Neutral Citation Number: [2023] EWHC 1501 (Ch)

Case No: BL-2018-001356

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**Business List (ChD)**

7 Rolls Building
Fetter Lane, London

Date: 23 June 2023

**Before** :

**MASTER PESTER**

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**Between :**

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| **WATFORD CONTROL INSTRUMENTS LIMITED** | **Claimant** |
| **- and -** | |
| **COLIN BROWN** | **Defendant** |

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**Richard Colbey** (instructed on a Direct Access basis) for the Claimant
**Niranjan Venkatesan** (instructed by Buckles Solicitors) for the Defendant

Hearing date: 30 March 2023

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# APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties or their representatives by email. The date and time for hand-down is deemed to be 2.30pm on 23 June 2023.

## MASTER PESTER:

### *Introduction*

1. This is my judgment on the Claimant's application, dated 27 February 2023, to amend its Particulars of Claim and add a new party as the second claimant.

2. The background to the application is set out in my judgment dated 12 January 2023 (neutral citation number [2023] EWHC 32 (Ch)). I will not repeat the details here. Essentially, the Claimant brings a claim against the Defendant ("Mr Brown") as assignee of a cause of action by a company now known as YZMA 00424553 Limited (In liquidation) ("YMZA"). I previously held, as set out in my earlier judgment, that the most recent assignment, dated 9 October 2022, on which the Claimant relied evinced an intention on the part of YMZA to assign what is described as the Colin Brown claim to the Claimant. However, Mr Brown's Counsel submitted that the Claimant would only have the right to sue Mr Brown in its own name if the assignment was a legal assignment under section 136 of the Law of Property Act 1925. An assignment under section 136 only takes effect on the date when notice is given to the debtor, not on the date when the assignment is entered into. No notice had been given to Mr Brown of assignment prior to the date when these proceedings were commenced (see at [82] – [85] of my earlier judgment, referring to the rule that notice, in the case of a legal assignment, must be given before the action is begun).

3. I held that, if the assignment took effect at all, it could only take effect as an equitable assignment. I therefore indicated that, to pursue the present action, which has been ongoing since 2018, the Claimant should issue an application to

plead the assignment relied upon. In order to bring such an application, the assignors would probably need to be joined to the action.

4. The Claimant accordingly issued the present application. Draft Amended Particulars of Claim accompanied that application. The application involves both a joinder application, to add YMZA as a new party, and proposed amendments. YMZA now consents to be joined as the second claimant to the proceedings. The proposed amendments, however, are not limited to pleading the recent assignment, but significantly expand the scope of the claims against Mr Brown, as I explain below.

5. Mr Brown opposes the application. There are witness statements from both Mr Brown and his solicitor. I have carefully considered what is set out therein. Mr Brown takes a host of points why both the joinder and the amendments should be refused. However, what is said to be "the most important of these" is that the effect of allowing the joinder and the amendments would deprive Mr Brown of an accrued limitation defence. The joinder and amendment is therefore barred by section 35(3) of the Limitation Act 1980 ("the Limitation Act"). It is also said, as a subsidiary submission, in the event that it were held that there was no limitation defence, that the application should in any event be dismissed either because it does not satisfy the requirements of CPR 19.2(2), 19.4(4) and 17.4(2), or in the exercise of the Court's discretion.

***The amendments***

6. In broad summary, the Claimant alleges that Mr Brown unlawfully extracted monies from YMZA, a company whose business the Claimant acquired in 2016.

Mr Brown was a director of YMZA until November 2016. The draft amendments seek to do three things:

(1) the company YZMA is added as the Second Claimant to the proceedings;

(2) the assignment dated 9 October 2022 is pleaded; and

(3) the claim is expanded, by reference to various schedules, to claim nearly twice the amount claimed in the original Particulars of Claim.

7. I note that, in several respects, the schedules attached to the draft Amended Particulars of Claim seek to widen the existing claims made against Mr Brown. The earliest pleaded misappropriation of funds which I can see in the original Particulars of Claim dates back to 2009. The new schedules takes issues with payments going all the way back to 2004. As mentioned above, the overall quantum claimed against Mr Brown is also very substantially increased.

8. In addition, paragraph 25 of the proposed Amended Particulars of Claim gives some further, limited, particulars as to Mr Brown's alleged dishonesty in appropriating money belonging to YZMA.

***Legal principles***

9. Section 35 of the Limitation Act has been described as one of the most convoluted provisions in the entire law of limitation: McGee, *Limitation Periods*, 8th ed (2018), para. 23.007. In a case such as the present, where the claimant wishes to plead an equitable assignment, it ought to be possible to set out the applicable principles the court should apply relatively simply. That this

is not the case is a matter of regret. Such complexity reflects badly on the state of English law.

