[2008] IEHC 474

THE HIGH COURT

[2001 No. 6543P]

BETWEEN

WALTER CROKE

PLAINTIFF

AND

WATERFORD CRYSTAL LIMITED

AND

IRISH PENSIONS TRUST LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered on the 29th day of April, 2008

Issue before the Court

1(1) The issue before the Court is whether the plaintiff is entitled to plead by way of reply the provisions of s. 44 and s. 71(1)(b) of the Statute of Limitations 1957.

The Nature and History of the Proceedings

2(1) The present proceedings have a long, complex and it must be said tangled history to which it is necessary to refer in order to put the matter now before the Court in context.

2(2) The plaintiff in the proceedings, Mr. Walter Croke, is a former employee of the first named defendant, Waterford Crystal Limited (Waterford Crystal). He was employed by Waterford Crystal between 1965 and 1992. In the period before he ceased to be employed by Waterford Crystal he was working as a gas blower.

2(3) Early in the 1990s, Waterford Crystal was engaged in a rationalisation program as part of which it sought to reduce its workforce. In this situation, employees were offered a voluntary redundancy package.

2(4) The plaintiff accepted the voluntary redundancy package on offer and left his employment.

2(5) While he was an employee there was in existence a pension scheme which had been introduced by Waterford Crystal. The second named defendant, Irish Pensions Trust Limited (IPT), was the sole trustee of the fund and it is suggested by the plaintiff that the day to day administration of it was the joint responsibility of both defendants.

2(6) The plaintiff's claim is based on the fact that he says that arising from his membership of the pension scheme he had a number of options open to him if he were to cease employment in the circumstances contemplated including:

(a) Accepting a net refund of his contributions to the pension scheme

(b) Transferring the value of his interest in the pension scheme to an approved scheme

(c) Opting for a deferred pension payable from age 65 calculated on the basis of the contributions made by him.

However, these he says were not put before him.

2(7) The plaintiff claims that the only option put before him was to accept the voluntary redundancy package on offer or to refuse it and then be transferred to another job with Waterford Crystal at a significantly lower wage.

2(8) The plaintiff opted to accept the available voluntary redundancy package and accordingly received a lump sum, which included a repayment of the contributions that he had made to the pension fund. In doing so he excluded himself from all other

benefits to which he might otherwise have had an entitlement, and in particular the possibility of a deferred pension.

2(9) In very broad terms, and this will be considered later in greater detail, he brings his proceedings on foot of a claim that he has suffered loss and damage by reason of the failure of both defendants to advise him in relation to his options and/or their actions in misadvising him.

2(10) The proceedings brought by the plaintiff are just one of approximately 350 similar claims that have been initiated by former employees.

2(11) The plaintiff's claim was initiated by way of a plenary summons dated 3rd May, 2001. A statement of claim was delivered on 14th January, 2002. Following a reply to a notice for particulars, a defence was delivered by IPT which *inter alia* denied the allegations made against it and pleaded that the plaintiff's claim was statute barred by reason of the Statute of Limitations 1957 (the Statute). For the sake of completeness only I would add that following a notice for particulars and reply thereto, Waterford Crystal also delivered a defence denying all allegations and disputing the plaintiff's entitlement to relief and pleading the Statute. However, for the purpose of the present application before the Court which has been initiated by the second named defendant, it is necessary to focus only on subsequent developments involving the plaintiff and the second named defendant.

2(12) Following a further exchange of particulars and replies thereto, IPT applied for directions as to a trial of preliminary issues in February, 2003. On 26th June, 2003, Smyth J. ordered that there should be a trial of preliminary issues, namely whether the plaintiff's claim was statute barred and whether the claim should be struck out under the Rules of Court or the inherent jurisdiction of the Court as being bound to fail. From that decision of Smyth J. the plaintiff brought an appeal to the Supreme Court.

2(13) In October, 2003, before the appeal from Smyth J. was heard, the plaintiff brought an application to amend his statement of claim as against both defendants and also seeking leave to deliver replies to each defence. On 20th April, 2004, Smyth J. refused the orders sought. Once more the plaintiff determined to appeal and this was heard by the Supreme Court in July, 2004, the Court delivering judgment in November, 2004. (The amendment application). That case is reported as *Croke v. Waterford Crystal Ltd.* [2005] 2 I.R. 383.

