APPROVED **[2021] IEHC 235**

THE HIGH COURT

2013 No. 13117 P.

BETWEEN

JIM STAFFORD
(AS STATUTORY RECEIVER OF HOLLIOAKE LIMITED (IN RECEIVERSHIP))

PLAINTIFF

AND

PETER RICE
SHEILA RICE
GREGORY RICE
ANGELA RICE
MARK RICE

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 April 2021

INTRODUCTION

1. This judgment is delivered in respect of an application for leave to amend pleadings. The application is brought on behalf of the Plaintiff, and seeks amendments to both the plenary summons and the statement of claim. Certain of the amendments have, belatedly, been agreed to by the Defendants, but there is significant disagreement between the parties in respect of the remainder of the proposed amendments.

PROCEDURAL HISTORY

2. The within proceedings were instituted by way of plenary summons on 29 November 2013. The statement of claim was delivered on 8 April 2014. The motion to amend issued on 13 August 2019, and came on for hearing before me last week (22 April 2021).

3. Given the nature of the objections made by the Defendants to the proposed amendments, it is necessary to explain, briefly, how the Plaintiff's claim has evolved. The claim arises out of a contract for the sale of land, dated 24 September 2004, entered into between the Defendants, as the vendors, and the Plaintiff's principal, as purchaser. As initially pleaded, the case had been that the entire beneficial interest in the lands in sale passed to Hollioake Ltd, as purchaser, upon the making of the contract for sale. This claim is pleaded by reference to section 52(1) of the Land and Conveyancing Law Reform Act 2009.

4. (This aspect of the claim is to be amended, on consent, to allow a plea in the alternative that the purchaser had acquired a beneficial interest commensurate with the amount of the purchase price paid. It seems that this amendment is intended to address the contingency that the provisions of the Land and Conveyancing Law Reform Act 2009 may not have retrospective effect, in the sense of applying to a contract for sale made a number of years prior to its enactment. The Plaintiff appears to fall back on the principles in *Tempany v. Hynes* [1976] I.R. 101).

5. The reliefs sought include an order for the partition of the lands, and, in the alternative, orders for the sale of the lands and the distribution of the proceeds of sale. There is then what might be described as a catch-all plea which seeks such further or other order relating to the lands as appears to be just and equitable in the circumstances of the case.

6. The claim as initially pleaded, therefore, relied on an asserted beneficial interest in the lands as giving rise to an entitlement to partition and/or sale. The proposed amendments would introduce a claim for breach of contract. More specifically, it is now sought to enforce a provision in the contract for sale to the effect that the Defendants were to deliver deeds of assurance to the Plaintiff's principal. These deeds of assurance were to be delivered following an intended partitioning of the legal ownership of the lands. This is

separate from the court-ordered partition now sought by the Plaintiff. I will refer to this claim as the "***contractual claim***" where convenient.

7. The proposed amendments would also introduce a claim to recover the monies paid under the contract for sale. This claim is formulated in a number of different ways, including a claim for monies had and received and a claim for unjust enrichment. I will refer to this claim as the "***claim for restitution***" where convenient.

OVERVIEW OF PRINCIPLES GOVERNING APPLICATION TO AMEND

8. The parties very helpfully prepared an agreed booklet of authorities for the assistance of the court. The summary which follows is based on this case law, as analysed by counsel in oral submission.

9. The principles governing an application to amend pleadings are well established. The modern approach commences with the judgment of the Supreme Court in *Croke v. Waterford Crystal Ltd* [2004] IESC 97; [2005] 2 I.R. 383 ("***Croke***"). Geoghegan J., delivering the unanimous judgment of the Supreme Court, held that the primary consideration in an application for leave to amend must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation. Geoghegan J. observed that there had been an overemphasis in the earlier case law on an obligation to give good reason for having to amend the pleadings. As to delay in the making of an application to amend, Geoghegan J. accepted that an application to amend might properly be refused if made at a very late stage of the proceedings; for example, if made shortly before the date scheduled for the hearing of the action. A court should, however, consider whether any prejudice to the other party could be addressed instead by an adjournment and an appropriate costs order.

10. More recently, the Supreme Court, *per* MacMenamin J., stated the general principle as follows in *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21 (at paragraph 42).

