

THE HIGH COURT

[2021] IEHC 605

[Record No. 2020/313 COS]

IN THE MATTER OF SPENCER DOCK DEVELOPMENT COMPANY LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT, 1963 TO 2012

AND

IN THE MATTER OF SECTION 678 OF THE COMPANIES ACT, 2014

BETWEEN

UNA GILLIGAN AND OTHERS

APPLICANTS

AND

FAXGORE LIMITED (IN LIQUIDATION)

INTENDED DEFENDANTS/RESPONDENTS

[Record No. 2020/314 COS]

IN THE MATTER OF SPENCER DOCK DEVELOPMENT COMPANY LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT, 1963 TO 2012

AND

IN THE MATTER OF SECTION 678 OF THE COMPANIES ACT, 2014

BETWEEN

UNA GILLIGAN AND OTHERS

APPLICANTS

AND

SPENCER DOCK DEVELOPMENT COMPANY LIMITED (IN LIQUIDATION)

INTENDED DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Stack delivered on the 24th day of September 2021.

Introduction

1. These are applications pursuant to s. 678 of the Companies Act, 2014 for leave to issue proceedings against the respondents ("the Companies"), which are both in liquidation. A separate application was issued in respect of each Company, but the applications were heard together on the basis of a single set of written submissions and this judgment applies to both.
2. The proceedings are somewhat unusual in that there are 832 intended plaintiffs, the applicants in this application, comprising the owners of 616 apartments in the Spencer Dock Development (the Development) which was developed by Spencer Dock Development Company Limited (in liquidation) ("SDDC"). Faxgore Limited (in liquidation) ("Faxgore") was a subsidiary of SDDC and it procured certification for the construction of the Development.
3. It is alleged that there are significant design and construction defects, relating mainly to the quality of windows and doors, and the related vents and sealing. The proceedings are instituted by Syndicate 4472 at Lloyd's of London ("the Insurer") in the names of each of the owners of the Units ("the applicants"). The applicants each have the benefit of latent defects cover insurance policies under the Premier Guarantee Scheme of Insurance, and it

is pursuant to those policies that the Insurer claims to be subrogated to the applicants' cause of action against the Companies. As the Insurer is taking steps to institute proceedings in the name of the applicants, I will refer to the moving parties as "the applicants," save in relation to the objection based on subrogation, where I will refer to the moving party as Insurer, given that a consideration of the subrogation issue requires a consideration of the Insurer as such.

4. The draft plenary summons exhibited to the grounding affidavit claims damages for breach of contract, lease and/or covenant, and warranty, as well as damages for negligence, breach of duty (including breach of statutory duty), negligent misrepresentation, negligent misstatement and nuisance. An order for specific performance requiring the defendants to rectify and make good all defects in the premises known as the Spencer Dock Development ("the Development"), as well as related injunctive relief (including interim and interlocutory relief) are also claimed. The names of the 832 plaintiffs are scheduled to the plenary summons, along with their addresses within the development. The discrepancy between the number of intended plaintiffs and the number of apartments is explained by the obvious fact that some of the apartments are jointly owned.
5. The intended proceedings are related to two existing sets of proceedings, first, in proceedings issued on 15 May, 2018, and bearing High Court Record No. 2018/4336P ("the Management Company Proceedings") the Management Company for the Development has already sued SDDC and others in relation to the alleged defects in the buildings comprising part of the Development. Furthermore, in proceedings bearing Record No. 2019/7612P ("the 2019 Proceedings"), the applicants have sued the various contractors and professionals who were involved in the design and construction of the buildings, and those proceedings relate to the same alleged defects. SDDC and Faxgore were not joined to those proceedings and it was apparently determined that, because they were both in liquidation, they would have to be sued in separate proceedings so as to accommodate the necessary application for leave pursuant to section 678.
6. SDDC and Faxgore were both the subject of winding up orders made 9 October, 2012. As regards SDDC, the Joint Official liquidators ("the liquidators") formally advertised for proof of debt from 17 November, 2017 and formal adjudication took place on 19 January, 2018, with further adjudication on 31 January, 2018, under the supervision of the Examiner of the High Court. Although it is not on affidavit, I am told that the liquidation has since stalled, and I understand this to refer to SDDC only as Faxgore is not a party to the Management Company proceedings. There is no information on affidavit as to the progress or otherwise of Faxgore's liquidation.

