Neutral Citation Number: [2019] EWHC 852 (QB)

Case No: D90MA268

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEALS CENTRE MANCHESTER
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2019

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

HUW MORGAN JENKINS	**Appellant /Claimant**
- and -	
JCP SOLICITORS LIMITED	**Respondent/ Defendant**

- -
- -

Richard Carter (instructed by **IPS Law LLP**) for the **Appellant/Claimant**
Clare Dixon (instructed by **Mills & Reeve LLP**) for the **Respondent/Defendant**

Hearing date: 11th March 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. Before the Court is the appellant's appeal against the Order of District Judge Osborne dated 7 September 2018 that:

    i) the appellant's application to substitute John Collins & Partners LLP ("the LLP") for the current defendant, JCP Solicitors Limited ("the Company"), should be dismissed; and

    ii) the Company's application to strike out the claim should be granted.

2. The respondents (the current and proposed defendants), are solicitors who have practised within the following entities:

    i) on 23 March 2004 the LLP was incorporated;

    ii) on 1 November 2010 the LLP started trading as "JCP Solicitors";

    iii) on 2 December 2014 the Company was incorporated;

    iv) on 6 April 2015 the Company started trading as "JCP Solicitors";

    v) on 2 May 2017 the LLP was dissolved by voluntary strike off;

    vi) on 15 November 2018 the LLP was restored to the register.

3. Until recently the appellant, Mr Jenkins, was the Chairman of Swansea City Association Football Club ("Swansea City AFC"). In February 2011 the appellant separated from his wife. On 7 April 2011 the appellant sought legal advice in relation to potential matrimonial finance proceedings. The LLP advised him against instituting proceedings as his level of indebtedness would preclude a "clean break" settlement. In June 2011 Swansea City AFC was promoted to the Premier League. In October and/or November 2011 the appellant received further advice from the LLP that his finances were not sufficiently stable to reach a financial settlement with his wife. Following the promotion of Swansea City AFC, the appellant's financial position improved substantially, primarily by reason of the significant increase in the value of his shares in Swansea City AFC. In 2015 the appellant instructed alternative solicitors ("IPS Law"). In 2016 the appellant's wife started divorce proceedings. A decree nisi was pronounced on 1 March 2017. On 14 March 2017 a financial settlement was achieved under which the appellant agreed to pay a lump sum of £2.25 million, transfer assets and make periodical payments to his former wife.

4. The appellant's case is that in 2011 the LLP should have been aware that his financial position was likely to improve and should have advised that it would be advantageous to start matrimonial proceedings before a material change in his circumstances occurred.

5. The respondents' position is that the Company did not provide any advice prior to 2015; any advice provided was within the range of advice which could have been given by a reasonably competent solicitor; in any event, even if the appellant had started matrimonial proceedings in 2011, it would not have resulted in a quicker or lower financial settlement.

Material history of the proceedings

6. On 14 December 2015 IPS Law requested the appellant's file from the Company, having been recently instructed by the appellant. On 15 December 2015 the Company responded stating:

> "Thank you for your letter of yesterday's date. Unfortunately, there appears to have been a misunderstanding. We did have one initial meeting with Mr Jenkins on 7 April 2011 which was free of charge, there was no follow-up, we did not hear from him again until October 2015."

7. On 11 October 2016 IPS Law served a preliminary notice and letter of claim to the Company stating:

> "We are instructed that in 2011 Mr Jenkins instructed JCP requesting advice on divorcing Mrs Jenkins.
>
> Your advice at this time was that Mr Jenkins should wait before filing divorce proceedings…
>
> By failing to provide Mr Jenkins with advice as to how to divorce Mrs Jenkins at the time, the result of doing so has caused him loss that if he had not have followed your advice, he would not have suffered."

