the plaintiff's signature as confirmed by a handwriting expert. The plaintiff states she did have possession of this document and concedes the maintenance agreement form, guidelines for parents of children received into care and the consent forms dated 4 June 1980, and 9 July 1980 bear her own signature, but she did not have those forms until recently. The plaintiff's solicitor avers her client "did not knowingly sign any form intending for her signature to indicate her consent to her baby being placed into the care of the state or thereafter adopted."

***Submissions from the parties***

[36] The plaintiff now seeks to "further clarify and particularise her claim to correct the erroneous references to 'consent form(s)' in the statement of claim and which ought to have explicitly referred to the explanatory memorandum." This will help to fairly dispose of the claim "so that the true issues may be determined." The plaintiff submits they brought their application a month after the relevant discovery was available to the plaintiff and they were able to consult and has not been made in bad faith given that such an accusation by the defendant at its core means dishonesty. The plaintiff submits there is no suggestion in the medical evidence that the plaintiff is acting in bad faith, and she has been truthful throughout.

[37] The plaintiff's counsel states the plaintiff had a file of papers from the Trust but was not entirely clear what it contained. This is also referenced in the report of Dr Francis Naylor who states the plaintiff obtained a file (albeit in 2015) "but was unsure what to do with it." Moreover, the letter of claim in April 2017 states "Mrs McAleer has obtained documentation from the Trust which purports to show Mrs McAleer's

signature giving consent to the adoption." The plaintiff's solicitors indicate that the discovery now available was not in their possession when the statement of claim was drafted in July 2021 and that there may be a limitation issue but no bad faith. They claim the trial of the action does not become shorter if the amendment is not allowed.

[38] The defendant asserts that the plaintiff was in possession of various documents since requesting them from their clients in 1996, including the materials now in dispute. The plaintiff further sought and obtained documents in 2009 when she attended personally to receive two volumes of social services records. The only new documents which were discovered recently are the NI Court Service file and Social Services records. None of these contain new material relevant to the issue of legal consent. The documents were only recently available to the plaintiff's legal team but the plaintiff herself had them for many years and should have given them to her legal advisers. The defendant argues that it was incumbent on the legal team to seek and obtain the documents meaning the drafting of the statement of claim was careless, there is no justification for the errors in the pleadings and the affidavits are deficient and insufficient. They assert the adoption legislation at the material time required oral or written consent and was witnessed by a Justice of the Peace. The defendant states it was entitled to presume the plaintiff was making the case she did not sign any of the consent documents and the plaintiff's legal team would not have made the error if they had taken due care, the pleadings were wrongly drafted, and costs should follow. They say the amendments are late, they represent a new claim and do not arise from new facts.

***The amendments to the statement of claim***

[39] I have considered the draft amended statement of claim. At para 1(a) and (b) it seeks to clarify the role of the defendants. Para 3 claims that the plaintiff was discharged without seeing the baby. Para 4, 4(a), and 4(b) state that the baby was placed by Ms Hassard, an employee of the defendant, the plaintiff did not hold the baby etc and Ms Hassard organised the adoption. Para 5, (a), (b), (c), (d), (e), (f), (g) and (h) all deal with the alleged forgery of the signature on the explanatory memorandum. It was signed on the day the plaintiff went home from hospital, the consent forms were not explained to her, no effort was made to ensure she understood them contrary to what is stated in the explanatory memorandum. It references her belief the form related to vaccination of the baby, the possibility that the consent forms may have been among other forms, she was a vulnerable and immature person and did not get to see, feed or hold her baby. None of the forms contain her writing, just her signature. The substance was completed by a third party, she did not understand the significance of the forms and the defendant failed in its duty to her.

[40] The particulars of negligence at (e) state the explanatory memorandum was a fraudulent document, and this is further dealt with in the particulars of breach of statutory duty and fraud. At para 5 (j) the plaintiff relies on an expert report, (k) refers to the defence admission the handwriting was forged, the particulars of personal injury set out the nature of the psychiatric injury, namely complex PTSD. Further at

para 6 the plaintiff relies on the expert medical evidence and the fact the HIA panel confirmed she suffered abuse, meaning there would be a deduction in damages in respect of the first defendant. The particulars of exemplary damages are set out in respect of the alleged forged signature.

***Consideration***

[41] The legal principles one draws from the authorities in relation to the exercise of the court's discretion under Order 20 rule 5 can be neatly summarised as follows. The court can exercise its discretion to allow an amendment for various reasons including to cure defects and to get to the real issues of controversy and can be to make a change of substance, however major. The amendment can be made if it arises from the same facts or substantially the same facts. Delay or negligence are not grounds to refuse the amendment unless the defendant cannot be compensated in costs but the later the application to amend, the more likely it will be enquired into The court will also consider if it is a bona fide amendment and the power to allow amendments has been described as a generous one to correct errors or mistakes, but the core consideration is to ensure justice is done.

