Neutral Citation No: [2025] NI Master 5	Ref: [2025] NI Master 5
Judgment: approved by the Court for handing down (subject to editorial corrections)	ICOS Nos: 2022/70421 *Delivered:* 28/02/25

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION

Between:

MARK DEVLIN

Plaintiff

- v –

JPH LAW (John P Hagan Solicitors)

First Defendant

- and -

SEAN HAGAN

Second Defendant

Mr Fletcher, instructed by Mills Selig Solicitors, on behalf of the plaintiff
Mr Keys, instructed by King & Gowdy Solicitors, on behalf of the defendants

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MASTER HARVEY

Introduction

[1] This case involves alleged professional negligence by solicitors in relation to the conveyance of lands in Crossmaglen in 2007. The plaintiff bought land purportedly for development, but this depended on having access to an adopted road. He claims to have proceeded on the basis the land abutted this adopted road. It transpired, however, there was a small section of intervening land owned by the Northern Ireland Housing Executive. This meant the land he bought was said to be of much lesser value as it could only realistically be used as agricultural land. His claim is against the solicitors who acted for him in the land purchase as he argues they failed to advise him the land was not connected to the adopted road. The issue came to light in August 2020 when he tried to sell the land, as the prospective buyer raised the issue through their solicitor. The plaintiff argues his own solicitor should have identified this in 2007 and their failure to do so was negligent. The plaintiff is no longer pursuing a claim for breach of contract.

[2] The writ was issued on 8 August 2022. The limitation period for such claims is 15 years from the breach of duty, pursuant to Article 12 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order"). The defendants argue the cause of action arose more than 15 years prior to issuing the writ as completion occurred on the 16 July 2007 when the plaintiff transferred payment to the vendor.

[3] The defendant's application is dated 17 October 2024 seeking to strike out the plaintiff's claim pursuant to Order 18 rule 19(1)(a), (b) and (d) of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules") and/or pursuant to the inherent jurisdiction of the court. The focus of the strike out application by the defendants is that the plaintiff's claim is out of time.

[4] I have considered the papers and helpful written and oral submissions from respective counsel which assisted the court.

Legal principles

Order 18 Rules of Court of Judicature

[5] Order 18 rule 19 is in the following terms:

> "*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."

[6] The parties are in agreement with regard to the applicable legal principles in strike out applications. This court recently dealt with a similar application, albeit in the context of a very different subject matter, in *Askin, White and Byrne v Chief Constable*

& Ors [2024] NI Master 7. I do not propose to rehearse all the principles here, but it is worth referring to some salient points.

[7] 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. The court may, however, 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).

[8] In *Magill v Chief Constable* [2022] NICA 49 the Northern Ireland Court of Appeal 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."

[9] In addition to no reasonable cause of action, the defendants here seek a strike out of the plaintiff's claim on the basis it is scandalous, frivolous or vexatious and an abuse of the process of the court. Frivolous and vexatious includes cases which are obviously unsustainable and an abuse of process of the court, taking into account matters outside the pleadings. The authorities show that this can apply to cases that are obviously unsustainable. The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the court" (*Young v Holloway* (1895) P. 87 at 90).

[10] 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).

Limitation as a preliminary issue

[11] One of the issues in this application is the grounding provisions relied on by the defendants pursuant to Order 18 rule 19. This is a draconian power which is sparingly used and enables the court to strike out claims at a preliminary stage thus denying the plaintiff a full hearing on the merits. The defendants have not applied in the more conventional way pursuant to Order 32 rule 12A or Order 33 rule 3 for limitation to be dealt with as a preliminary issue by this court or a referral for it to be determined by the trial judge.

[12] It is worth pausing to explore these provisions as they form the basis of many authorities where limitation was dealt with at a preliminary stage. The issue can be heard in an interlocutory summons by a Master. As was stated by Stephens J in *Margaret Roseanna Gordon and McKillens (Ballymena) Limited* [2016] NIQB 32 at para 10, "the Master has jurisdiction to hear and determine a summons dealing with the issues under Article 50 (of the Limitation Order)." While that article does not apply in the present action, it is clear from that case the Master's powers under Order 32 rule 12A apply to consideration of limitation under the 1989 Order and this extends to a case such as this involving professional negligence.

[13] The case of *Gordon* was a personal injury claim in which the defendants argued the action was statute barred. Consideration of Article 50 of the 1989 Order was at the centre of that case. It grants the court power to exercise its discretion to disapply the limitation period but before doing so must carry out a balancing exercise weighing up various factors and all the circumstances of the case. In the present case, limitation is governed by Article 12 of the 1989 Order which provides no such discretion and therefore no balancing exercise is required. Nevertheless, it does require an assessment of the facts of the case to determine when the breach of duty occurred. In *Gordon*, Master Bell had refused to exercise his discretion to disapply the limitation period, and this was appealed. Stephens J overturned this decision and at para [44] pointed to the difficulties of dealing with limitation points at an interlocutory stage stating:

> "The Court cannot, on the hearing of an interlocutory summons, properly have regard to the particular circumstances in Article 50(4)(b) and to all the circumstances of the case."