8. On 23 March 2017 IPS Law sent a further letter to the Company, stating:

> "We are in the process of taking instructions from our client in relation to his prospective claim against JCP Solicitors. We understand that the limitation period is approaching and therefore, in order to save both time and costs in issuing the claim prior to discussing this matter further we see it to be in both party's interest if you were to agree a standstill agreement. We therefore attach a draft copy of the same."

9. On 3 April 2017 the appellant and the Company entered into a standstill agreement, suspending time for limitation purposes in respect of the dispute. The standstill agreement was made between the appellant (Party A) and the Company (Party B). The dispute was identified as:

> "any claim for negligence or breach of contract arising from legal advice given, or not given, to Party A by Party B in relation to Party A's matrimonial affairs."

10. On 28 September 2017 the appellant issued the Claim Form against the Company, seeking damages in contract and tort for negligent advice given in 2011. The defendant was named as "JCP Solicitors Ltd (t/a JCP Solicitors)".

11. The material allegations by the appellant were pleaded in the Particulars of Claim as follows:

> "[19] The advice provided by the Defendant … was negligent and/or in breach of the retainer between the Claimant and the Defendant.
>
> [19.1] The Defendant failed to advise the Claimant properly as to the options open to him as at 2011, and in particular, failed properly to consider the merits of issuing a divorce petition and seeking a financial remedy order at that time;
>
> [19.2] The Defendant advised the Claimant not to take any steps to divorce Sian despite the risk that Claimant's financial position might change substantially to the better if, as in fact happened, Swansea Football Club were promoted to the Premier League;
>
> …
>
> [19.4] The Defendant failed to advise the Claimant that, should Swansea City AFC gain promotion to the Premier League, and/or his financial position improve, he should immediately consider issuing divorce proceedings to minimise the potential claim against him by Sian;
>
> …
>
> [20] By reason of the matters set out above, and the negligence and/or breach of retainer of the Defendant, the Claimant has suffered loss and damage;
>
> [20.1] The Claimant lost the opportunity to… bring before the Courts the financial remedies determination at a time when his financial position would have resulted in a considerably lower award being made to Sian;
>
> [20.2] Had proceedings been begun in 2011…
>
> [20.3] … he would not have been ordered to transfer to Sian any of his shareholding in Swansea City AFC … or his interest in the commercial property;
>
> …
>
> [20.5] The Claimant has therefore suffered loss in the region of £2.25m, such being the difference between the amount he would have been ordered to pay Sian in 2011, and the amount paid in 2017…"

12. On 9 November 2017, Mills & Reeve LLP, the respondents' solicitors, wrote to IPS Law, stating:

> "The Defendant is JCP Solicitors Limited (company number 09336286). As you will have seen from Companies House, that company was incorporated on 2 December 2014. Therefore it was the firm which your client retained in respect of the October 2015 retainer but it did not exist at the time of the meeting(s) in 2011.
>
> As your client will have appreciated from his various other retainers before JCP Solicitors Limited came into existence, your client instructed John Collins & Partners LLP (company number OC307349) in respect of any matters in and around 2011. The LLP was incorporated on 23 March 2004 and was dissolved in May 2017.
>
> Whilst we understand that any claim asserted in relation to any advice in October 2015 would be asserted against JCP Solicitors Limited, please explain on what basis the claim in respect of any advice in 2011 is made against JCP Solicitors Limited."

13. By letter dated 1 December 2017, IPS Law responded:

> "You will be aware that it is a requirement of all SRA regulated legal practices to provide professional indemnity insurance for 6 years following their cessation. If you are asserting that JCP Solicitors Limited did not assume the liabilities of John Collins & Partners LLP as a successor practice, (in which case we will be correct in bringing a claim against JCP Solicitors Limited) please by return provide details of John Collins & Partners LLP professional indemnity insurance policy so that we can enquire as to whether it may be necessary to add them to these proceedings as a Defendant."

14. Mills & Reeve replied on 15 December 2017, confirming that the Company was the successor practice to the LLP and the Company's insurance policy would respond to claims made against the Company or the LLP.