[42] There is of course a difference between correcting mistakes and a claim being raised for the first time. The defendant asserts this application is in answer to the strike out application and based on evidence already available to the plaintiff. In addition, while a plaintiff can introduce a new case, they cannot advance one which is unarguable and not at a late stage to change the character of the action.

[43] I have carefully considered the material before the court. I have taken into account the explanation provided by the plaintiff as to the nature of the proposed amendment and the reason for this late application to amend her pleading. I consider this is a bona fide amendment. I consider that the medical evidence points to this plaintiff being a vulnerable person who has experienced significant psychiatric issues. Based on the available information, I do not consider her actions amount to bad faith. Simply because the application for amendment is being made at a late stage is not an obstacle to the court exercising its discretion to allow it. The issues came to light in the course of these proceedings as a result of discovery being provided.

[44] I note it appears the plaintiff herself may have come into possession of various documents as far back as 1996 and 2009, however, this has not been tested in cross examination. Certainly, it was well before proceedings were brought but it appears it was prior to obtaining legal advice. I note the plaintiff has not sworn an affidavit setting out her version of events as to the factual background and chronology of when she first received the relevant documents and the contents of same, but ultimately this can be addressed at trial. As to whether the allegation is unarguable, on balance I am not satisfied I have sufficient evidence before me at this interlocutory stage to determine it is without merit such as to disallow the amendments. Nor do I consider there is evidence of any substantive prejudice to the defendant in having to meet such allegations. I consider that this will require evidence to be heard if the case goes to

trial. Further, I consider that the amendment does not change the character of the action and it will not require the calling of new witnesses.

[45] On balance, I conclude that the amendments do clarify the nature of the relief sought and constitute bona fide amendments arising from the same facts or substantially the same facts. There is a consistent thread running through the pre-action correspondence, pleadings and medical evidence such that the defendant cannot claim to be taken by surprise regarding the nature of the claim. They do not materially alter the basis of the plaintiff's allegation from the outset which has been that her son was adopted without her consent and that a form relevant to such a process was signed by someone other than her, namely a social worker. These are all matters which should be properly dealt with at trial.

***Application to strike out***

[46] The defendant's counsel states in the skeleton argument on 26 February 2024. "the effect of these submissions would be to extinguish the plaintiff's claim." The defendant robustly asserts the plaintiff's claim is incoherent, imprecise, unclear, wrong in law and inherently flawed and that there is no evidence the plaintiff lacked capacity and the pleaded case is vague and contains various breaches of duties which do not exist in law. The defendant submits that it does not know the case it has to meet as it has not been properly pleaded in accordance with the Rules.

***The plaintiff's case***

[47] The plaintiff alleges she was put into a convent called Marian Vale when she was under 18 and the defendant owed a duty of care to her as a minor which is at least an arguable assertion. The plaintiff then alleges she had a baby but was not allowed to hold or feed him at the hospital. The defendant does not act for Daisy Hill hospital or the Trust and states that this allegation cannot be brought against the current defendant as it was not involved. The baby was then taken into care which is something the defendant conceded they can seek to address. The final stage was the adoption, the defendant claims it was not involved at the adoption stage other than the provision of a Guardian Ad Litem report.

***Submissions of the parties***

[48] The defendant asserts the case is unarguable. The adoption was lawful as in the 1980's they were governed by the Adoption Act (NI) 1967 and the County Court Rules 1969 and in this case the legal process was followed. The case has no realistic prospect of success as there has been no breach of the Act and the case therefore has to be struck out and the third iteration of the statement of claim does not alter that fact. They state the allegation of forced adoption has not been pleaded as the explanatory memorandum was signed at the time of placement into care, not when signing over for adoption. If the case against the second defendant is struck out, the plaintiff is not left without remedy as she can continue her "more serious case" against the first

defendant. If the entirety of the allegations is allowed to go to trial it will only serve to increase costs and prolong the duration of the trial. The plaintiff does not accept the social worker was not involved in the entire process and that a hospital does not keep a newborn baby from its mother for no reason, they claim this must have been at the direction of Ms Hassard. They claim the plaintiff was placed at Marian Vale at the behest of Ms Hassard, paid for by the defendant.

[49] The defendant contends the NI Court Service file confirms the adoption complied with the 1967 Adoption Act. There was a court hearing, the plaintiff signed the relevant documents and gave her consent freely. There has been delay in bringing the case and it cannot possibly succeed meaning it will simply be a waste of court resources. They further state the plaintiff has failed to issue proceedings against the hospital which is noteworthy as she alleges, they forcibly removed her son. The defendant points to the case of *HXA* and states that the court can sensibly avoid the wasted costs of a full trial by striking the case out now. The plaintiff could, if she wished, have sought to appeal the original adoption order to the court of appeal on the basis of fraud but did not do so.