> "It is clear, of course, that courts do have a discretion to amend. That discretion must be exercised judicially. Where an amendment may be made without prejudice to the other party, to enable the real issues to be tried, it should be allowed. A court must consider whether prejudice can be overcome by an adjournment. If so, that amendment should be made, and an adjournment, if necessary, granted, to overcome any possible prejudice. If the amendment puts another party to extra expense that can be regulated by a suitable order as to costs, or by the imposition of a condition that the amending party shall indemnify the other party against such expenses […]. A court will, *inter alia*, consider an applicant's conduct in the proceedings, and any question of delay. It is now long established that the function of courts is to decide the rights and duties of parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. […]".

11. The parties are in disagreement as to the approach to be taken where a proposed amendment involves the introduction of a new cause of action. Counsel on behalf of the Defendants submits that an amendment cannot be allowed under Order 28, rule 1 of the Rules of the Superior Courts where it involves the introduction of a new cause of action which requires new facts to be pleaded. The judgment of the Supreme Court in *Smyth v. Tunney* [2009] IESC 5; [2009] 3 I.R. 322 is cited in support of this proposition. I will return to address this dispute in the context of the relevant amendments at paragraph 13 below.

DISCUSSION

12. For ease of exposition, I propose to address the objections made to the proposed amendments thematically, under separate headings below.

(i). New cause of action

13. The principal objection made to the proposed amendments is to the effect that the Plaintiff should not be permitted to introduce a new cause of action which necessitates the pleading of new facts. It is said that the claim for breach of contract is entirely new and is predicated on a new fact, namely the issuance of a written demand, pursuant to the contract for sale, for the delivery of deeds of assurance. This demand had been made by way of letter dated 19 May 2017 issued on behalf of the Plaintiff by his solicitors.

14. Counsel has cited the judgment in *Smyth v. Tunney* [2009] IESC 5; [2009] 3 I.R. 322 as authority for the proposition that the introduction of a new cause of action predicated on new facts is impermissible. Particular emphasis is attached to the following passages (at paragraphs 29 and 30 of the reported judgment).

> "In summary the law as to amendment now is that an amendment will be allowed if it is necessary for the purposes of determining the real issues in controversy between the parties. The addition of a new cause of action by amendment will be permitted notwithstanding that by the date of amendment the Statute of Limitations had run if the facts pleaded are sufficient to support the new cause of action. Facts may be added by amendment if they serve only to clarify the original claim but not if they are new facts. Simple errors such as an error in date or an error as to location which do not prejudice the defendant and enable the real questions in controversy between the parties to be determined will be permitted.
>
> The amendment sought here by way of the addition of causes of action does not satisfy these requirements. In order to sustain the new causes of action additional facts are required to be pleaded and indeed the notice of motion sought amendment of the statement of claim by the addition of the necessary pleadings of fact. These amendments should be disallowed. Similarly the amendment of the statement of claim by pleading additional facts relating to additional publication to the Revenue Commissioners and the *Phoenix* magazine should be disallowed. The Statute of Limitations may well have run and the defendants would be prejudiced by the amendments sought as to additional publication."

15. In response, counsel on behalf of the Plaintiff submits that there is no specific rule precluding the introduction of a new cause of action, citing the judgment in *Moorehouse v. Governor of Wheatfield Prison* (above), and the summary of the

principles set out in the recent judgment of the Court of Appeal in *Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2019] IECA 360.

16. With respect, the Defendants' objection is predicated on an overly narrow reading of the judgment in *Smyth v. Tunney*. It is evident from the passages from that judgment cited above that the reference to "new facts" is made in the specific context of the Statute of Limitations. The amendment proposed in *Smyth v. Tunney* would have introduced new claims for defamation and would inevitably have necessitated the joinder of new defendants (on the facts, the Revenue Commissioners and *The Phoenix*). The mischief with which the Supreme Court were concerned is that of a plaintiff seeking to introduce what would otherwise be a statute-barred claim into existing proceedings.

17. To elaborate. The crucial date for the purposes of the Statute of Limitations is the date upon which proceedings are first instituted. Time runs from the date of institution, and not from the later date upon which proceedings are amended. To permit an amendment which introduces a new cause of action predicated on new facts has the potential to cause prejudice to a defendant by denying him a defence which he might otherwise have had under the Statute of Limitations. In the absence of leave to amend, a plaintiff would have to issue a fresh set of proceedings and run the gauntlet of the Statute of Limitations.