15. On 12 January 2018 the Company served its Defence in which it pleaded that:

> "[2] The Defendant was incorporated on 2 December 2014. The advice about which the claim is made is alleged to have been given in April and October 2011. The Defendant can have no liability for advice given by a different entity, prior to the incorporation of the Defendant.
>
> [3] The Claimant does not assert why the Defendant is liable for acts or omissions which occurred before it existed as a legal entity. The Claimant's solicitors have however confirmed by letter of 1 December 2017 that they and their client intended to sue the Defendant rather than John Collins & Partners LLP (a corporate entity now struck off the register following voluntary

> liquidation), the business with which the claimant dealt in 2011…
>
> [4] Since no cause of action is alleged against the Defendant, the claim is liable to be struck out without further notice…"

16. The Defence also pleaded a limitation defence in respect of any claim made against the LLP arising out of the April 2011 advice.

17. On 19 March 2018, the appellant issued an application to substitute the LLP for the Company on the basis that he had mistakenly issued against the Company rather than the LLP.

18. On 4 July 2018 the Company issued a cross-application to strike out the claim on the ground that there was no reasonable cause of action against the Company.

19. By Order dated 10 September 2018, District Judge Osborne dismissed the appellant's substitution application and struck out the claim against the Company on the grounds that the appellant knew, or should have known, that the Company had not been incorporated until 2014; the mistake was not as to the name but as to liability of the Company for negligence on the part of the LLP. The Judge also concluded that the Court should not exercise its discretion to permit the substitution given the delay in issuing proceedings, the availability of an alternative remedy against the appellant's legal representatives and the speculative nature of the claim.

20. The appellant sought permission to appeal against that order. At an oral renewal hearing on 26 November 2018 before Soole J, the appellant conceded that the limitation period in respect of any claim arising out of the April 2011 advice had expired when proceedings were started (because the LLP was not a party to the standstill agreement). Therefore, the Court did not have power to grant substitution pursuant to CPR 19.5(2)(a) in respect of that part of the claim. Soole J granted permission to appeal, subject to that concession as recorded in the recital to the order:

    > "AND UPON it being recorded that the Appeal relates only to the alleged negligent advice given by the Respondent in October/November 2011 and does not extend to the alleged negligent advice provided in April 2011."

21. On 30 January 2019 the hearing of the appeal came before Turner J who raised with the parties a possible argument that the claim in respect of the April 2011 advice might not be statute-barred for limitation given the decision of the House of Lords in *Law Society v Sephton* [2006] 2 AC 543. An adjournment was granted for the appellant to consider his position and, if so advised, to file amended grounds of appeal.

22. The appellant took the opportunity to serve amended grounds of appeal, seeking to overturn the Order dated 10 September 2018. The proposed amended grounds are:

    i) the District Judge wrongly categorised the mistake as one of identity rather than nomenclature;

ii) the District Judge wrongly exercised his discretion to refuse substitution, taking into account, or giving undue weight to, the merits of the case;

iii) the appellant seeks to amend the Claim Form in accordance with CPR 17.1(2)(b) to join the LLP as a defendant; the appellant seeks the permission of the Court to bring this application within this Appeal and to remove the limitation imposed by Mr Justice Soole to the October/November 2011 advice in relation to this amendment.

23. Therefore, the court must consider:

i) whether the appellant should be permitted to resile from its earlier concession;

ii) whether permission to appeal should be granted in respect of the amended grounds; and

iii) if so, whether the substantive appeal in relation to the existing grounds of appeal and/or the appeal on the amended grounds should be allowed.

Application for permission to withdraw concession

24. It is common ground that when the matter came before Soole J for permission to appeal, the appellant accepted that any claim against the LLP based on the April 2011 advice was statute-barred when proceedings were issued in September 2017. Mr Carter, counsel for the appellant, seeks permission to withdraw that concession so that reliance can be placed on the principle established in *Sephton* in support of an argument that the claim is not statute-barred for limitation.