The nature of the discretion under section 678

7. Section 678 (1) of the Companies Act, 2014, provides:

"(1) When in relation to a company—

(a) a winding-up order has been made,

(b) *a provisional liquidator has been appointed, or*

(c) *a resolution for voluntary winding up has been passed,*

no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.”

It is agreed that this constitutes a re-enactment (with modification by way of inclusion of companies in voluntary liquidation) of s. 222 of the Companies Act, 1963, as amended, and that the authorities in relation to that provision are therefore relevant. However, the parties differ as to the correct approach to be taken to these applications. The applicants say that the authorities demonstrate that, if the cause of action could not more conveniently be dealt with in the winding up, and if there is a benefit to them in bringing the action or if they would be prejudiced if not permitted to sue, then leave ought to be granted. By contrast, the Liquidators say the discretion is broader and that the Court can consider, in addition to the matters identified by the applicants, a variety of factors in relating to the nature and circumstances of the proposed claim against the Companies in considering whether it is right and fair to permit the claim to be brought.

8. In the earliest of the authorities opened to me, *Re MJBCH Ltd. (in liquidation)* [2013] IEHC 256, [2013] 1 I.R. 407, Finlay-Geoghegan J., in considering the principal issue before her as to whether leave pursuant to s. 222 of the 1963 Act could be granted retrospectively in relation to existing proceedings, identified the purpose of s. 222 of the 1963 Act (at para. 17) as “*not simply the protection of creditors, but rather, primarily the purpose identified by Black L.J. in the Court of Appeal in Northern Ireland in Boyd v. Lee Guinness Ltd. [1963] N.I. 49, of placing all proceedings in relation to the company being wound up by the court under the supervision of the court.*” She stressed, however, that the Irish section must be read in light of the constitutional right of access to the court. This emphasis on the constitutional right to bring an action to vindicate one’s rights suggests that, unless there is real prejudice to the winding up of the company, as opposed to the inevitable disadvantage arising from being sued, leave should be granted pursuant to section 678.
9. To similar effect is the judgment of Laffoy J. in *Wright-Morris v. IBRC (in special liquidation)* [2014] 3 I.R. 468. That case concerned s. 6 of the Irish Bank Resolution Corporation Act, 2013, which provided that no further actions or proceedings could be issued against IBRC without the consent of the High Court. Although s. 10 (2) (c) of the 2013 Act specifically provided that s. 222 of the 1963 Act was not to apply to IBRC, it was conceded that the authorities on s. 222 of the 1963 Act were of assistance.
10. The judgment in *MJBCH Ltd (in liquidation)*, which had been delivered only a short time before the hearing in *Wright-Morris* appears not to have been cited to Laffoy J. However, Laffoy J. took a remarkably similar approach to the application before her, leaning in favour of the right of the intended plaintiff in that application to pursue his proceedings, albeit that the case had additional considerations arising out of the fact that the

proceedings were to be instituted in England and Wales. The intended proceedings in that case were based on an allegation that IBRC's predecessor had mis sold a "swap transaction" to the intended plaintiff in the United Kingdom. Relying on English authorities such as *Re Exchange Securities & Commodities Ltd.* [1983] BCLC. 186, which were to the effect that leave should be refused under the identical English statutory provision if the action proposed "*raises issues which can conveniently be decided in the course of the winding up*", (para. 21), Laffoy J. granted leave, noting that IBRC's counsel had not contended that the proceedings in that case could be more conveniently dealt with in the special liquidation of IBRC.