[14] As stated above, this case does not require a detailed analysis of the matters in Article 50(4) of the 1989 Order such as the reason for the delay in issuing proceedings, the impact of delay on the cogency of the evidence to be adduced and the conduct of the parties. It does, however, require a fact sensitive enquiry weighing up the scant materials available and affidavits submitted by the parties to determine whether the

case is in fact out of time. I do not have the benefit of oral evidence, the parties have not exchanged discovery and I do not have any affidavit evidence from the plaintiff himself.

[15] In *Maguire v Western Education and Library Board* [2023] NIMaster 11, I dealt with an application under Order 32 rule 12A and this again highlighted the difficulties for this court dealing with limitation at a preliminary stage. That was in the context of a personal injury claim. At para [14], I concluded that:

> "… at this interlocutory stage in the absence of oral evidence, further documentation and affidavits, I could not properly have regard to the factors set out in Article 50(4)(b) of the 1989 Order, nor all the circumstances of the case."

[16] While the context of the above cases may have been in relation to personal injury claims and therefore distinguishable from this action, they do highlight the difficulties of dealing with limitation in the context of a summons.

[17] I recognise there is a clear difference between the exercise a court must undertake when considering the range of factors as required by Article 50(4) of the 1989 Order and the more circumscribed task when considering Article 12 which is admittedly narrower. Nevertheless, I consider the court cannot properly adjudicate upon this issue in circumstances where I consider there is a realistic probability the pleadings are capable of improvement. There may be interrogatories, discovery will be provided and at trial the court will hear oral evidence from witnesses and experts. That is not available at this preliminary stage.

[18] In *Gordon*, Stephens J at para [8] went as far as stating: "… that in the High Court the trial of the preliminary issue, which is a part of the trial, should be by a judge." The defendants cite the case of *Ulster Garden Villages Limited & ors v Farrans (Construction) Limited & ors* [2024] NIKB 15, in which Huddleston J dealt with a strike out application on the basis of a limitation issue. He noted "this is inevitably a high hurdle."

[19] In that case, some of the defendants applied to have the claim struck out in reliance on Order 18 rule 19(1)(a). That action had a unique factual matrix involving claims under the Defective Premises (Northern Ireland) Order 1975. The judge concluded that the case involved vague and imprecise allegations which did not disclose a direct cause of action under the above legislation which could survive the limitation point and proceeded to strike out the claim as he considered it was not arguable, concluding at para 140 "the arguments advanced do not hold sufficient merit to be advanced to trial."

Consideration

[20] In the present case, the claim relates to professional negligence. The time limit for bringing a claim is 15 years from any alleged breach of duty, not the date of the alleged loss or damage. The parties are in agreement about this.

[21] The particulars of negligence in the statement of claim must be taken at face value. They do not specify a precise timeframe in respect of the allegations. There is force in the plaintiff's submission that the most the defendants can seek is an amended pleading providing more temporal specificity. The defendants argue completion took place on 16 July 2007 when the money transferred between the plaintiff and the vendor meaning proceedings should have been issued on or before 15 July 2022 (and not 8 August 2022 as happened here). They further argue the pleadings confirm the defendants started providing conveyancing services in November 2006 and do not allege negligence beyond 16 July 2007. The defendants argue the affidavit evidence from the plaintiff's solicitor makes no averment regarding breaches of duty after 16 July 2007 and merely avers that damage crystallised after 9 August 2007, which is irrelevant given Article 12 of the 1989 Order sets the limitation date based on breach of duty, not damage.

[22] The plaintiff asserts completion did not take place on this date as there was a delay in transfer of the lands as the vendor died and the land registry process was not completed until the following year. The task of this court is not to make findings of fact or decide whether this is a strong or weak case. This court is instead asked to determine whether the plaintiff's pleadings are incurably defective, and the claim is unarguable or incontestably bad. As was stated by Huddleston J in *Ulster Garden Villages* (para [38]):

> "Where there is doubt then the authorities are clear that that should be resolved by allowing the case to proceed to full trial."