25. The Court has a general discretion to allow a party to change its position on a point of law or fact. Ms Dixon, counsel for the respondents, helpfully drew my attention to the test set out in *Glatt v Sinclair* [2013] 1 WLR 3602 (CA) per Davis LJ at [24] (quoting Nourse LJ in *Pittalis v Grant* [1989] QC 605):

> "Even if the point is a pure point of law the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

26. In this case, there has been no trial and the issue has arisen at a relatively early stage in the proceedings. The point of law in question was raised by Turner J at the last hearing and the appeal was adjourned so that both parties would have adequate opportunity to consider the issue. Counsel for both parties have made clear and comprehensive submissions on the limitation issue. The Company and the LLP have not suffered any prejudice by the change of position. In those circumstances, it would be appropriate to

allow the appellant to withdraw its concession on limitation in respect of any claim arising out of the April 2011 advice.

Application for permission to appeal on amended grounds

27. The appellant seeks to rely on amended grounds of appeal to add the LLP as a further defendant and to extend the appeal to cover a claim arising out of the April 2011 advice. Ms Dixon has identified an error in the original and amended grounds of appeal, namely, the identity of the party to be added or substituted as the defendant. The grounds of appeal identify the party as 'John Collins & Partners'. Clearly, that is a mistake; the correct party should be 'John Collins & Partners LLP'.

28. Further, Ms Dixon notes that the amended grounds seek to add the LLP as a defendant. The original application before the District Judge was an application to substitute the LLP for the Company. The premise of the application was acknowledgment that there was no actionable claim against the Company. It is against the District Judge's refusal to allow the substitution application that the appeal is sought to be made. An application to add the LLP as a second defendant would require a separate application. That is recognised by Mr Carter, who seeks to add LLP by an application pursuant to CPR 17.1, but invites the Court to consider the application within the appeal hearing.

29. The principle ground of objection by the respondents to the amended grounds of appeal is that the appeal has no real prospect of success and/or there is no other compelling reason for the appeal to be heard. I consider that the appropriate course is to treat the hearing as a rolled-up hearing for permission and the substantive appeal and consider the merits of the appeal (and potential application to amend) in determining whether to grant permission.

Appeal based on the original grounds

30. Under section 2 and 5 of the Limitation Act 1980 the limitation period for actions founded on tort or contract is 6 years from the date on which the cause of action accrued. A cause of action in contract accrues on the date of breach. An actionable cause of action in tort requires damage. Therefore, a cause of action founded on negligence accrues when the claimant has suffered loss resulting from the negligent act or omission.

31. Section 35(4) of the Limitation Act 1980 states that the rules of court may provide for allowing a new claim after a relevant limitation period has expired but only if the conditions specified in section 35(5) are satisfied and subject to any further restriction the rules may impose. In the case of a claim involving a new party, the relevant condition specified in section 35(5) is that the addition or substitution of the new party is "necessary for the determination of the original action". Section 35(6) provides that the condition is not satisfied unless:

> "(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name …"

32. The original grounds of appeal were limited to the allegedly negligent advice given in October/November 2011. The Claim Form was issued on 28 September 2017. The

application for substitution was issued on 19 March 2018. The appeal arises out of the application for substitution on the grounds of mistake, based on an assertion that the limitation period was current at the date of the Claim Form but has since expired.

33. CPR 19.5 provides:

> "(1) This rule applies to a change of parties after the end of a period of limitation under –
>
> (a) the Limitation Act 1980 …
>
> (2) The court may add or substitute a party only if –
>
> (a) the relevant limitation period was current when the proceedings were started; and
>
> (b) the addition or substitution is necessary.
>
> (3) The addition or substitution of a party is necessary only if the court is satisfied that –
>
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party…"

34. In *Adelson v Associated Newspapers Ltd* [2007] EWCA Civ 701, giving the judgment of the Court, Lord Phillips stated:

> "[55] CPR 19.53 makes it a precondition of substituting a party on the ground of mistake: "that the new party is to be substituted for a party who was named in the claim form in mistake for the new party." It is clear from this language that the person who has made the mistake must be the person responsible, directly or through an agent, for the issue of the claim form. It is also clear that he must be in a position to demonstrate that, had the mistake not been made, the new party would have been named in the pleading."
>
> "[56] The nature of the mistake required by the rule is not spelt out. This court has held that the mistake must be as to the name of the party rather than as to the identity of the party, applying the generous test of this type of mistake laid down in *The Sardinia Sulcis*."