2(14) This Supreme Court judgment is central to the issues now before the Court and will be considered shortly in greater detail. At this stage it is sufficient to note that in relation to the matters before the Court the plaintiff was permitted to amend his statement of claim against the first named defendant but was not permitted to amend the statement of claim against the second named defendant and was permitted to deliver a late reply to each of the defences. Consequent on the Supreme Court decision the plaintiff now had to deliver an amended statement of claim and two replies. The amended statement of claim which the plaintiff sought to deliver became the subject of considerable controversy between the parties. In particular, the second named defendant complained that the draft contained amended pleas against the second named defendant despite the fact that leave to amend the statement of claim against the second named defendant had been refused. The second named defendant protested, in particular, that certain of the pleas were of the character which the Supreme Court had specifically refused to permit to be advanced. The second named defendant was also concerned about the form of the proposed reply to the defence in particular, taking exception to the fact that the plaintiff was pleading that it was his intention to rely on s. 44 and s. 71 of the Statute of Limitations 1957.

2(15) This situation gave rise to a further hearing before the Supreme Court which was then adjourned from time to time. Ultimately, on 26th February, 2005, the Supreme Court made orders in relation to the form of the statement of claim directing deletions of all proposed amendments against the second named defendant.

2(16) The Supreme Court declined to become involved with the emerging issue as to the form of the reply, essentially taking the position that any issue in relation to the form of the reply was a matter in the first instance for the High Court.

2(17) A reply to the IPT's defence was therefore delivered. Paragraph 2 of that reply of the 14th April, 2005, was in these terms "it is denied that the Plaintiff's claim is statute barred in particular having regard to the provisions of s. 11 and/or s. 43 of the Statute of Limitations, 1957 either as alleged or at all. The plaintiff will rely, *inter alia,* on s. 11, s. 43, s. 44 and s. 71 of the Statute of Limitations, 1957 to 2000 as amended."

2(18) The matter came back before the Supreme Court once more in July, 2005, on this occasion by way of an appeal from the decision of the 26th June, 2003. However, in a situation where the Supreme Court had already permitted the amendment of the statement of claim as against Waterford Crystal and the delivery of two replies, events had overtaken this appeal. In these circumstances, the Supreme Court remitted the matter to the High Court for the purpose of case management. The *ex tempore* judgment of the Court (Geogheghan J.) referred to the desirability of case management. Of note, the judgment refers to the fact that Mr. Ian Finlay S.C. on behalf of IPT had flagged an intention to apply to the High Court for the purpose of striking out certain portions of the reply.

The Immediate Background to the Current Application

3(1) The matter was then assigned to Murphy J. for the purpose of case management. All parties brought applications for direction. The motion brought by the second named defendant *inter alia* sought an order directing the trial of a preliminary issue as to whether the plaintiff was entitled to plead and rely on the provisions of s. 44 and s. 71 of the Statute of Limitations 1957. On foot of this notice of motion, Murphy J. directed the trial of a preliminary issue as to whether the plaintiff was entitled to plead and rely on ss. 44 and 71 of the Statute of Limitations 1957.

3(2) The judgment and order of Murphy J. gave rise to a further appeal to the Supreme Court by Mr. Croke. On the hearing of this appeal, the Supreme Court (judgment of Denham J.) ordered the trial of a preliminary issue.

3(3) Given the importance of this order in the context of the issue now before the Court it is appropriate to quote from that order:-

> "It is ordered that without further pleadings a preliminary issue be tried before a Judge without a jury and without evidence... such issue to be . . .
>
> 1. Whether the plaintiff in the relevant proceedings is entitled to plead the provisions of sections 44 and/or 71(i) (b) of the Statute of Limitations, 1957."

The Form of the Order of the Supreme Court

4(1) It will be apparent that the formulation of the issue by the Supreme Court departed from the formula that appears in the High Court order and indeed from the notice of motion on foot of which its order had been made. In particular whereas the motion had sought the trial of an issue as to whether the plaintiff could *plead and rely on* the sections, the issue directed by the Supreme Court to be tried was whether the plaintiff could *plead* the section.

4(2) The significance, if any, of this divergence is the subject of debate between the parties. The plaintiff, in his written submissions, describes the difference between an entitlement to plead a matter and an entitlement to rely on it as a matter of the utmost importance and maintains that position before the Court. In contrast Mr. Ian Finlay, S.C., on behalf of the second named defendant, says there is no significance at all and that it amounts to a distinction without a difference. I understand from counsel that the departure arises from an exchange before the Supreme Court as to whether oral evidence was going to be necessary for the determination of the proposed issue. It appears the Supreme Court was of the view that whatever argument there might be, that oral evidence would be necessary to determine whether the plaintiff could or could not rely on statutory provisions; the question of whether the plaintiff could plead the statutory provisions was one to be determined without oral evidence.