11. In addition, Laffoy J. stated an application for leave could be refused where it would be futile to grant leave as, for example, where a claim would be clearly statute-barred, although that threshold was not met in that case. It is notable that Laffoy J. adopted that test from the principles applicable to the joinder of parties to existing proceedings.
12. That judgment was subsequently applied by Finlay-Geoghegan J. in *Re Hibernation Therapeutics Global Ltd. (in liquidation)* [2014] IEHC 41, where leave to continue part of an existing counterclaim comprising a complex dispute in relation to the ownership of the shares in the company could not "*be conveniently determined in the course of the winding up proceedings*" (para. 16). Interestingly, as there had been no application to strike out the counterclaim, Finlay-Geoghegan J. stated that she would not make any assessment of the merits of that counterclaim.
13. In both *Wright-Morris* and *Re Hibernation Therapeutics Global*, the statement of the Court of Appeal in England and Wales in *Re Aro Co. Ltd.* [1980] 2 WLR 453, that the equivalent English provision gave the court a free hand "*to do what is right and fair according to the circumstances of each case*" was approved. Obviously, such a test appears very broad on its face and it is based on that test that the liquidators now argue that this Court has a wide-ranging discretion to grant or refuse leave and can take a variety of different factors into account.
14. Along with the broad nature of the test in *Re Aro Co. Ltd.*, the liquidators rely strongly on *Crumb Rubber Ireland Ltd. (in liquidation)* [2020] IEHC 348, in which O'Moore J. refused leave to issue proceedings pursuant to ss. 57 and 58 of the Waste Management Act, 1996, so as to seek mandatory orders to compel the liquidators to decontaminate a site which the company had leased from the applicant.
15. It is true that O'Moore J. refused leave on the basis of:
 - i. the fact that the proceedings might affect preferential creditors,
 - ii. the inappropriateness of the mandatory orders, which could not be made against the liquidators,
 - iii. the "very important factor" that the company had no assets or insurance, such that the proceedings were futile, and

- iv. the applicant would not be prejudiced as he could proceed against the other respondents to the proceedings.

O'Moore J. refused to base his decision on the argument that the Deed of Surrender executed by the liquidators had constituted a full waiver of the relevant cause of action, stating that this could not be decided on an application for leave pursuant to section 678.

- 16. Reviewing the Irish authorities referred to above, it seems to me that the concept of what is "*right and fair in all the circumstances of the case*" was one originally propounded in the neighbouring jurisdiction in light of the absence of any explicit restriction in the equivalent section in the UK Companies Acts. However, any statutory provision must be interpreted in light of its purpose and of course, as already identified by Finlay-Geoghegan J. in *Re MJBCH Ltd (in liquidation)*, in light of the constitutional right of access to the courts. Neither the purpose for which s.678 was introduced (which appears to have been to ensure that unsecured creditors prove their debts in the liquidation process insofar as possible) nor the constitutional right of access to the courts suggest that the purpose of conferring the discretion was to create a wide-ranging jurisdiction to consider the merits of the proposed proceedings, though there would seem to be nothing objectionable in refusing leave if satisfied that the claim would be subject to dismissal as being doomed to fail as this would be consistent with the jurisdiction of the courts in a variety of procedural situations to restrict the right to sue (by, for example, refusing to join a party to existing proceedings or acceding to an application to dismiss), but only if it is clear that the proceedings could never succeed.
- 17. The liquidators relied strongly on the variety of matters considered by O'Moore J. in *Crumb Rubber* as grounding their approach which was to mount a series of different objections and then submitting that cumulatively, these justified refusing leave. However, when one looks at the factors considered by O'Moore J., they seem to fall into the category of either a concern about the effect of the proceedings on the liquidation or the more general jurisdiction to dismiss proceedings where they are, for any reason, frivolous or vexatious or doomed to fail. The reference to the impact on preferential creditors could be said to fall into the former category. By contrast, the approach to the interpretation of the Deed of Surrender in that case, the finding that the mandatory orders which formed the entire relief sought in the proceedings could not be made against the liquidators, and the reference to the futility of suing a company with no assets or insurance, are all matters which could form the basis for an application to dismiss proceedings as being frivolous or vexatious or doomed to fail.
- 18. In my view, therefore, a consideration of what is "*fair and just in all the circumstances*" does not entail any consideration of the merits of the proceedings, and leave will in general be granted unless the applicant could just as conveniently bring his claim in the course of the winding up proceedings, or unless the proceedings may be said to be frivolous and/or vexatious or deemed to fail, which is that, taking the plaintiff's case at its highest, it simply cannot succeed. One aspect of such a claim may be that a plaintiff's