35. The test was set out by Lloyd LJ in *The Sardinia Sulcis* [1991] 1 Ll.Rep 201 at p.207:

> "In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test … if in the case of an intended defendant, the plaintiff gets the right

> description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise."

36. Helpful guidance is set out by Leggatt J (as he then was) in *Insight Group Ltd v Kingston Smith* [2014] 1 WLR 1448, a case concerning a claim brought against a limited liability partnership in respect of a claim for damages for alleged negligent advice given by a partnership of accountants prior to their formation of the LLP. Leggatt J stated:

> "[56] … Applying the *Sardinia Sulcis* test as discussed above, it seems to me that the relevant description of the defendant in a case of this kind is that of professional adviser. It is the fact that the defendant has provided professional services and has allegedly done so negligently which potentially gives rise to the legal liability."

> "[57] In order to decide whether the claimant's mistake can be regarded as one of name rather than description, it is thus necessary to distinguish between the following two possible cases. (1) The claimant sues the LLP in the mistaken belief that the LLP provided the services which are said to have been performed negligently, failing to recognise that the services were provided by the former partnership and not the LLP. (2) The claimant knows that the services were provided by the former partnership but mistakenly believes that the LLP is legally liable for the negligence of the earlier firm. The court has the power to grant relief in case (1) but not in case (2)…"

> "[58] To determine into which category a particular case falls, it is necessary to consider the whole of the evidence which may serve to explain why the LLP, and not the firm, was named as the defendant in the claim form. Such evidence will of course include any extra explanation given by the person who was responsible for preparing the claim form. But any such explanation may well not be conclusive, not least because the person responsible for the mistake may have given no proper thought to the decision to name the LLP is the defendant and may not consciously have followed either of the possible thought processes distinguished above. Any explanation given of the nature of the mistake may thus be an attempt to rationalise what was done in hindsight. For that reason other, objective evidence is likely to be just as, if not more, important. If particulars of claim were prepared when the claim was issued or at any rate before the mistake was recognised, they may be the best source for inferring what the claimant intended. It is also potentially relevant to consider what was said in any correspondence which preceded the issue of the claim form and in subsequent correspondence in so far as it sheds light on what the reason was the naming the LLP as the defendant."

37. In this case, although it was appropriate and necessary for Christopher Farnell of IPS Law to produce a witness statement explaining the mistake, I place little weight on his analysis for the reasons identified by Leggatt J in *Insight*. Objective evidence, such as the contemporaneous documents, is a more reliable source as to the nature of the mistake made.

38. It is clear from the contemporaneous documents that the appellant intended to sue the entity which provided the professional advice in 2011, that is, the LLP, for the following reasons. Firstly, the initial claims correspondence prior to proceedings stated that the intended claim concerned the advice given in 2011. The LLP was in existence in 2011; the Company was not incorporated until 2014. Secondly, the standstill agreement dated 3 April 2017 was intended to suspend time running in respect of a limitation period that was about to expire in respect of a claim arising from legal advice given to the appellant. That could only be a reference to the legal advice allegedly given by the LLP to the appellant in 2011. Thirdly, correspondence referred to the intended defendant as JCP Solicitors. The only entity known as JCP Solicitors in 2011 was the LLP. Fourthly, the Particulars of Claim advance a claim against the Company as the entity that gave legal advice to the appellant in 2011. There is no pleaded case against the Company as the legal successor to the LLP.