4(3) Had the distinction between the formulae not emerged in the way it did I would not have attached any significance. In common parlance, and indeed in common legal parlance, the party pleading a section is relying on that section.

4(4) However, I cannot ignore the fact that the Supreme Court consciously decided to draw a distinction and must have done that for a purpose. Accordingly, I cannot share the view of Mr. Finlay S.C. that no significance is to be attached to the departure. The language of the issue which the Supreme Court directed to be tried focuses attention exclusively on the entitlement to plead. The significance of that is that the occasions when a party will be precluded from pleading the case that he wishes will be rare, though obviously there will be many cases where the plaintiff will not be able to rely successfully on the plea.

The Purpose of Pleading

5(1) Fitzgerald J., in *Mahon v. Celbridge Spinning Company Limited,* [1967] I.R. 1 at p. 3 observed:-

> "The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained in the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at the trial."

A Preliminary Submission

6(1) While not so described, the plaintiff has advanced a radical preliminary submission which, if it succeeded, would dispose of the issues now before the Court. The plaintiff makes the point that the Supreme Court placed no restriction whatsoever on the form of the reply and, so it is said, it follows from this that the plaintiff was given liberty to file any reply he could and would have filed in the absence of having to seek leave, had he done so within the permitted time. In my view, this argument is unsustainable. The Supreme Court judgment of the 30th July, 2007, delivered by Denham J. states specifically at para. 3:-

> "The preliminary hearing is to be based solely on legal argument, the pleadings, and *the judgment of the Supreme Court.*" [Emphasis added]

6(2) If the plaintiff was really at large to deliver any reply, then the reference to the Supreme Court judgment would make absolutely no sense whatsoever. This reference puts beyond doubt that in drafting a reply the plaintiff was required to be cognisant of the Supreme Court decision and mandates this Court to consider the plaintiff's

entitlement to plead in the light of the Supreme Court decision. In fairness to the plaintiff, and notwithstanding the bold assertion of an entitlement to plead as he will, the plaintiff, in drafting the reply and in delivering further particulars, was conscious of the constraints imposed by the Supreme Court judgment. There remains for consideration whether, notwithstanding this, the reply transgresses the constraints imposed in an objectionable manner.

The Statutory Provisions Pleaded

7(1) Section 44 of the Statute of Limitations 1957 provides as follows:

"No period of limitation fixed by this Act shall apply to an action against a trustee or any person claiming through him where:-

(a) the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or

(b) the claim is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his own use.

Section 71(1) of the statute provides as follows:-

1. Where, in the case of an action for which a period of limitation is fixed by this Act, either:-

    (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

    (b) the right of action is concealed by the fraud of any such person,

    (c) the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

Section 44

8(1) So far as s. 44 is concerned, this section contains two subsections each dealing with different situations. However, Mr. Creegan S.C., on behalf of the plaintiff, has clarified that notwithstanding the reference in the reply to s. 44 without qualification he is in fact only pleading and seeking to rely on s. 44(a). Accordingly, there is no need to consider subs. (b) in this judgment and I do not do so.

8(2) The situation in relation to s. 71 is less clear cut. The notice of motion and the judgment of Murphy J. in the High Court had referred to s. 71 without elaboration. However, the Supreme Court order refers only to s. 71(1) (b). Neither counsel has been able to assist me on why this should be so. The written submissions filed by the plaintiff make it clear that he is pleading and seeking to rely on s. 71(1)(a). Both sides' written submissions and oral arguments have dealt with this subsection.

8(3) This begs the question how I should approach the subsection. One view would be that no issue in relation to s. 71(1) (a) has been directed and that accordingly the entitlement to plead and rely on this subsection was unchallenged and that this Court now has no function in relation to it. I confess that this was the approach that I was initially minded to adopt. However, having canvassed the opinions of the parties, I am satisfied that I would not be doing them any favours if I did so as it seems the effect of so doing would be to provoke still further applications to the Court. In this situation, and given that no one is suggesting that the Supreme Court actually refused to direct an issue in relation to s. 71(1) (a), I do propose to indicate my thinking on the subsection. However, what I have to say in relation to the subsection is clearly *obiter.*

The Argument of the Parties Summarised

9(1) On behalf of IPT (the moving party in this application), it is argued the reply offends the cardinal rule of pleading that a reply can only deal with matters raised in

the defence and cannot raise any new ground or claim or contain an allegation of fact inconsistent in the sense of new or different to what was pleaded in the statement of claim.

9(2) IPT then goes on to analyse the statutory provisions which the plaintiff seeks to invoke and states that each plea is objectionable as constituting an impermissible departure from the case as pleaded in the statement of claim.