claim is statute-barred, which is I think why Laffoy J. in *Wright-Morris* recognised that an application for leave could be refused where the claim was “clearly” statute-barred.

19. I do not think that this analysis is, in practice, very far removed from the approach urged on me by the applicants. They are correct to point to the relevance of a benefit if proceedings are issued or a prejudice to an applicant if leave is refused, and this is a material consideration, albeit, as I think is demonstrated by *Crumb Rubber*, it is linked to whether the proceedings could be said to be futile. Allied to the recognition by Laffoy J. that leave can be refused if proceedings are clearly statute-barred, it seems to me that the question of a potential benefit or prejudice to an applicant can be regarded as one aspect of a more general consideration, which is whether it would be futile to grant leave.
20. It was not suggested in this case that the proceedings are futile in the sense found in *Crumb Rubber*. The applicants’ solicitor has averred that she believes that SDDC has relevant insurance and this has not been denied.
21. Although it is stated that Faxgore, has no assets, counsel for the applicants has stated that it is sued only to avoid almost inevitable reliance by other defendants on s.35(1)(i) of the 1961 Act. Given that a number of defendants are sued and given that the issue of the statute has already been raised, as well as the fact that SDDC has already relied on s.35(1)(i) in its Defence to the Management Company proceedings, this submission is almost undoubtedly correct.
22. The applicants are already litigating liability for the defects against various other defendants in the 2019 proceedings. Failure to sue the respondents may result in their being deprived of relief by reason of s.35(1)(i) of the Civil Liability Act, 1961, and I accept the submission of the applicants that this provision is likely to be relied upon by the existing defendants in the 2019 proceedings. It is therefore essential that the applicants sue all persons potentially responsible for the alleged defects the subject matter of the 2019 proceedings.
23. Therefore, even if neither company were sued, there would be a benefit to the applicants in bringing the intended proceedings against both companies and they could not be said to be futile or vexatious. On the contrary, the applicants appear to be seeking access to the court in respect of proceedings that would not be liable to dismissal on any recognised ground and the proceedings would plainly not be more conveniently dealt with in the winding up.
24. The liquidators made a specific objection in relation to whether the proceedings were statute-barred which logically falls for consideration at this point, as it is clear from the judgment of Laffoy J. in *Wright-Morris*, discussed above, that leave could be refused if a claim could be said to be “clearly” statute-barred.
25. Counsel for the liquidators very fairly conceded that I could not find that all of the claims brought by the 832 plaintiffs were statute-barred. He confined his submission to stating that there was a strong argument that some of the claims were statute-barred.

26. This argument was based on an email dated 21 November, 2008, which indicated that remedial works were being undertaken on at least 18 apartments at that time. The six year limitation period in tort relating to construction defects runs from the date upon which the defect became manifest: see *Brandley v. Deane* [2018] 2 I.R. 741. If leaks from inadequate window and door frames, and other matters the subject matter in these proceedings were manifest in November, 2008, or earlier, then obviously proceedings relating to those defects instituted in 2021 would be statute-barred.
27. However, the production of an email, relating to only a small number of the apartments the subject matter of the proceedings, and authored by a person who has not sworn an affidavit in these proceedings, is insufficient to meet the high bar set by Laffoy J. in *Wright-Morris*. Furthermore, a single email cannot be read out of context but would undoubtedly be open to elucidation by way of evidence at hearing. This email is simply not sufficient for me to say that even in relation to the 18 unidentified apartments referred to in the email, the damage relevant to these proceedings was manifest such that the claim in relation to those apartments was clearly statute barred, let alone find that any claim in relation to any of the 616 units in the Development is clearly statute barred.
28. I have no doubt that, if leave was granted, the issue of the statute will be pleaded and that this issue will in due course receive extensive consideration and, ultimately, a determination in this Court. In my view the liquidators have not met the threshold required for establishing that these claims are so clearly statute-barred that this Court could exercise its discretion to prevent the proceedings from being brought at all.
29. I am of the view that the above is sufficient to justify the grant of leave, but in the event that I am wrong in that, and in deference to the submissions made on behalf of the liquidators, I now turn to consider the remaining objections of the liquidators to the within application.

