Neutral Citation No: [2020] NIQB 27 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **SHA11234** *Delivered:* **27 March 2020**

2013 No 59396

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

PAUL TWEED AND SELENA TWEED

Plaintiffs

and

J & E DAVEY TRADING AS DAVY

Defendant

_____

SHAW J

Introduction

[1] Davey (the Defendant) is a financial services firm that provides investment advice and sells financial products. In the summer of 2007 Mr and Mrs Tweed, (the Plaintiffs), took advice from Davey about investments. In June 2007 the Tweeds purchased a financial product from Davey which they later regretted. They now seek compensation from Davey. The issue for determination is whether the court should exercise its discretionary power to amend the writ allowing fresh claims that are otherwise statute barred.

[2] It is plain that the court has a discretion to allow the Tweeds to add a new cause of action (that would otherwise be time barred) *if* that 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. The court's power is found in Order 20 Rules 2 and 5 of the Rules of the Court of Judicature 1980 (the Rules) which are underpinned by Article 73 of the Limitation (NI) Order 1989 (the Order).

[3] While the parties acknowledged the discretionary power of the court and its provenance in the Order and Rules, they differed on its application. The dispute

centres on the true scope of the writ (when properly construed) and, in particular, the identification of those 'facts' that gave rise to the cause(s) of action initially claimed.

The Background

[4] Shortly before the expiry of the primary limitation period, the Tweeds issued a writ on 5 June 2013 seeking damages from Davey. A Statement of Claim was not served until 9 May 2017.

[5] The Defendant objected that the Statement of Claim advances a time-barred case for mis-selling a financial product that lies beyond the scope of the writ. Davey says the writ complains merely of Davey's bad advice and affords no basis for the separate and distinct claim of mis-selling a financial product: to advise is not to sell. In response the Tweeds contend there was only one transaction (a purchase induced by Davey's bad advice) and the writ (when read correctly) articulates the bad advice *and* sale sufficiently.

[6] Master McCorry granted leave to amend the writ but Davey has appealed. I heard the matter *de novo* with the benefit not only of the lucid written judgment of the learned Master but also the helpful written and oral submissions made by senior counsel for the respective parties: Mr Ringland QC for the Tweeds and Mr Humphreys QC for Davey. I am indebted to each of them for the assistance rendered to the court.

The Application

[7] To better appreciate the competing positions, I set out the material provisions in the Rules and the legislation to which I have added emphasis by underlining:

(1) "Order 20 of the RsCJ says insofar as material:

> *Amendment of writ or pleading with leave*
>
> 5.-(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.

(2) The statutory underpinning to the Rules is found in Article 73 of the Order. It provides:-

"73.-(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)…; 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; …"

[8] The writ of 5 June 2013 signed by junior counsel says (with the proposed amendment underlined):-

> "The Plaintiffs' claim is for:
>
> (3) Damages is 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;
>
> (4) A declaration that the Defendant is obliged to indemnify the Plaintiffs in respect of their liability, if any, to Anglo Irish Bank (In Liquidation) or its successors;
>
> (5) Further or other leaf;
>
> (6) Costs;
>
> (7) Interest under section 33A of the Judicature (Northern Ireland) Act 1978 at such rates and for such a periods [sic] as the court sees fit."

Consideration

[9] In the Court of Appeal decision of *Metcalfe* [1991] NI 237 Kelly LJ explained that (as here) a number of reported cases had been cited to illustrate when amendments have and have not been allowed under the Rules of Court. Aptly he observed that the cases were "of limited value because of their factual differences" [page 241G]. Having considered the various authorities placed before me by counsel, I echo and adopt the assessment of Kelly LJ. To be clear, I have given careful consideration to the submissions advanced by each party even though I do not rehearse them here.

[10] Since the Order and Rules require me to assess the matter in light of the claim(s) previously made in the action, I accept the submission by Mr Humphreys QC that the court here must look to the original writ *only* and decline to take into account the contents of the Statement of Claim or pre-action correspondence; the former arises too late while the latter is not part of a claim made "in the action".