10. Section 35(3) of the Limitation Act provides that the Court shall not, except as provided by rules of court, "allow a new claim … to be made in the course of any action after the expiry of the time limit under this Act which would affect a new action to enforce that claim". The expression "new claim" includes the addition of a new party, which is therefore subject to the prohibition in section 35(3): see section 35(2)(b).

11. The relevant rules of court are found in CPR r. 19.5(2) and CPR r. 19.5(3)[1]. Rule 19.5 is headed "Special provisions about adding or substituting a party after the expiry of the relevant limitation period." The relevant rules read, insofar as relevant, as follows:

> (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 –
> …
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant.
> …

12. The effect of the provisions, so far as relevant to this application, in the Limitation Act and the CPR can be summarised in this way:

[1] This has now been renumbered to CPR r. 19.6, due to the addition of a new rule 19.5, pursuant to the Civil Procedure (Amendment) Rules 2023 (SI 2023/105). The wording has not changed.

(1) A new claim means a claim involving (a) the addition or substitution of a new cause of action; or (b) the addition or substitution of a new party: section 35(2).

(2) Any new claim made in the course of an action is deemed to have been commenced on the same day as the original action: section 35(1). This is the "relation back" doctrine.

(3) No such new claim may be made after the expiry of any applicable limitation period, except as provided by rules of court: section 35(3).

(4) Rules of court may provide for allowing a new claim, but only (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action (ie. Any claim made in the original action cannot be maintained by an existing party unless the new party is joined as a claimant or defendant): section 35(4)(5)(6). The relevant rules of court are in CPR r. 17.4 and 19.5.

(5) CPR r. 17.4(2) has the effect that a new claim may be added by amendment but only if the new claim arises out of the same facts or substantially the same facts as the original claim.

(6) CPR r. 19.5(2)(3) has the effect (among others) that a new party may be added only if the limitation period was current when the proceedings were started, and the addition of that party is necessary in the sense that the claim

cannot properly be carried on by the original party unless the new party is added.

(7) Rules of court may allow a party to claim relief in a new capacity: section 35(7). The relevant rule is CPR r. 17.4(4), by which 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. .

13. There have been a number of authorities as to how these two expressions are to be interpreted – that is, (a) the relevant limitation period was current when the proceedings were started and (b) the addition or substitution is necessary. It seems to me that not all of what is said in those authorities is necessarily reconcilable, which may in part be due to the "convoluted" drafting of section 35 of the Limitation Act itself.

14. On behalf of Mr Brown, reliance was placed on *Ballinger v Mercer Ltd* [2014] 1 WLR 3597, CA, where Tomlinson LJ said this, at [27]:

> *"… Working from first principles however it is plain that, provided the defendant can show a prima facie defence of limitation, the burden must be on the claimant to show that the defence is not in fact reasonably arguable. The claimant is after all in effect inviting the court to make a summary determination that the defence of limitation is unavailable. If the availability of the defence of limitation depends on the resolution of factual issues which are seriously in dispute, it cannot be determined summarily but must go to trial. Hence it can only be appropriate at the interlocutory stage to deprive a defendant of a prima facie defence of limitation if the claimant can demonstrate that the defence is not reasonably arguable."*

15. Turning to the authorities on CPR r. 19.5(2)(a), there is a conflict as to what is meant by the expression "the relevant limitation period was current when the proceedings were started". In *Jenkins v JCP Solicitors* [2019] PNLR 21,

O'Farrell J held that CPR r. 19.5(2) is not satisfied if the defendant has an arguable defence that the limitation period has expired when the proceedings are originally commenced. In effect, she applied the *Ballinger* test on an application under CPR r. 19.5(2)(a). On the other hand, Philip Marshall QC (sitting as a deputy High Court judge) expressed the view in the later case of *Slough Borough Council v SSE plc* [2019] 4 WLR 161, at [30], that O'Farrell J was wrong: all that the applicant who relies on rule 19.5 had to show was an arguable case that the limitation period had *not* expired before the proceedings commenced.

16. As to whether the addition or substitution is "necessary", in the sense specified in CPR r. 19.5(3)(b), McGee makes the point that, whilst this is the broadest three heads of the rule, it is "far from clear" what is meant by the word "properly": McGee, para. 23.058. I did not find the authorities cited to me assisted greatly in the resolution of this question.