The Objections of the Liquidators

1. Delay

30. There is no reference to any time limit or jurisdiction based on delay in s.678, and it seems this objection is based on the liquidators' reliance on an interpretation of the discretion under s. 678 which I have rejected. It seems to me that the applicants' submission that delay should only justify refusal of leave if the test for dismissing proceedings for inordinate and inexcusable delay is met is correct, save that I would add that, if it could be shown that delay had caused some particular prejudice to the liquidation, this might also be a factor. However, no specific prejudice is asserted by the liquidators here.
31. In particular, it should be noted that SDDC has been party to the Management Company proceedings since 2018 in relation to a similar claim for defects in the same building and they have not been able to point to any specific prejudice or unfairness which they would suffer by being asked to meet a similar claim by the applicants.

32. As only a general complaint about delay is made, I think the applicants correctly point to *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50 as providing the relevant guidance. This states that proceedings should be struck out for pre-commencement delay only in "*the most exceptional circumstances*", and further requires proof of delay leading to a real and serious risk of an unfair trial or an unfair result, a clear and patent injustice in asking the defendant to defend the proceedings, or the placing of an inexcusable and unfair burden on the defendant to defend. It is not surprising that the jurisdiction to strike out for pre-commencement delay is limited, given that defendants may avail of the statute of limitations in an appropriate case to defeat proceedings.
33. As regards the effect on the liquidation, while the winding up orders were made in 2012, the key steps in the SDDC liquidation appear to have taken place in 2017 and 2018. I am told by counsel for the intended plaintiffs (without objection) that the liquidation of SDDC at least is, in effect, in abeyance, as a result of the Management Company proceedings. While those proceedings seek relief in somewhat different terms, they quite clearly relate to similar defects to those intended to be pleaded in the intended proceedings. It should be noted that SDDC has specifically pleaded in those proceedings that the management company has no locus standi to bring proceedings in relation to, *inter alia*, units owned by the applicants.
34. It should be noted that the liquidators rely on the test of what is "fair and just in all the circumstances" to ground their wide-ranging objections to the grant of leave, including this very general complaint of delay. However, it would clearly be unjust to refuse leave on the basis of delay when the liquidation of SDDC has, in effect, stalled while the Management Company proceedings are progressed and where reliance is being placed by SDDC in those proceedings on the failure of the applicants to sue it.
35. These motions were issued on 14 October, 2020, approximately one year after the institution of the proceedings against the other defendants, and only a little less than two and a half years after the Management Company proceedings were instituted. I do not think that delay is egregious and it also appears that it has not impacted on the liquidation of SDDC. I have been given no information as to the effect of the Management Company proceedings on Faxgore, nor is there any evidence of prejudice to the liquidation of Faxgore, other than a general reference to the fact that it will be delayed. This type of objection did not find favour with Finlay-Geoghegan J. in *Re Hibernian Therapeutics Global Ltd.*
36. Any consideration of the justice of the case demonstrates, in my view, that such delay as has occurred could not justify conferring an immunity from suit on the respondents. In those circumstances, it seems to me that delay is not a basis for refusing leave in this case.