18. Whereas there is no prohibition on allowing an amendment in such cases, a court will exercise restraint where it is alleged that a defendant would be prejudiced in this way.

19. Crucially, no such issue arises in respect of the Statute of Limitations in the present case. The proposed amendments do not give rise to the type of mischief with which the Supreme Court were concerned in *Smyth v. Tunney*. This is because, on the Defendants' own analysis, the breach of contract claim was already statute-barred by the time the within proceedings were instituted in November 2013. The Defendants contend that any obligation on their part to deliver deeds of assurance would have arisen in 2006, when

the lands were partitioned and taken into separate folios. The six year limitation period would have expired prior to the institution of these proceedings. Thus, again on the Defendants' own analysis, there is no benefit to the Plaintiff in pegging the date of the contractual claim to the date of the initiation of these proceedings in November 2013.

20. (I hasten to add that this judgment makes no finding on the question of whether the contractual claim is actually statute-barred. This is a matter for the trial judge. For present purposes, the point is that the Defendants' position is not prejudiced by the amendments in that their arguments on the Statute of Limitation are the same irrespective of whether the contractual claim is advanced in these proceedings or in fresh proceedings with a later date of institution).

21. The present case is distinguishable from *Smyth v. Tunney* on two grounds, as follows. First, the proposed amendments do not cause any prejudice in terms of the Statute of Limitations for the reasons outlined above. Secondly, and in any event, the proposed amendments do not involve the introduction of "new" facts in the strict sense. Rather, the amendments arise out of "substantially the same facts" as those already pleaded in the statement of claim and/or fall within the "ambit of the original grievance". These are the relevant tests as per *Krops v. The Irish Forestry Board Ltd* [1995] 2 I.R. 113 and *Rossmore Properties Ltd v. Electricity Supply Board* [2014] IEHC 159 (since approved of by the Court of Appeal in *Persona Digital Telephony Ltd v. Minister for Public Enterprise*). The breach of contract claim is predicated on the contract for sale of the lands. The existence of this contract had been pleaded in the initial statement of claim and the new claim is rooted in that contract. Put otherwise, it arises out of facts already pleaded.

22. The circumstances of the present case are also distinguishable from those at issue in another authority relied upon by the Defendants, *Mangan v. Murphy* [2006] IEHC 317.

In that case, the plaintiff had sought to introduce a new claim which the court considered would possibly be statute-barred. The court held that it was not appropriate to attempt to resolve "arguable" issues under the Statute of Limitations at an interlocutory hearing. Instead, leave to amend was refused, but the plaintiff was given liberty to apply to have any fresh proceedings heard at the same time as the original proceedings.

23. Counsel for the Defendants in the present case urged that a similar approach should be adopted in these proceedings, i.e. the breach of contract claim should be brought in a fresh set of proceedings which could then be consolidated with these proceedings. With respect, this approach is inappropriate in circumstances where, for the reasons outlined earlier, the making of the amendments does not cause any prejudice in terms of the Statute of Limitations. Unlike the position in *Mangan v. Murphy*, it is simply not arguable that an issue arises under the Statute of Limitations.

(ii). Claim for restitution bound to fail

24. Counsel for the Defendants submits that the claim for restitution is bound to fail. It is submitted that the amended plea to the effect that there has been a "total failure of consideration" on the part of the Defendants under the contract for sale cannot succeed. This is because, as asserted in submission, certain "houses were built" and the contract partially completed.

25. It is well established that the court should lean in favour of allowing an amendment, which is otherwise appropriate, unless it is "manifest" that the issue sought to be raised by the amended pleading must "necessarily fail". The court should not, on a procedural motion to amend, enter into the merits or otherwise of the issue sought to be raised, save to the extent of asking itself whether the issue which would be required to be tried as a result of the amended pleading is one which must "necessarily fail" (*Woori Bank v. KDB Ireland Ltd* [2006] IEHC 156).

26. This threshold has not been met in the present case. It is not "manifest" that the claim for restitution is one which must "necessarily fail". It is apparent from both the original pleadings and the proposed amendments—and indeed the affidavit filed by Mr. Frawley on behalf of the Defendants—that the transaction entered into between the parties had been complex and it had been adversely affected by the economic crash. The controversy to be resolved at the trial of the action is as to what the legal consequences of all of this is. Whereas the Defendants might ultimately succeed, at the trial of the action, in their arguments that the contract had been performed in part and that they are entitled to retain monies paid under the contract for sale, it is not obvious at this stage of the proceedings that the Plaintiff's claim for restitution cannot succeed.