17. Mr Brown relied heavily on what was said in *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 AC 240. This is a difficult authority to apply to the facts of the application before me, both because it was concerned with a different factual situation and because, as I read the various speeches, the different members of the Supreme Court adopted different analyses as to the correct way to apply section 35 of the Limitation Act.

18. The case concerned the proposed amendment of pleadings so as to allow a beneficiary under a will to bring a representative action in addition to a personal action against solicitors for their alleged negligence in the handling of an estate. In the end, the majority of the Supreme Court decided that case on the ground

that the claimant had not made out "special circumstances" such as would justify the court's discretion to allow such amendment. As such, the case addressed a different problem from the application before me. However, the application had also been resisted on the ground that there was no jurisdiction to make such an amendment under CPR r. 19.5(3). Although this question was discussed at considerable length, the Supreme Court ultimately chose not to decide it. The majority view (given by Lord Collins, with whom Lord Rodger and Lord Walker agreed) appears to be that it might well not have been absolutely necessary to join the administrator of the estate as a party, and it was not permissible to overcome the limitation problem by amendments in "separate stages", so as to procure the result that the addition of the administrator would be necessary "for the determination of the original action" for the purposes of section 35(5)(b): see at [70]. Although the judgments contain extensive discussion of the history of RSC Ord. 20.5 and now CPR r. 19.5, in the end the crux of the discussion seems to go to a point about the law of derivative actions, rather than a point of limitation. Lord Hope and Lord Clarke each appear to have expressed the view that they would not decide the question whether (assuming special circumstances were present) there was power to give the claimant permission to amend to introduce the derivative claim.

19. I note that Lord Collins indicated that one of the objectives behind section 35 of the Limitation Act "… was to enable parties to be added out of time, in cases where joinder of the new party was necessary if the plaintiff's claim was to succeed, for example where the plaintiff was an equitable assignee and had omitted to join the assignor prior to the expiry of the limitation period." (at [2]). That suggests to me at least that Lord Collins certainly contemplated that a

claimant could rely on CPR r. 19.5(2)(b) and 19.5.(3)(b), where what was sought was to add the equitable assignor as a party to the claim after the end of the limitation period. However, Counsel for Mr Brown relied on what Lord Collins said at [43], which is worth setting out in full:

> *"But if the administrator has to be added at the same time as Mark Roberts changes the capacity in which he sues, Mark Roberts must satisfy the requirements of CPR r. 19.5(2)(b) and CPR r. 19.5(3)(b) (giving effect to section 35(5)(b) and 6(b)), namely that the addition of the administrator is necessary in the sense that "the claim cannot properly be carried on by … the original party unless the new party is added". But if it were necessary to join the administrator in order for the representative action to be carried on, Mark Roberts would not be able to satisfy those requirements because he would not be able to show that the original claim could not properly be carried on by Mark Roberts in his personal capacity against the solicitors unless the administrators were added as a party. That is because there is no possible basis for any suggestion that the administrator would be a necessary or proper party to the personal claim."*

20. The point is that what one cannot do is to approach matters in two steps, first in allowing the amendments to bring in what is in substance a new claim, and then asking at that stage whether the joinder of the administrator is necessary in order to pursue the new claim itself: see per Lord Collins at [68] – [71]. That reasoning emerges perhaps more clearly in the majority of the Court of Appeal's judgment in *Roberts v Gill*, in the judgment of Arden LJ, at [36].

21. In the end, *Roberts v Gill* deals with a different situation, namely, a claim by a beneficiary under an unadministered estate. Such a claim, properly understood, is in no sense analogous to the position of an equitable assignee: see *Roberts v Gill*, at [68] (per Lord Collins), and [102] (per Lord Walker). It is also striking that it is not even clear, as the various judgments in *Roberts v Gill* explain, whether it is strictly speaking necessary to have the equitable assignor as a party before the court at all: see at [62] - [67], [71] (per Lord Collins) and at [125]

(per Lord Clarke). The principal reason for joinder of a party like an assignor is to bind the assignor so that there cannot be any further claim based on the same cause of action: see the judgment of Arden LJ, at [30], citing *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1.