2. Overlap with Management Company proceedings

37. Complaint is made that there is overlap with the Management Company proceedings. I find it difficult to understand the basis to this objection. As already stated, SDDC has

pleaded as against the management company that it has no *locus standi* in relation to the units that have been sold on to the plaintiff. If that plea is correct. I do not see how it can be argued that, while SDDC should be entitled to defend the Management Company proceedings on the basis that the management company cannot sue in relation to the defects to the apartments owned by the applicants, the applicants should not be entitled to sue in relation to those same defects. This objection is rejected.

3. Whether the Insurer is entitled to sue in the name of all of the applicants

38. The within proceedings are brought by the Insurer, on behalf of each of the owners of each of the units in the development. It has been averred on affidavit that each of the owners has taken out latent defects cover with the Insurer. It is acknowledged by counsel for the Insurer that there may be other losses which are not covered by the insurance policies but which will fall within the proceedings. However, he submits that this issue can be dealt with in the course of the proceedings by way of case management. In effect, the unit owners who wish to claim for losses which are not insured, but which would fall within the claim made in the proceedings, will be invited to make a claim in these proceedings for those losses.
39. Counsel for the liquidators accepts that, in light of the most recent affidavits filed by the parties, there is a relevant policy of insurance in relation to each unit.
40. After that, the parties differ, with counsel for the Insurer saying that is sufficient for him to show standing for the purposes of this application, whereas counsel for the liquidators says that the Insurer should identify how many apartment owners have notified a claim, and there should be proof as to whether the Insurer has confirmed that it will provide cover. It was not contended at hearing that there should be evidence of an indemnity being given, i.e., that money had been paid over.
41. Both of these arguments are based on the interpretation of the relevant clause in the insurance policies. Before turning to those arguments, which are based on proposed interpretations of the relevant clause of the insurance policies, it should be noted that the doctrine of subrogation confers two distinct rights on the insurer: the right to oblige the insured to pursue remedies against third parties for the insurer's ultimate benefit, and the right to recover from the insured any benefits received by the insured in extinction or diminution of the loss for which he has been indemnified: *MacGillivray on Insurance Law*, 13th ed (Thomson Reuters, London, 2015), (at para. 24-035). We are clearly concerned only with the former aspect of the doctrine of subrogation, as it is common case that the insured in this case have not themselves instituted proceedings or recovered any compensation from the respondents or anyone else.
42. It is accepted by both sides that if the common law doctrine of subrogation were in issue, then an actual indemnity would have to have taken place for the insurer to be subrogated to the rights of the plaintiffs, i.e., the insurer would already have had to pay out on foot of the insurance policies before suing or taking control of the proceedings. However, it is also accepted that this can be modified by the insurance policy and that this has been done in this instance by way of Clause 6.8.

43. Clause 6.8 is headed "Recoveries from third parties" and provides:

"the Underwriter is entitled and the Policyholder gives consent to the Underwriter to control and to settle any claim and to take proceedings at its own expense but in the name of the policyholder to secure compensation from any third party in respect of any loss or damage covered by this policy."