39. I reject any suggestion that the respondents misled the appellant as to their identity or acted in bad faith. It is not incumbent on a party to make the other side's case for it or to point out errors in the claim advanced by the other side. A defendant is entitled to rely on all defences properly available to it, just as a claimant is entitled to rely on any reasonable cause of action against a defendant that has a real prospect of success.

40. The respondents refer to subsequent correspondence, such as the letter dated 1 December 2017 and the email dated 24 January 2018, in which the appellant positively asserted that the Company was the successor practice to the LLP. The respondents submit that this indicates that the appellant intentionally brought its claim against the Company. Reliance is placed on analysis in a similar case: *American Leisure Group Ltd v Olswang LLP* [2015] EWHC 629 (Ch.D.) per Walden-Smith J at [18], [19], [41]-[46]. Statements by the appellant's solicitors after proceedings had been issued may shed light on its intentions at the time that the Claim Form was issued but are not conclusive as to the mistake made. It is regrettable that the appellant failed to admit that it had made a mistake when issuing proceedings against the Company. However, its attempt to identify an alternative case based on a transfer of liability to the Company does not detract from the clear statements in earlier correspondence and in the pleading that its intention was to sue the entity that provided legal advice in 2011.

41. Ms Dixon relies on the fact that the appellant knew, or should have known, that the Company was not incorporated until 2014. This finding was the basis of the District Judge's determination. However, it is a neutral point. It is common ground that a mistake was made. Identifying lack of care on the part of the solicitors does not assist in ascertaining the nature of the mistake made. The material question is whether the appellant intended to sue the entity that provided the legal advice in 2011 and mistakenly issued the claim against the Company; or whether the appellant intended to sue the Company, wrongly believing that it assumed responsibility for any liability on the part of the LLP. The answer to that question in this case is provided by the contemporaneous documents.

42. For the reasons set out above, I conclude that this was a mistake as to name and not as to identity. The District Judge was wrong to decide that the mistake was as to identity and therefore wrongly decided that the Court had no jurisdiction to allow substitution.

43. The District Judge also decided that he would have exercised his discretion against allowing the substitution. That decision was based on the delay in bringing the claim, the alternative remedy open to the appellant to claim against his solicitors and his assessment that the nature of the claim seemed speculative.

44. Guidance on the exercise of discretion in these cases was provided by Leggatt J in *Insight* (above):

    i) The discretion must be exercised in accordance with the overriding objective of enabling the court to deal with cases justly [100].

    ii) The appellate court should interfere only if the District Judge made an error of principle or exceeded the bounds within which a reasonable disagreement is possible as to how the court's discretion should have been exercised [104].

    iii) The fact that the appellant has a potential remedy against his legal representatives does not provide an adequate substitute for the loss of the original claim [107].

    iv) Consideration of the merits of the case was appropriate only if and to the extent that it was clear that any of the relevant claims had no real prospect of success and should be struck out [109].

45. It is common ground that the District Judge applied the wrong criteria when exercising his discretion in this case. Therefore, this Court is invited to exercise its discretion afresh.

46. I note that there was significant delay in commencing proceedings in this case. The appellant failed to comply with the pre-action protocol and inadequate details were given in 2016 when the claim was first intimated. However, the LLP and the Company have been aware of the potential claim since 2015/2016. The same solicitors represent the Company and the LLP. The passage of time will have affected memories of the material events but the respondents have, or should have, notes of the relevant meetings. Although the appellant was slow to issue the application for substitution and there have been a number of additional errors, no prejudice has been suffered by the failure to name the correct defendant in the claim. A fair trial remains possible. Having regard to all the circumstances of the case, it would be appropriate to exercise the Court's discretion to allow the substitution of the LLP as a defendant in respect of the claim based on the October/November 2011 advice.

Appeal based on the amended grounds

47. The amended grounds of appeal seek to amend the Claim Form pursuant to CPR 17.1(2)(b) to join the LLP as a defendant.