***Consideration***

[50] I consider the defendant does know the case it has to meet. While this is now the third iteration of the statement of claim, I am persuaded the case as pleaded is more than enough to pass through a strike out application. Issues such as when and whether the plaintiff had the documentation relevant to her claim much earlier, the involvement of the defendant in the care and adoption process, the process of obtaining consent and the removal of the baby are all matters for any trial in due course. I consider the defendant will have to answer the allegation that the explanatory memorandum was not signed by the plaintiff albeit I note the defence assertion this will not attract an award of damages. I consider there are sufficient particulars in the statement of claim. If the defendant seeks further clarity, they can do so via a notice for particulars meaning the pleadings are therefore capable of improvement. The core allegation, no matter how clumsily it may have been pleaded, is that the plaintiff did not consent to the process which resulted in her baby being removed from her.

[51] This court should not embark on a mini trial with a protracted assessment of the limited documents available at an interlocutory stage. Nevertheless, I have conducted a detailed analysis of the available materials and having regard to such documentation, the overriding objective, the importance of the issues and the respective position of the parties, I consider the statement of claim discloses a cause of action and raises questions fit to be decided by a judge. As stated in the authorities, the strike out power is a draconian one, sparingly used and for plain and obvious cases only. Provided the cause of action has some chance of success, the mere fact it may appear weak is not ground for striking it out and in all the circumstances, I refuse to do so.

[52] I note this case was set down for trial on 5 December 2022. The statement of claim was served on 9 July 2021. The defendant served a defence on 25 November 2022 and sought to amend this on 15 January 2024. The action was listed for trial on 8 January 2024 and 15 April 2024. Much was made by the defendant regarding the tardiness of the plaintiff's application to amend the statement of claim. The strike out application by the defendant was brought on the eve of trial, 14 months after filing a defence, which in itself may have amounted to good reason to refuse the application, having regard to the overriding objective. The plaintiff sought to amend the pleadings in light of the discovery now available to the plaintiff and in response to the strike out application. Given the competing interlocutory applications, it became necessary to adjourn the trial, which for a case of this vintage is unfortunate to say the least. Having heard briefly from the plaintiff herself at the summons hearing, it is evident that this case needs to be expedited for all concerned and the parties should focus their efforts in securing a hearing date at the earliest possible opportunity. I note the defence psychiatric expert in his conclusion states, "resolution of this legal process may be an important step in the overall journey for Ms McAleer."

***Limitation***

[53] The alternative relief sought by the defendant is that the court could direct some or all of the remaining issues to be considered as "preliminary points." The matters referenced are "to determine the effect of the Consent Form as a preliminary issue (and/or) to determine the issue of limitation as a preliminary issue."

[54] The social worker is now deceased, and various witnesses are no longer available including the justice of the peace, social services officer, guardian ad litem and assistant principal social worker. There are purportedly no living witnesses, some documents are missing according to the defence expert and no records are available from daisy hill hospital. Similarly, the first defendant appears to have no living witnesses and no records. The delay in bringing the case has arguably caused prejudice to the defendant.

[55] The issue of delay in bringing proceedings and evidential prejudice arising therefrom was considered in a legacy case of *Stanislas Carberry v MOD* [2023] NIKB 54. I note the conclusion of Mr Justice McAlinden at para [187]:

> "If it transpires that the defendant cannot adduce relevant, cogent and reliable evidence at this stage in order to establish that the shooting was justified and this inability is primarily as a result of the long passage of time from the date of the incident and, in particular, the delay on the part of the plaintiff in bringing proceedings after the expiry of the limitation period then, subject to the court's consideration of all the circumstances of the case and, in particular, the matters set out in Article 50(4), the court can refuse to exercise its discretion under Article 50, thus, bringing the case to an end."

[56] I have considered all the circumstances of this case and determine that although preliminary points may present potential difficulties, this is in my view an appropriate case for a direction pursuant to Order 33 rule 3. The "effect of the consent form" is a matter for the trial of this action and not a matter I consider appropriate to deal with by way of preliminary hearing. However, the limitation issue may prove decisive and there is sufficient evidence at this stage that the delay in bringing the claim may have caused demonstrable and evidential prejudice to the defendant such as to create a real possibility that the prospects of a fair trial have been adversely impacted. The authorities demonstrate that it may be preferable to hear all the evidence first in order to test whether the cogency of the evidence has been impacted by the delay. The Rule provides that such a preliminary matter can be dealt with before, at or after the trial of the main action. It is a matter for the trial judge as to when this issue is determined.

***Conclusion***

[57] I allow the plaintiff's application for amendment to the pleadings pursuant to Order 20 rule 5. I refuse the defendant's application for a strike out pursuant to Order 18 rule 19, but direct that under Order 33 rule 3 the issue of limitation shall be referred to the judge as a preliminary issue. Turning to the issue of costs, I note the plaintiff is a legally assisted person. In all the circumstances of this case, I reserve the issue of costs to the trial judge.