44. Counsel for the liquidators relies on the phrase "any loss or damage covered by this policy", stating that this is the critical language and means that the Insurer must show that they have actually accepted cover for each of the 832 intended plaintiffs before they can purport to issue proceedings in their name on foot of this clause.
45. However, counsel for the Insurer says that this phrase only requires that the Insurer should have provided cover in respect of loss or damage claimed in the proceedings. It is submitted that the policy should be read as a whole, from which it is evident that cover is distinct from the making of a claim, and reliance is placed on various clauses of the contract to demonstrate this.
46. The parties are in agreement that insurance contracts must be interpreted in line with the principles in cases such as *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274 and *The Law Society of Ireland v. The Motor Insurer's Bureau of Ireland* [2017] IESC 31. The latter case was cited by both parties in their written submissions and the applicants relied in particular on the modern "text in context" approach to interpretation, as referred to by Clarke CJ. at para. 10.4 of his judgment. The applicants also referred to the judgment of McMahon J. in *Manor Park Homebuilders Limited v. AIG Europe (Ireland) Limited* [2009] 1 I.L.R.M. 190 where he stated that recognised terms including those as to subrogation would be implied into every insurance contract unless specifically excluded. This was relied on for the proposition that subrogation was, at least in relation to insurance contracts, a matter of contract and the general common law principles relating to it could therefore be modified by the terms of the insurance policy.
47. As McMahon J. stated, subrogation is so well known and so well established that it would be implied into a contract of insurance, even if not reduced to writing. Clause 6.8 must I think, therefore, have been intended to modify (or perhaps clarify) the common law in some way. As evidenced by the submissions of the parties, there may be an issue as to the nature and extent of the modification which it makes to the common law position.
48. Again, I am assisted by the fact that the parties do not disagree that, before damages can be paid over, the Insurer must have actually indemnified the applicants. However, the Insurer submits that this particular issue can be dealt with down the line, whereas the liquidators say that, in order to establish an entitlement to sue in the name of the applicants, the Insurer must have confirmed cover in relation to each of them, and as cover has only been confirmed in relation to six Units, the Insured can only sue in the name of the owners of those six Units.

49. The real question, it seems to me, is whether any of these matters are material to an application under section 678. As set out above, I do not believe that the section grants a wide-ranging discretion to the Court to refuse access to the court on the basis of whatever objections a liquidator can summon so as to attempt to gain an immunity from suit. The objection must be raised either because of the effect of the proposed litigation will be to disrupt an orderly liquidation, or on the basis that the proposed litigation is such that a court would be satisfied to dismiss it as being somehow doomed to fail.
50. There is no doubt but that, on the facts asserted in the affidavits filed in support of the application, the applicants potentially have a cause of action against the Companies and the proceedings are brought in their names, effectively to protect the position of the applicants and their insurers. There is no question, therefore, of the proceedings being improperly constituted and the only issue is one which seems to fall to be litigated as between the applicants and the Insurer, which is the entitlement of the Insurer to sue in their names and to control the proceedings. It is conceded by the Insurer that cover would have to be confirmed before any monies could be paid over to it, but it says that this does not arise at present.
51. It should also be said that, returning to the critical issue of whether the type of claim could be resolved in the winding up proceedings, any issue as between the insured and the plaintiff to control the proceedings is one which it is not convenient to deal with in the winding up proceedings ought, insofar as the liquidators have any entitlement to dispute the rights as between the insured and the insurer *inter se*, that is a matter which should be dealt with in these separate proceedings which it is intended to issue, and this is therefore a factor leaning in favour of granting leave to the plaintiff to issue these proceedings, during which all of these matters can be resolved.

4. Order 15, rule 1 (1)

52. In the course of his submissions on the Statute of Limitations, counsel for the liquidators referred to the fact that, because the damage may have become manifest in the various units and apartments at different times, the issues relating to the operation of the statutory limitation period would differ and therefore it was inappropriate that the proceedings would be constituted as they are at present, with 832 plaintiffs all in the one plenary summons.
53. In support of this proposition, the liquidators relied on *Plunkett v. Houlihan* [2004] 3 I.R. 603, and a recent application of it in *Greffrath v. Greymountain Management Ltd (in liquidation)* [2020] IEHC 284. In each case, the issue was whether a group of individuals, each of whom had similar cause for, in the case of *Plunkett*, negligent advice, and in the case of *Greffrath*, outright fraud, would maintain their claims in a single set of proceedings.
54. Order 15 , r. 1 (1) of the Rules of the Superior Courts, 1986, provides:

"All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged

to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise; provided that if, upon the application of any defendant, it shall appear that such joinder may embarrass or delay the trial of the proceeding, the Court may order separate trials or make such order as may be expedient."