[11] Leaving the issue of the writ so close to the expiry of the primary limitation period and serving a Statement of Claim nearly four years later, the only material

provided by the Tweeds for the court's assessment is the writ. In some of the authorities cited to me the court had not only a writ but also a Statement of Claim issued within the primary limitation period: see for example *Eastwood* [1992] NI 183 and *Metcalfe* [1991] NI 237. Although crafted in the laconic style that is customary in this jurisdiction, the writ serves to halt the limitation clock and, as I read it, contains a brief Statement of Fact out of which the alleged legal causes of action are said to arise thereby providing a basis for the compensatory damages sought (if established).

[12] Confining myself to the writ, I am satisfied that paragraph one adequately sets forth (a) several causes of action at law (b) grounded on a set of facts concisely stated for which (c) specified relief is sought. I find that the reader of paragraph one is able to glean readily that the Tweeds seek compensation (the relief sought) under five distinct heads of claim at law (listed as 'misrepresentation' through to 'breach of contract') that arise from the provision of advice by Davey to the Tweeds (the factual foundation). The factual base asserted to ground the several causes of action listed is that Davey provided advice of a character described as "investment and financial services advice".

[13] In exchanges with counsel I explored whether one might derive a sale from the phrase "financial services" provided by Davey. On reflection, I am satisfied that this would artificially isolate that phrase and distort the plain meaning of the words used. I find myself unable to do so.

[14] I have given careful consideration to the analysis put forward by Mr Ringland QC. In a forthright submission he argued that there was only one transaction which started when the Tweeds engaged with Davey, continued with the provision of advice on matters of investment and financial services culminating in a purchase of a product from Davey. He invited me to view this as a set of unchanging underlying facts to which he merely wished to add a "new legal label" in the form of the proposed amendments. He cited the approach of the court in *Metcalfe* [1991] NI 237 and also *Eastwood* [1992] NI 183 where such 'new legal labels' were applied.

[15] However, in each of those cases, unlike here, the court had both a Statement of Claim and a writ to review. For example, the writ in *Eastwood* complained of libel and the Statement of Claim set forth the facts including the words in issue which the Plaintiff later wished to have classified as 'slander' in the proposed amendment. Unsurprisingly the court saw its way to grant leave to amend with Carswell J (as he was) observing at page 186:

> "A new cause of action, ie slander, arises out of exactly the same facts as the cause of action, libel, in respect of which relief has already been claimed in the action by the plaintiff. No extra facts are pleaded and it is merely a question of a new legal label for the claim already made."

[16] While I realise the single purchase transaction analysis proffered by Mr Ringland QC might well align with what occurred between the parties in June 2007, I do not accept it is what the writ alleges. Paragraph one of the writ does not provide any temporal reference and furnishes no material to supply a factual basis for a cause of action rooted in the sale of a financial product. On the contrary, I accept the submission by Mr Humphreys QC that selling a financial product is separate and distinct from the provision of advice. I conclude that in paragraph one the Tweeds elected to focus on the fact that Davey provided advice to them rather than the sale of a product. The Tweeds sued Davey as an advisor not as vendor of a financial product.

[17] Although neither side raised paragraph two of the writ in their written or initial oral submissions, Mr Ringland QC was willing to call it in aid (although he did not think it necessary) to reinforce his submission that there was one single purchase transaction which was already discernible in paragraph one. The argument runs along the lines that paragraph two connotes a liability incurred by the Tweeds to a bank connected to their purchase of a financial product from Davey. Having incurred that liability to make the purchase, paragraph two seeks an indemnity from Davey for it. If approached that way, one might seek to contend that what is in contemplation is a purchase transaction (as promoted in the analysis of Mr Ringland QC).

[18] However, even if it were conceivable to read paragraph two in that fashion, I accept the submission by Mr Humphreys QC that it is neither necessary nor appropriate to do so. In the absence of any express nexus between paragraphs one and two, I am unable to conclude that paragraph two is connected to paragraph one of the writ. I have concluded it does not assist me in my task.

[19] Consequently, I have come to the conclusion that by their writ the Tweeds have confined themselves to a claim for bad advice by Davey. 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.

[20] 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.

[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.

Conclusion

[22] 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 Davey and not a sale of a financial product to the Tweeds.

[23] Since the Statement of Claim trespassed beyond the proper limits of the writ as I have identified them, a fresh Statement of Claim will be required reflecting the writ as amended. Mr Ringland QC helpfully confirmed that any new Statement of Claim will not allege fraud.

[24] I will hear submissions on costs.