22. It is also worth noting that Lord Clarke, whilst agreeing with the result of the majority, and agreeing that the appeal should be dismissed, did so on the basis that there were no special circumstances which would justify the claimant bringing a derivative claim. However, Lord Clarke expressly noted that, if a situation should arise were there were special circumstances, then it seemed to him that it was at least arguable that the court would have power to allow the claimant to change the capacity in which he is suing and that, if he did so, the effect of section 35(5)(b), section 35(6)(b) and CPR 19.5(3)(b) would be that the change of capacity would be deemed to take effect as at the date of the original proceedings. Joinder effected thereafter would be unaffected. Lord Clarke concluded by stating that "[T]he court would thus have power first to permit an amendment to change capacity and to permit joinder thereafter on the basis that joinder would be necessary to allow the proceedings to continue." (at [132])

23. A somewhat different situation arose in *Parkinson Engineering Services Ltd (in liquidation) v Swan and another* [2009] EWCA Civ 1366; [2010] Bus LR 857, CA, where the claimant company had begun proceedings under section 212 of the Insolvency Act 1986 against its former administrators. The administrators relied on the fact that they had been granted their statutory release under section 20 of the Insolvency Act 1986. The Court of Appeal held that the substitution

of the liquidator as claimant was necessary within the meaning of this rule because otherwise the action could not be carried on. The case was decided after the Court of Appeal's decision in *Robert v Gills*, but before the decision of the Supreme Court. Counsel for Mr Brown sought to distinguish *Parkinson Engineering v Swan* on the basis that what was sought to be pursued was the *same* claim against the administrators; all that was changed was the identity of the claimant. In contrast, in the present case, the Claimant needs to add a party, and amend its claim, in order to plead a capacity it did not have when the proceedings were started. It is submitted that this is fatal to the current application.

24. On behalf of the Claimant, reliance was placed on *Finlan v Eyton Morris Winfield* [2007] EWHC 914. In that case, the court held that the modern practice was to allow an amendment the effect of which was to make good a defect in the claimant's title to sue, even though the event relied upon did not arise until after the proceedings had been issued so that, in strict law, the claimant did not have a cause of action at the time he issued the process. In many ways, however, that was a simpler and more straightforward case than the current proceedings before me. The first claimant brought its claim as assignee from the second claimant, who was thus already a party to the action. The assignment on which the first claimant relied had been executed a few hours after the claim was started. The court held there, perhaps unsurprisingly, that although the first claimant was seeking to introduce new causes of action in the sense intended by "new claim" in section 35(5)(a) of the Limitation Act, as the first claimant's title to sue was an essential part of his cause of action, the new claims arose out of substantially the same facts as the existing claims. It is not difficult to see

why, on the facts of that case, the court held that to refuse to exercise its discretion to permit the amendment would be disproportionate.

25. Finally, it is clear that even where there is jurisdiction under section 35 of the Limitation Act to allow the joinder and amendments, that is, where the relevant limitation period was current when the proceedings were started and where the addition of the new party is necessary, the court retains a discretion as to whether to grant the relief sought: see White Book, vol. 1, p. 553. The opening words of r. 19.5(2) ("The court may …") indicate that the court has a discretion to refuse an application for addition or substitution under this rule even if both conditions are satisfied. That discretion should be exercised in accordance with the overriding objective, including the cost and delay elements contained therein.

***Analysis and discussion***

26. Although the submissions of the parties ranged very widely, and every conceivable point was taken on behalf of Mr Brown, the central question on the Claimant's application, which is whether I should permit the joinder and accompanying amendments, can be decided on a quite straightforward and simple basis.

27. In this case, the pleaded breaches alleged against Mr Brown relate to breaches of fiduciary duty/trust and / or the statutory duties he owed as director of YZMA. It is not disputed that those causes of action are subject to a primary limitation period of six years, pursuant to section 21(3) of the Limitation Act. These are subject to other provisions, namely sections 21(1)(a), 21(1)(b) and 32, that is, fraudulent breach of trust, receipt of trust property and fraud and

deliberate concealment respectively. Where there is fraud, or a fraudulent breach of trust, to which the trustee was a party or privy, or an action to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, no period of limitation is prescribed under the Limitation Act.

28. As set out in the original Particulars of Claim, the Claimant claims in respect of the following acts:

(1) Mr Brown's use of the company credit card for personal expenses in the period December 2009 to April 2016 (Particulars of Claim, para. 22(i));

(2) Mr Brown's drawing cheques on YZMA's bank account for his own purposes in July 2009 to October 2014 (Particulars of Claim, paras. 22(ii) and 29)); and

(3) Certain transactions in Mr Brown's director's loan account between 2009 and 2014 (Particulars of Claim, para. 22(ii)).

29. These proceedings were started by claim form dated 15 June 2018. The Claimant only obtained the assignment on which it now relies to bring the proceedings on 9 October 2022. By the proposed amendment, the allegations against Mr Brown are significantly expanded, and extend the period in which claims are made all the way back to 2004. Thus, all of them are now time-barred under section 21(3) of the Limitation Act, or Mr Brown has at the very least an arguable case that this is so. Mr Brown denies having acted fraudulently, or having deliberately concealed any fact relevant to the Claimant's right of action. I accept that I cannot decide on this interim application whether Mr Brown acted fraudulently, or not, or whether he deliberately concealed any fact relevant to

the Claimant's right of action so as to justify extending the time limit under section 32.