9(3) In addition to the general prohibition on using the reply to alter the basis of a statement of claim, IPT says that the pleas relating to s. 44 and s. 71 are objectionable in that they seek to reintroduce matters that the plaintiff was prohibited from introducing to the case by virtue of the judgment of the Supreme Court.

9(4) The plaintiff argues that the reply is the appropriate place to plead matters relied on to defeat the Statute. The fact that the plaintiff has not laid his claim in fraud, does not, it is submitted, preclude him from now pleading s. 44 and s. 71 as an answer to the plea that his claim is statute barred. He stresses that in referring to s. 44 and s. 71 he is not pleading these sections to constitute or advance a new claim or cause of action. The plaintiff then addresses each of the proposed pleas in turn and asks whether the proposed plea contravenes the Supreme Court judgment of 26th November, 2004 and concludes that none of the proposed pleas infringe the Supreme Court judgment.

General Pleading Rules

10(1) In these circumstances I propose, in the first instance, to consider the argument that having regard to the general rules applicable to pleading, the plaintiff should not be permitted to plead any of the subsections in issue. Then, having regard to the central relevance of the Supreme Court decision of the 26th November, 2004, I

will consider that judgment in some detail. Finally, I will address the issues in respect of each of the subsections pleaded in the context of the reply delivered and the additional particulars furnished, having regard to the judgment of the Supreme Court.

10(2) As I have already referred to, IPT argues that the pleading offends what they describe as the well established rule that a reply cannot properly raise any new ground or claim or contain allegations of fact inconsistent with the statement of claim. In support of the arguments IPT places reliance on passages from the leading Irish text book *Civil Procedure in the Superior Courts* by Delaney and McGrath, 2nd Ed., (Dublin, 2005) and reference was also made to a similar passage from a leading English text book, *Pleading Principles and Practice* by Jacob and Goldrein, 1st Ed., (London, 1990). IPT says that the plaintiff has departed from the statement of claim in a most dramatic and objectionable manner, making the point that just how radical the departure is emerges if one goes beyond the formal plea in the reply and fleshes out what is actually underpinning the plea.

10(3) The defendant submits that the reply is the proper place for the plaintiff to plead issues in relation to the Statute, making the point that there was no requirement to anticipate a defence. Indeed, the plaintiff says that not only is there no obligation to plead matters relied on to defeat the Statute of Limitations in the statement of claim, to do so would not be appropriate as it would itself offend against a different cardinal principle of pleading that one should not anticipate a defence as to do so would involve "jumping the stile".

Conclusion in Relation to the General Issue

11(1) In my view, the obvious and appropriate place to plead matters to defeat a plea that a plaintiff's claim is statute barred, is in the reply. It is noteworthy that in

the course of his judgment on the amendment application, Geogheghan J. at p. 402 had observed:-

"If there is an answer to a plea of the Statute of Limitations, that answer must be pleaded in a reply."

11(2) The defendant has chosen to invoke the Statute of Limitations, as is of course its right, although it was not obliged to do so. Having done so it was only to be expected, that the plaintiff would join issue with the defendant on its defence and plead matters designed to defeat the plea based on the Statute.

11(3) I am quite satisfied, therefore, that subject to considering the implications of the Supreme Court judgment, there was nothing *per se* objectionable in the course the pleadings have taken. Ordinarily, a plaintiff required to meet a Statute of Limitations plea is at large as to how he will do so. In particular, he will not be precluded from raising issues in relation to fraud or concealment or his date of knowledge in the reply merely because the original claim is not a claim in fraud or deceit. Subject only to the Supreme Court judgment, there is no reason why this case should be any different.

A Subsidiary Pleading Issue

12(1) IPT complains that the plaintiff has failed to plead fraud/fraudulent breach of trust properly or adequately while accepting that this is not their fundamental or primary objection. Even if I was to accept this argument this would not result in the question posed in the issue directed being answered in the negative, as the issue is whether the plaintiff is entitled to plead the sections, and not whether the matter has been adequately pleaded. The argument does not take into account, in any event, the fact that very full and detailed particulars were furnished by letter on 26th May, 2006 and the 16th June, 2006. Indeed, the later particulars go much further than is normal

in that not only is the claim particularised but the evidence which it is proposed to rely on is set out in some detail.