55. In *Plunkett v. Houlihan*, the court ordered the plaintiff to proceed by way of separate action in a case where they had initially brought proceedings jointly in relation to similar types of advice given by the defendant to them, which in each case they alleged to have been negligent.
56. In such a case, each person made an individual investment on the basis of advice separately given to him or her and, while there might have been similarities, and indeed a pattern of behaviour, it could not be said that the right to relief arose out of "the same transaction or series of transactions". In *Greffrath*, O'Moore J. identified "the same transaction or the same series of transactions" as meaning "the same transaction or same series of transactions". *Greffrath* similarly related to a series of individual transactions made by individuals with what appear to be connected companies and individuals, but the transactions conducted by the defendant in order to purportedly invest each plaintiff's money was in fact separate (though similar in nature) from each of the others.
57. In my view, this case is different because the claims of each of the 832 plaintiffs relate to the same development, developed by the same company, retaining the same firm of architects, the same firm of engineers, the same building contractors, in each case. Although now the subject of a separate legal title, each apartment forms part of the same building, constructed by the same people using the same methods of design and construction.
58. It is absolutely inevitable that there will be common issues of fact in relation to each of the 616 claims. Insofar as separate issues arise in relation to the Statute of Limitations, they will turn not, it would seem at present, on any different issue of law, but on the different factual circumstance of when any defects that may be said to exist first became manifest. It is possible that these will vary as between different parts of the building, depending on the nature of the defect, exposure to the elements, and so forth, but it would seem unlikely that the damage became manifest on 616 separate occasions. Instead, insofar as there is any difference, it may be that the 616 units will ultimately be categorised into a relatively small number of groups of units, in respect of which the damage became manifest at different times. Therefore, there are undoubtedly common issues of fact and law.
59. Insofar as the plaintiffs' claim is concerned, it seems to me difficult to deny that the applicants' claims in negligence relating to the construction of the building, and the quality of the design and workmanship, must be said to be matters arising out of the "same transaction". The claim in contract can be said to arise out of the same series of transactions, i.e., a series of contracts followed by the grant of long leases in identical terms to the various apartment owners.

60. In my view, this situation is distinct from the linking together of a series of individual investors or clients, such as attempted to be done in *Plunkett* or *Greffrath*. The owners of various units in an apartment block may truly be said to be “in the one boat”, with their fortunes, insofar as defects in the buildings are concerned, inextricably linked. It seems to me that this type of proceeding is peculiarly well suited to the joinder of all apartment owners in a single set of proceedings, rather than, as appears to be suggested by the liquidators, the issue of 616 separate sets of proceedings, all relating to the same alleged defects in the same built development.
61. It is therefore my view that the proceedings are properly constituted and the objections of the liquidators by reference to O.15, r.1 (1) are not well-founded.
62. I should have said that I would agree that it appears to be somewhat contradictory for the liquidators to object on the one hand to the issue of these proceedings on the basis that they overlap with the 2019 proceedings and the management company proceedings and therefore constitute – on some unspecified basis – an impermissible proliferation of proceedings, while on the other hand making an argument which would appear to lead to the inevitable conclusion that there would potentially be 616 additional sets of proceedings rather than this single set of proceedings. While the submission was made at hearing that there should only be six summonses, this is a reference to the fact that cover has only been confirmed to date in relation to six units. This submission therefore assumes success on the subrogation related objection. The logical consequence of the argument by reference to Order 15, however, is that the liquidators are saying that up to 616 separate summonses should issue. On the contrary, it seems to me that this is a peculiarly appropriate case for the joinder of the unit owners as co-plaintiffs in the same proceedings.

Conclusion

63. In my view, there is no valid objection to the grant of leave to the plaintiff to issue the within proceedings. The intended plaintiffs have already sued a variety of defendants associated with the design and construction of the development in which they now own units. In effect, they now seek to preserve their position, both as regards the statute of limitations and as regards s. 35(1)(i) of the Civil Liability Act, 1961. In my view, this is not a claim that could be more conveniently dealt with in the liquidation nor are the objections to the grant of leave well-founded.
64. I therefore propose to grant the relief sought at para. 1 of each of the originating notices of motion and I will list the matter before me for mention early in the new legal term in order to deal with costs.