[23] The learned judge also stated something which is referenced in a long line of authorities when considering interlocutory matters. Put simply, this is not a "mini-trial." Having considered the available material it is at the very least arguable that there may have been breaches of duty after 9 August 2007. The plaintiff asserts the defendants failed to act. It is not possible to make any finding of fact on whether this may have occurred after purported completion on 16 July 2007. Moreover, the plaintiff argues there was a right of recission until 24 August 2007 as the special conditions provided for recission within three months of the contract having been signed, which took place on 24 May 2007. There is disagreement between the parties regarding the interpretation of special condition 3 and whether in fact the plaintiff had a right of recission but at the very least the plaintiff argues that if the only party with a right of recission was the vendor, it meant the sale was conditional and completion could not have taken place on 16 July 2007 and the conditionality applied beyond completion. It was during this time he alleges the solicitors failed to act, meaning his claim could not be statute barred as the defendants assert. On balance, I consider there is sufficient doubt in this case on the basis of the pleadings to allow the claim to proceed.

[24] I consider that the *Ulster Garden Villages* case merely affirms that as a matter of law, the court can deal with a strike out application pursuant to Order 18 rule 19 on limitation grounds, but I do not consider in the particular circumstances of this case that it is an appropriate course and ultimately, I have formed the provisional view that the claim is at least arguable. I note defence counsel's reliance on the *Supreme Court Practice* ("*White Book*") (1999 Edition) at paragraph 18/19/11 which states that "in a very clear case (of a claim being statute barred, the defendant) … can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of process of the court." Further, counsel points to paragraph 18/19/26 asserting that the inherent jurisdiction of the court can be invoked to strike out claims in such circumstances. In my view this is not a very clear case and I also consider that in the vast majority of cases, it is preferable that such limitation issues should be dealt with by the trial judge. The trial judge will have the distinct advantage of hearing oral evidence, cross-examination of witnesses, and sight of further documents after discovery has been completed which is not available at this interlocutory stage. The trial judge can also decide whether and when to deal with it as a preliminary issue and this can be before, at or after the main trial.

[25] In the Northern Ireland Court of Appeal decision in *The Governor & Company of the Bank of Ireland and John Conway* [2024] NICA 80, the court warned of the dangers of forming conclusions at a preliminary stage, stating:

> "[18] It is not for this court in the exercise of its circumscribed function to make any judgement about any of the foregoing assertions. Rather, it suffices to recognize that the defendant's evidence at trial could include the foregoing and, further, could be accepted by the trial judge, in whole or in part, giving rise to findings of fact in his favour which, in turn, could establish or contribute to establishing one or more of his causes of action as pleading."

[26] That case involved a strike out of aspects of the defendant's defence. The Court of Appeal stated that at an interlocutory stage of the proceedings, there is no evidence, no findings of fact or agreed material facts. The onus rests on the defendant to establish that the contentious aspects of the plaintiffs pleading:

> "could not conceivably in any realistically foreseeable trial circumstances succeed and are incurably vitiated in consequence."

Delivering the judgment in that case, McCloskey LJ stated "this entails a hurdle of formidable dimensions."

[27] 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 I consider it may appear weak or that I consider there may be some force in the defendants' contention that it is statute barred, is not grounds for striking it out and in all the circumstances, I refuse to do so. If the

defendants are vindicated at trial, the plaintiff will face a significant costs burden. That is the risk of litigation. Having regard to the overriding objective, it will, however, mean both parties have a chance to fully and fairly argue their case, cross examine witnesses and adduce evidence supporting their respective positions. My assessment of the preliminary facts of this case is that the defendants have not overcome the high hurdle of demonstrating there is no reasonable cause of action on the face of the pleadings or having considered the admissible affidavit evidence that it is frivolous, vexatious or an abuse of the process of the court.

[28] I have considered whether to permit further affidavit evidence, but I do not consider it appropriate as that would involve embarking on a mini trial by affidavit and a further protracted assessment of what is limited documentation available to me at this interlocutory stage. There are already five affidavits in this case, with four on the defendants' side alone. A further option is to order a trial of a preliminary issue by referring this case to the judge pursuant to Order 33 rule 3. I do not consider that an appropriate course not least because no such request has been made by the defendants, and this is an application to strike out the claim There is of course no barrier to the defendants in pursuing such a course should they wish.

[29] A further issue arose in the case as the plaintiff issued proceedings against JPH Law and not the correct entity which is John P Hagan Solicitors. Having considered this issue and the submissions from the parties, I am prepared to allow an amendment of the title of proceedings to reflect John P Hagan Solicitors as the first defendant. On balance it appears to have been a genuine mistake. The caselaw in this area is clear that delay and even negligence are not grounds to refuse such an amendment pursuant to Order 20 rule 5. I consider it will serve to clarify the real parties in the case and corrects a bona fide error. There is no injustice to the defendant who I conclude has suffered no prejudice. There was no doubt as to who was being sued, and this defendant was able to enter an appearance.

Conclusion

[30] I grant leave for the plaintiff to amend the title of proceedings pursuant to Order 20 rule 5, to reflect John P Hagan Solicitors as the first defendant. I refuse the defendants' application for a strike out pursuant to Order 18 rule 19. I reserve the issue of costs to the trial judge.