The Judgment of the Supreme Court

13(1) While Mr. Croke was permitted to amend his statement of claim against Waterford Crystal, the Court refused permission to amend against IPT describing the proposed amendments as "drastic" and which would, if permitted, radically alter the nature of the claim. The Court stressed that the original statement of claim contained no allegation whatsoever of fraud or deceit or any kind of deliberate misconduct against IPT. An analysis of the original statement of claim and two replies to particulars conducted by the Supreme Court established that the plaintiff had not put forward any factual basis whatsoever in support of allegations of fraud or any kind of deliberate misconduct.

13(2) Proposed amendments rejected by the Supreme Court included allegations of fraud and deliberate misconduct, and allegations of knowledge of the untruth of representations made and an allegation of wrongful concealment.

13(3) Of significance in the context of the sections of the Statute now pleaded is the fact that subsequent to the Supreme Court judgment the plaintiff sought to deliver an amended statement of claim which contained references to IPT having being complicit in and/or privy to the alleged fraud of Waterford Crystal but was not permitted to do so.

The sections pleaded considered in the light of the Supreme Court judgment

Section 44(a) of the Statute of Limitations 1957

14(1) In the light of the Supreme Court judgment, the plaintiff does not contend that the second named defendant was a party to the alleged fraud of the first named defendant. It does contend, however, that IPT was privy to the fraud. The plaintiff

relies on the judgment of Lord Denning M.R. in *Compania Maritima San Basilio SA v. Oceanus Mutual Writing Association (Bermuda) Limited,* [1976] 3 ALL E.R. 243, as well as the definition of privy and privity contained in a number of legal dictionaries.

14(2) At p. 251 of the *Compania Maritima* judgment, Lord Denning commented as follows:-

> ". . . when the old common lawyers spoke of a man being 'privy' to something being done, or of an act being done 'with his privity', they meant that he knew of it beforehand and concurred in it being done. If it was a wrongful act done by his servant, then he was liable for it if it was done 'by his command or privity', that is with his express authority or with his knowledge and concurrence. 'Privity' did not mean that there was any wilful misconduct by him, but only that he knew of the act beforehand and concurred in it being done. Moreover, 'privity' did not mean that he himself personally did the act, but only that someone else did it and that he knowingly concurred in it."

14(3) The plaintiff argues that he is not circumventing the Supreme Court judgment because he is seeking to rely on s. 44 only as a shield and not as a sword.

14(4) For the purpose of this section there is no doubt that fraud means actual fraud, in the sense of dishonesty (see the judgment of Millett L.J. in *Armitage v. Nurse* [1998] Ch. 241). That being so, the plea, albeit as a shield rather than a sword, is that the defendant was, in effect, a party to a conspiracy or something very close to it. That is precisely the case that the Supreme Court refused to permit. Indeed, as we have seen, the plaintiff's initial amended statement of claim contained a plea to the effect that IPT was complicit or privy to Waterford Crystal alleged fraud, but the plaintiff was not permitted to make this case. That being so, just as the plaintiff may

not plead that IPT was a party to the fraud, neither, in my view, is it permissible to plead that IPT was privy to fraud. I am of that view notwithstanding the indication in the *Compania* case that the word "privy" is less accusatory and pejorative than one might assume.

Section 71(1)(a)

15(1) It is accepted on behalf of the plaintiff that the case cannot be made that there was fraud on the part of IPT. However, the plaintiff seeks to argue that Waterford Crystal was acting as the agent of IPT. The plaintiff claims to have always pleaded that Waterford Crystal was acting as agent of IPT. However, that case is not made explicitly anywhere in the amended statement of claim. It is the case though, that in the course of a reply to particulars, there is a plea that the servants or agents of the first defendant were acting as servants or agents of the second defendant. Geogheghan J. would seem to have had this plea in mind when he spoke (at. p. 393) of the plea as "nothing more than a piece of legalistic pleading". Nothing that has happened since the Supreme Court delivered judgment has altered that position and so it seems to me that the plaintiff is once more seeking to plead what has already been prohibited. The plaintiff argues that this was not an issue that was considered by the Supreme Court. I cannot accept that. While it may be that there was no explicit ruling on the issue of whether Waterford Crystal was the agent of IPT, it seems to me very clear that the plea now being made in the reply is encompassed by the Supreme Court judgment and falls foul of that judgment.

Section 71(1)(b)

16(1) I think it is fair to say that this is the section upon which the plaintiff primarily relies.

16(2) While the phrase "concealed by fraud" appears in the same section as the word "fraud", which we have already seen means actual fraud, there is no doubt that in contrast to s.44 and indeed to s.71(1)(a) which are concerned with actual fraud, the concept of fraudulent concealment is broader than fraud in the classic sense.