48. CPR 17.1 provides that, once a statement of case has been served, a party may amend it only with the consent of the other party or with permission of the court.

49. CPR 17.4 states:

> "(1) This rule applies where –"
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1980 …;
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.
>
> (3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.
>
> (4) The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired.
>
> (Rule 19.5 specifies the circumstances in which the court may allow a new party to be added or substituted after the end of a relevant limitation period)."

50. Therefore, any application to add or substitute a new party where the limitation period has expired must satisfy the conditions set out in CPR 19.5 as set out above.

51. Section 35(1)(b) of the Limitation Act 1980 provides that any new claim made in the course of any action (including the addition or substitution of a new party) shall be deemed to be a separate action and to have been commenced on the same date as the original action (the principle of 'relation back').

52. Thus, if the Court grants permission to the appellant to add or substitute the LLP as a defendant, the claims against LLP, including any claim arising out of the April 2011 advice, will be deemed to have been made on 28 September 2017. This could deprive LLP of any limitation defence that has accrued since that date.

53. No useful purpose would be served by substitution or addition if the claim were already statute-barred by the date of the Claim Form as 'relation back' would not assist. For that reason, CPR 19.5 provides that if the claim arising out of advice given in April 2011 was statute-barred when the Claim Form was issued, the Court does not have jurisdiction to allow addition or substitution of LLP as a defendant.

54. The appellant's application is made on the basis that the loss, and therefore, any cause of action in tort, did not accrue at the date of the advice. At that date there was a contingent loss as explained by the House of Lords in *Sephton* but no damage was suffered until the contingency occurred.

55. In *Sephton* a solicitor misappropriated client funds over a number of years. Between 1989 and 1995 the solicitor's accountants certified that he had complied with the relevant accounting rules. From 1996, the Law Society was required to make payments, compensating the clients for their losses. In 2002 it issued proceedings in negligence against the accountants. A limitation defence was raised. The issue was whether damage was suffered (1) when the solicitor misappropriated the client's fund after the accountant's report had been delivered to the Law Society and from which time the clients could have made a claim on the fund, or (2) when a claim on the fund was made. The House of Lords held that damage did not occur until a claim on the fund was made because until such time, there was only a contingent liability. Accordingly, the claim was not statute-barred for limitation. Lord Hoffmann stated:

> "[18] … [the solicitor's] misappropriations gave rise to the possibility of a liability to pay a grant out of the fund, contingent upon the misappropriate not being otherwise made good and a claim in proper form being made. Such a liability would be enforceable only in public law, by judicial review, but would still in my opinion count as damage. But until a claim was actually, made, no loss or damage was sustained by the fund…
>
> [30] A contingent liability is not as such damage until the contingency occurs…
>
> [31] The majority of the Court of Appeal appear to have decided the case on the basis that the Law Society did not enter into any transaction giving rise to the contingent liability. It did nothing and the contingent liability was created by the misappropriations and the previous existence of the compensation fund and the rules which governed its administration. No doubt in most cases in which a party incurs a contingent liability as a result of entering into a transaction, that liability will result in damage for the reasons already discussed in relation to bilateral transactions. But I would prefer to put my decision on the simple basis that the possibility of an obligation to pay money in the future is not in itself damage."

56. Lord Mance agreed with the opinion of Lord Hoffmann and stated:

> "[60] Any cause of action by the society for negligence accrued when the society first suffered any "actual" damage applicable to the wrong in question: *Forster v Outred* [1982] 1 WLR 86, 94 and *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627, 1630D-F, 1631D and 1632D …