27. Counsel for the Defendants makes a separate objection that the proposed amendments in respect of the claim for restitution introduce allegations of "wrongdoing" against the Defendants. Counsel seeks to draw an analogy with the approach taken by the Supreme Court in *Croke v. Waterford Crystal Ltd* to allegations of fraud and conspiracy. The Supreme Court had refused to allow amendments in respect of one of the defendants on the basis that the plaintiff had not put forward any factual basis whatsoever to support a fraud or any kind of deliberate misconduct claim against that defendant. The Supreme Court further held that the proposed amendments would "radically alter" the claim against that defendant, and were not necessary for the purpose of determining the real questions in controversy between the parties.

28. The amendments proposed in the present case are entirely distinguishable. The claim for restitution is premised on the existing pleas (at paragraphs 14 and 15 of the statement of claim) to the effect that the Defendants had been paid an aggregate sum of €2,271,000 pursuant to the contract for sale. The proposed amendments plead that those monies should be repaid, whether pursuant to an alleged resulting and/or constructive trust; as

monies had and received; or on foot of unjust enrichment. None of these claims comes close to an allegation of fraud or conspiracy (which is what had been in issue in *Croke*). Moreover, the claim for restitution is one which is referable to facts which have already been pleaded in the original statement of claim, and the amendments are necessary for the purpose of determining the real questions in controversy between the parties.

29. Similarly, the analogy which counsel for the Defendants sought to draw with *Persona Digital Telephony Ltd v. Minister for Public Enterprise* is also misplaced. The decision on the amendment application in that case had been informed by an earlier Supreme Court judgment allowing the case to be pursued notwithstanding inordinate delay. As appears, in particular from paragraphs 42 to 44 of the Court of Appeal's judgment, certain amendments were refused in that case because to do so would allow the case proceed on an entirely different factual and legal basis to that which had been central to the decision of the Supreme Court.

(iii). Delay

30. Counsel on behalf of the Defendants objects that there has been delay in these proceedings, and draws attention to the fact that the claims for restitution and for the alleged breach of the requirement to deliver deeds of assurance have been raised for the first time some six or seven years after the commencement of the proceedings. (The motion to amend issued on 13 August 2019, and the final draft of the proposed amendments settled on by 2 July 2020).

31. It is certainly correct, as a general observation, that there has been delay on both sides in these proceedings. For the purposes of an application to amend the pleadings, however, the focus must be on whether the delay in making the application has prejudiced the other side. Here, notwithstanding that the proceedings have been in existence for almost eight years, the case has not been progressed significantly. For example, the question of

discovery has not yet been addressed. It does not seem to me that any prejudice has arisen as a result of the delay in making an application to amend. It is, of course, a separate matter as to whether the proceedings have been prosecuted diligently, and this is something which may have to be addressed by way of case management.

CONCLUSION AND FORM OF ORDER

32. Leave to amend the pleadings is granted pursuant to Order 28, rule 1 of the Rules of the Superior Courts. The amendments permitted are those in the drafts exhibited in the affidavit of the Plaintiff's solicitor sworn on 2 July 2020.

33. Insofar as the allocation of costs is concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

34. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order. Order 99, rule 2 of the Rules of the Superior Courts provides that the High Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

35. My provisional view is that the Plaintiff should be entitled to recover two-thirds of his costs of the motion to amend. The Plaintiff has been entirely successful in the application. The Defendants' consent to certain amendments came too late to produce any meaningful saving in costs, and the Defendants' objections to the balance of the proposed amendments have been rejected.

36. The proposed discount of one-third is intended to reflect the fact that the necessity for the amendment application arose out of shortcomings in the initial pleadings, and an application to court would have been necessary even had the Defendants not objected to the proposed amendments. The costs of both sides were undoubtedly increased as a result of these objections and the proceedings were becalmed pending the hearing of these objections.

37. If either party wishes to contend for a different form of costs order, then short written legal submissions should be filed within 14 days of today's date.

Appearances

Joe Jeffers for the Plaintiff instructed by Hayes Solicitors (Dublin)
Roughan Banim, SC and Elizabeth Gormley for the Defendants instructed by O'Hagan Ward & Co

Approved