16(3) Hardiman J. in *Gough v. Neary* [2003] 3 I.R. 92 in the course of his dissenting judgment (at p.110) considered the meaning of fraud in this context, observing that fraud within the meaning of s. 71 (1) (b) has a much broader meaning than the same word either in its criminal law limitations or in its connotation in other branches of the civil law. He went on to quote with approval from the judgment of Lord Evershead M.R. in *Kitchen v.Royal Air Force Association* [1958] 1 W.L.R. 563 who had commented (at pp. 572 to 573), in considering the equivalent English section as follows:-

> "(But) . . . It is now clear that the word 'fraud' in the section which I have read, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S. Ltd.* [1949] 1 K.B. 550 [a decision of Denning J.] that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define 200 years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."

16(4) While, on the basis of a number of Irish and English Authorities to which I will refer, it is clear that the conduct which will bring the subsection into play is wider

than actual fraud, what is less clear cut is how to define the elements that must be present if the subsection is to apply.

16(5) Some of the cases would suggest that the phrase is to be interpreted as inequitable concealment. This would seem to have been the approach of the Supreme Court in *Behan v. Bank of Ireland,* [1998] 2 I.L.R.M. 507. The Court, in that case, overturned the judgment of the High Court that the plaintiff's claim in contract and tort was statute barred, holding that s. 71(1) (b) of the Act applied whenever the conduct of the defendant or his servant or agent was such as to conceal from the plaintiff his cause of action in circumstances such that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim. Unfortunately, the background facts of the case are not set out in the judgments in any great detail and this makes it somewhat more difficult to know how to apply the decision. In the course of his judgment Barron J., with whom O'Flaherty J. (at pp. 522 to 523) concurred, referred with approval to another judgment in this area of Lord Denning M.R., who in *Archer v. Moss* [1971] 1 ALL E.R. 747 at p.750 had commented as follows:-

> "Those cases show that 'fraud' is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be 'against conscience' for him to avail himself of the lapse of time. The section applies whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action, in such circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim."

16(6) An issue that arises on the authorities is whether there must be present a special relationship. It will be recalled that Lord Evershead M.R. had used that phrase

in *Kitchen v. RAF.* Further, the absence of a special relationship was a major factor in the decision of Carroll J. in *Morgan v. Park Developments Ltd.* [1983] I.L.R.M. 156. At p. 162 of her judgment she commented as follows:-

> "I do not think the plaintiff has made out a *prima facie* case of fraudulent concealment. There is no evidence that the defendant knowingly concealed anything from the plaintiff. The statement by the defendant's agent [a building foreman] as to the nature of the crack cannot be put any further than a statement of opinion. No special relationship (such as that of solicitor and client) existed between the parties. Therefore I am of opinion that the statements made by the defendant's agent cannot be considered as fraudulent concealment within the meaning of s. 71(b)."

16(7) However, later cases such as *King v. Victor Parson and Company* [1973] 1 W.L.R. 29, some of which have been referred to with apparent approval in judgments of the Irish courts, seem to indicate that any unconscionable failure to reveal will suffice even in the absence of a "special relationship".

16(8) In any event, even if there is a requirement for a special relationship, I am of the view that there arguably existed a special relationship in the present case. I think it may be possible to regard the relationship between a member of a pension fund, and the trustee and manager of the pension fund, as constituting a special relationship akin in many ways to that of solicitor and client. The relationship between fund trustee and member is such as to militate against the obtaining of a second opinion. I regard this as a relevant consideration.

16(9) In *Beaman v. A.R.T.S. Ltd.* the Appeal Court had held that because the action was in conversion and not based on fraud, s. 26(a) of the Limitation Act, 1939, [the English equivalent of our s. 71(1) (a)] did not apply. However, the Court held that the

action of the defendants in making no attempt to obtain the plaintiff's instructions before disposing of her property for their own convenience and in breach of the confidence imposed on them, and in not informing her of what they had done at any time thereafter, constituted a reckless concealment by fraud to the right of action within 26(b) [the equivalent of our s. 71(1) (b)].

16(10) It must be said that while the action may not have been pleaded in fraud the actions of the defendant were by any standards deplorable. A somewhat similar situation is to be found in *Archer v. Moss* M.R. [1971] 1 ALL E.R. 747 in which *Megaw L.J.* had referred with approval to the judgment of Lord Greene M.R. in v. *Beaman A.R.T.S,* as this was a case where inadequate foundations were quite literally covered up and indeed this was also the situation in *King v. Victor Parsons* another covered over foundation case. It is noteworthy that while many of the cases contain statements of principle in broad terms to the effect that no element of moral turpitude is required, the facts of the cases disclose conduct that is by any standard clearly blameworthy.