> [69] A … line of authority establishes that the cause of action against a solicitor whose negligence deprives his client of a claim which the solicitor was engaged to pursue accrues when the claim becomes time barred or liable to be struck out for want of prosecution …
>
> [70] In all these cases except *Forster v Outred* ... the defendant failed to preserve or procure for the claimant an asset (including a particular chose in action) which could and should have been preserved or protected by proper performance of the defendant's duty in relation to the transaction affecting the claimant's legal position. In *Forster v Outred & Co* the claimant's case was that, but for the defendant's negligence, she would never have entered into the transaction at all. But in that case, by doing so, she clearly depreciated the value of the house in a measurable way. However, while a defendant's failure to preserve or protect a particular asset by proper performance of his duty in relation to a particular transaction may readily be seen to have caused measurable loss, negligence causing a claimant to enter into a transaction which he would not otherwise have entered may not immediately, or indeed ever, cause measurable loss to any particular asset."

57. The appellant's case is that the legal advice in April 2011 gave rise to a contingent loss at that time. No actual loss occurred until (a) the appellant's financial circumstances improved significantly, or (b) the appellant's then wife commenced matrimonial proceedings in 2016.

58. Mr Carter submits that the Court should allow the amendment to add the LLP as a defendant and the issue whether the limitation period had expired in respect of the April 2011 advice by the date of the Claim Form in September 2017 could be determined at trial.

59. The respondents' case is that any loss arising out of the April 2011 advice occurred immediately, or shortly thereafter, when the appellant relied on the advice and did not start matrimonial proceedings. Ms Dixon submits that *Sephton* must be understood as explained by Arden LJ (as she then was) in *AXA Insurance Ltd v Akther & Derby* [2010] 1 WLR 1662 at [33]:

> "In my judgment, the central idea in the *Sephton* case is that there has to be loss additional to that resulting from the incurring of a purely contingent liability."

60. The pleaded case by the appellant is that he should have been advised to start proceedings before Swansea City AFC were promoted to the Premier League in June 2011 and his financial position improved. Ms Dixon submits that this is not a contingent liability case but, rather, a flawed transaction case. By relying on the alleged legal advice and not starting proceedings immediately, the value of the appellant's financial liability in any matrimonial proceedings was increased.

61. Ms Dixon submits that permission to appeal should be refused or the amended grounds of appeal should be dismissed on the ground that the respondents have a reasonably arguable case that the claim arising out of advice given in April 2011 was statute-barred when the Claim Form was issued. The Court should refuse to permit the addition or substitution of a new defendant and leave the appellant to issue fresh proceedings if it wishes to argue that limitation has not yet expired.

62. Without deciding the issue, I am satisfied that the respondents have an arguable case that any claim arising out of the April 2011 advice is statute-barred for limitation and/or was statute-barred at the date of the Claim Form. The Court of Appeal has stated that where it is arguable that a new claim is statute barred, leave to amend should not be given. The claimant should not gain the benefit of relation back under section 35(1) of the 1980 Act: *Chandra v Brooke North* [2013] EWCA Civ 1559 per Jackson LJ at [63] and [64].

63. In those circumstances, permission to amend the grounds of appeal is given but the appeal in relation to the additional ground and the application to amend is refused.

Conclusion

64. I am grateful to counsel for their clear and concise skeletons and helpful submissions.

65. For the reasons set out above, the appeal is allowed to the following extent:

    i) The District Judge was wrong in law to find that the Company was named as defendant instead of the LLP by mistake. The Court has jurisdiction to allow the substitution of the LLP in respect of the October/November 2011 advice.

    ii) The District Judge was wrong in law to assess the merits of the claim when considering whether to exercise the Court's discretion to permit the substitution. The Court exercises its discretion afresh to permit the substitution of the LLP in respect of the October/November 2011 advice.

    iii) The Court permits the appellant to withdraw its concession made at the hearing before Soole J and recorded in the Order dated 26 November 2018.

    iv) The Court grants permission for the appellant to raise the new grounds in its amended grounds of appeal.

    v) The respondent has an arguable case that any claim arising out of the April 2011 advice is statute-barred for limitation. Therefore, the Court refuses permission to allow substitution or addition of the LLP in relation to the claim arising out of the April 2011 advice.