30. I also note that the sum claimed in the original Particulars of Claim was £350,000. The draft Amended Particulars of Claim do not identify a single figure claimed, but it is clear that it is considerably in excess of £350,000, because the value of the transactions referred to in the new Schedules 1 and 2 is £288,047.47 and £356,537.30 respectively, totalling approximately £645,000, nearly twice what is claimed in the original Particulars of Claim. The part of the prayer claiming £350,000 has been deleted in the draft Amended Particulars of Claim. I agree with Counsel for Mr Brown that the Amended Particulars of Claim seek to introduce what are undoubtedly in substance and not just in form new claims. The proposed amendments do not simply plead the fact of the assignment, instead they seek to expand the scope of the claim more broadly.

31. In my view, CPR 19.5 is undeniably engaged. It is one of the relatively unusual features of this case that, at the time when the proceedings were started, some of the alleged causes of action against Mr Brown were already more than six years old, that is, all the instances of alleged misappropriation which predated 16 June 2012. I also accept that the Claimant has not pursued these proceedings with proper despatch. There has undoubtedly been considerable delay in pursuing this claim on the part of the Claimant. Whilst I did hold in my earlier judgment that that the delay in this case did not justify the summary dismissal of the claim, it is a factor which I cannot ignore when the Claimant now wishes to amend to plead what are in substance, in many respects, new claims.

32. Permission to amend and join YZMA as a party to the claim should not be given unless the Claimant can show that Mr Brown did not have even an arguable case on limitation which would be defeated by allowing the new claim. Here, I cannot be so satisfied. I cannot, at this interim hearing, decide that Mr Brown's arguments that he has a defence on limitation are hopeless. Therefore, allowing the addition of YZMA as a party to the claim and the reliance on the October 2022 assignment would deprive Mr Brown of a limitation defence in respect of any claims that arose after 16 June 2012, and were thus current as at 15 June 2018. The effect of granting the amendments sought by the Claimant would be, at least arguably, to deprive Mr Brown of a limitation defence which would otherwise be available to him, because the amendments would relate back to the time when the proceedings were begun, that is, June 2018. That is a strong pointer to the conclusion that, even if I were to hold that there was jurisdiction under CPR r. 19.5, I should refuse to allow the amendment as a matter of discretion. The loss of a limitation defence is prejudice that is undoubtedly relevant to the exercise of the discretion: *American Leisure Group Ltd v Olswang LLP* [2015] PNLR 21.

33. Other points were taken on behalf of Mr Brown which were said to justify the conclusion that, even assuming that there was jurisdiction, I should not exercise any discretion to grant the proposed amendments and joinder. I found those other points less compelling, but ultimately that does not matter. I have reached the clear view that it would be wrong to exercise any discretion in favour of allowing the proposed amendments and joinder. The proper way to determine the parties' respective arguments on limitation is to leave the Claimant to issue

fresh proceedings (as it is entitled to do). In those proceedings, Mr Brown's defence on limitation can be tested at trial.

34. Strictly speaking, given my decision on discretion, I do not need to say anything more about whether there is jurisdiction in this case to allow the joinder (and any consequential amendments), or to attempt to resolve the various conflicts on the authorities cited to me. I will content myself with this observation. It does seem to me that, if the very narrow approach to joinder advocated by Counsel for Mr Brown were correct, then it is difficult to see how a party could ever plead an equitable assignment, and add the assignor, after the expiry of the primary limitation period. This would appear to be contrary to what section 35 of the Limitation Act was intended to do, at least in the view of Lord Collins. It also seems to me to be at odds with the approach taken in *Parkinson Engineering v Swan* and *Finlan v Eyton Morris Winfield*.

35. In the end, however, I decline to decide whether on the facts of the case before me there is jurisdiction to join the equitable assignor. I have come to the firm view that, as a matter of discretion, permission amend the Particulars of Claim and to add new party should be refused.

***Conclusion***

36. For the reasons set out in this judgment, I refuse the application for permission to join a new party and amend the particulars of claim. Whilst of course it is a matter for it, if the Claimant wishes to pursue proceedings against Mr Brown, then it will need to issue a fresh claim form.

37. I will deal with consequential matters arising from my judgment after this judgment is formally handed down, at a date to be fixed.