16(11) The defendant has suggested that insofar as the plaintiff relies on *Kitchen v. RAF, King v. Victor Parsons and Company* and cases such as *Beaman v. A.R.T.S. Ltd.* [1949] 1 K.B. 550 that this line of authority should not be followed.

16(12) For my part, I can see no reason for not following the approach in the English cases. Indeed, this line of authority has received the endorsement of the High Court and Supreme Court. In *McDonald v. McBain* [1991] 1 I.R. 284 Morris J. indicated that had he not found as a fact that the plaintiff had sufficient information to link the defendant to the tort so that the wrong was not in fact concealed, he would have had no difficulty in adopting, in the main, the approach of Lord Denning M.R. in *King v. Victor Parson.* We have already seen that these remarks were endorsed by

Hardiman J. in his dissenting judgment in *Gough v. Neary* who also referred to *Kitchen v. RAF* and *King v. Victor Parsons.*

16(13) *Kitchen v. RAF, Beaman v. A.R.T.S.* as well as *Archer v. Moss* were all referred to in the course of the judgment of Barron J. in *Behan v. Bank of Ireland.*

16(13) It seems to me that were I to accept the defendant's submission that this line of authority should not be followed, I would be departing from the approach of Morris J., Barron, J., O'Flaherty J. and Hardiman J. Even if I felt myself free to do so, I could see no justification for so doing.

16(14) Accordingly, I am of the view that the defendant will not be able to defeat the plaintiff's claim if the cause of the action was deliberately concealed such that it would be inequitable or unconscionable for the defendant to avail of the lapse of time.

<u>The Particulars of Concealment Pleaded</u>

17(1) It is necessary to consider the details of the plea originally set out in a somewhat oblique fashion in the reply but expanded on by way of particulars. I should say that I regard this as an entirely legitimate exercise. The purpose of pleading is to define the issues and to ensure that the parties will know in broad terms the case they have to meet. The fact that the details are not set out in the reply itself, nor indeed in the statement of claim, is not fatal. In coming to that view, I am not ignoring the comment of Hardiman J. in *Gough v. Neary* who referred to the case of *Lawrance v. Lord Norreys* (1890) 15 A.C. 210 as authority for the proposition that general averments of fraud are not sufficient and that the *Statement of Claim* must contain precise and full allegations of fact and circumstances leading to the reasonable inference that fraud was the cause of the concealment. (Emphasis added). However, Halsbury's *Laws of England*, 4th Edition (1997 reissue) at para. 854 to which Hardiman J. referred, states that "(w)here fraud, deliberate concealment or mistake is

relied upon as postponing the limitation period, it must be sufficiently alleged in the *pleading* to bring the case within the appropriate statutory provision". (Emphasis added). It may also be observed that the objectionable and inadequate pleas in *Lawrance v. Lord Norreys* were in fact contained in the statement of claim and it must also be noted that Hardiman J. was dealing with a case where fraudulent concealment had not been pleaded in the statement of claim or the reply or anywhere else, apparently because a conscious and deliberate decision had been taken not to allege fraudulent concealment. In these circumstances, I am of the view that the crucial issue is whether fraud is fully and adequately pleaded and not where the plea is made.

17(2) Further particulars of the matters pleaded in the reply are set out in letters of 26th May, 2006 and 16th June, 2006. In the course of the letter of 26th May, 2006, the plaintiff alleges that other employees of Waterford Crystal who left after he did, were informed of certain options. If the plaintiff could establish this as a fact, then it would seem arguably open to him to contend that from that point on both defendants must have realised that the plaintiff had not been informed of his options, thus potentially giving rise to a cause of action and that this fact was intentionally withheld from him.

17(3) At para. 12 of the letter it was alleged that the defendants concealed from the plaintiff the fact that they had corresponded with the Amalgamated Transport and General Workers Union and in that correspondence had informed them, or otherwise led them to believe, that all employees were being informed of their rights and entitlements available when this was not in fact the case. If the plaintiff could establish this as a fact then he might be in a position to argue that by informing the plaintiff's union that employees were receiving details of their rights and entitlements, this concealed the inadequacy of the information and advice.

17(4) In the same letter at para. 18 it alleged that a particular named employee received correspondence, within six weeks of the communications with the plaintiff which set out the range of options available for the employee. If the plaintiff could establish this, then he might be in a position to argue that the latter correspondence indicates that the defendants were, at least, from that date aware of the inadequacy of their earlier information but chose to conceal that fact.

17(5) In para. 22 of the letter it is alleged that 98 former employees issued proceedings raising exactly the same issues in 1994 which were subsequently settled. On this basis the plaintiff would seek to argue that if the 98 former employees had a cause of action in 1994, then the defendant must have known that the plaintiff likewise had a cause of action but did not inform him of that fact and instead by silence concealed the situation from him.

17(6) Further particulars were furnished in a letter of 16th June, 2006. The letter makes it clear that these particulars were furnished arising from an affidavit sworn on 4th April, 2006, by Frank Hickey, the General Manager of Waterford Crystal with responsibility for Personnel, in the course of interlocutory proceedings. By reference to that affidavit, the plaintiff makes the case that the second named defendant participated fully in the process that led to the plaintiff being informed of only one option.

17(7) Having analysed the contents of the affidavit, the plaintiff pleaded the second named defendant was privy to all the acts, omissions, representations and inducements of the first named defendant. The paragraph then goes on to plead that the second named defendant was privy to the fraud and/or fraudulent breach of trust of the first named defendant. It appears this latter portion of the plea was directed towards s. 44 of the Statute, with which I have already dealt. However, it may prove

to be of some significance that the affidavit of 4th April, 2006, was of course not available to the plaintiff when the amendment application was argued in the Supreme Court in 2004.

17(8) There is no doubt that the pleas that the plaintiff now seeks to make are quite similar to those which were disallowed by the Supreme Court. However, I do not read the decision of the Supreme Court as endorsing the second named defendant's conduct or certifying that conduct as being free from deliberate wrongdoing. Rather, the Supreme Court refused to allow these matters to be pleaded in an amended statement of claim as they so radically altered the entire basis of the claim up to that point against the second defendant, in a situation where no factual basis for the plea had been advanced. In doing so, it did not put the defendants' conduct beyond scrutiny for all purposes.

17(9) Even if the plaintiff could establish all the matters set out in the letters of 26th May, 2006 and 16th June, 2006, it certainly does not follow that this would lead to a conclusion that the cause of action was deliberately concealed such that it would be unconscionable to permit the defendant benefit from elapsed time.

17(10) However, if the plaintiff could establish these matters he would be in a position to argue that the conduct, which on this hypothesis had been established, amounted to inequitable concealment.

17(11) What is at issue now is not whether the plaintiff has established, or is likely to establish, deliberate wrongdoing on the part of the second named defendant, but whether faced with a defendant who has invoked the Statute of Limitations, he is to be prohibited from making the arguments that he wishes in relation to the Statute. If he is denied the opportunity to make his case in relation to the Statute, then the inevitable result of this will be that the claim will be statute barred and that the merits of the

claim against IPT will never be considered. In the course of the amendment hearing, Geoghegan J. commented at p. 402 as follows:-

> "If there is an answer to a plea of the Statute of Limitations that answer must be pleaded in a reply. While it is true that there are time limits for the delivery of a reply there would have to be extraordinary circumstances in my view for a court to deprive a plaintiff of the right to adduce a perfectly good answer to a plea of the Statute of Limitations effectively on a time point."

17(12) The observations of Geoghegan J. seem equally applicable to a situation where a plaintiff, who claims to have a good answer to the Statute that is pleaded against him and has set out that answer in some detail, is denied the opportunity to make his case.

17(13) I would again stress that nothing in this judgment is to be taken as an indication that the plaintiff will in fact be able to establish deliberate wrongdoing or that, even if he establishes the conduct of which he complains, that such conduct would be sufficient to satisfy the Statute. However, the situation is not so sufficiently clear cut that the plaintiff should be denied any opportunity to make his case.

17(14) Insofar as different formulations of what is required to defeat the Statute emerge from the authorities, it seems to me that if any of these would suffice if established by the plaintiff, or indeed if any other interpretation that is reasonably open would avail the plaintiff, then he should not be prohibited from pleading as he wishes.

17(15) If it is necessary to determine with greater particularity what is meant by "concealed by fraud", that exercise is best undertaken in a context where the facts have been established. At this stage all one can say is that it is not sufficiently certain

that the plaintiff does not have a case to make and that he should be denied an opportunity to join issue with the defendant on his defence. The circumstances would have to be wholly exceptional for a plaintiff who claims to have an effective answer to the Statute to be denied an opportunity to make his case.

17(16) In conclusion, I propose therefore to deal with the preliminary legal issues as follows:

(1) The plaintiff is not entitled to plead s. 44(a) of the Statute of Limitations 1957, by the same token I will indicate my view that the plaintiff is likewise not entitled to plead s. 71(1) (a). However, the plaintiff is, at this stage entitled to plead s. 71(1) (b)