

APPROVED

[2021] IEHC 620



THE HIGH COURT

2016 No. 3533 P

BETWEEN

DONAL CAREY

PLAINTIFF

AND

PAUL SWEENEY
(TRADING AS PAUL SWEENEY FINANCIAL SERVICES)

CANTOR FITZGERALD IRELAND LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 October 2021

INTRODUCTION

1. This judgment is delivered in respect of an application for leave to amend pleadings. The plaintiff seeks to amend his statement of claim to elaborate upon a plea of breach of statutory duty. Whereas the original version of the statement of claim had pleaded breach of statutory duty in general terms, no details of the specific statutory provisions said to have been breached had been provided.
2. The application for leave to amend is opposed solely on the basis that the proposed amendments fail to disclose a reasonable cause of action. It is submitted that an application to amend pleadings is subject to a threshold analogous to that governing an application to dismiss proceedings as bound to fail.

NO REDACTION REQUIRED

SUMMARY OF THE CLAIM AS INITIALLY PLEADED

3. In circumstances where this matter comes before the court on the basis of an interlocutory application for leave to amend the statement of claim, it is neither necessary nor appropriate to make any findings on disputed facts. The summary which follows is based on the case as pleaded in the statement of claim, and on documents the content of which is not in dispute. (The legal effect of these documents is very much in dispute).
4. The plaintiff is a businessman. As of 2011, the plaintiff had accumulated significant savings and wished to invest same. The first named defendant is what is described as a “*financial intermediary*”. The plaintiff pleads that he relied upon the advice, expertise and skill of the first named defendant.
5. The first named defendant introduced the plaintiff to a firm of stockbrokers known as “*Dolmen Stockbrokers*”. The second named defendant has since taken over Dolmen Stockbrokers. It is agreed, at least for the purpose of this application, that the second named defendant would be responsible for any wrongdoing on the part of Dolmen Stockbrokers in respect of the provision of financial services to the plaintiff.
6. For ease of exposition, the plaintiff will be referred to as “*the Investor*”; the first named defendant as “*the Financial Intermediary*”; and the second named defendant as “*Dolmen Stockbrokers*” or “*the Stockbrokers*”. Save where necessary to do so, no distinction will be drawn between Dolmen Stockbrokers and Cantor Fitzgerald Ireland Ltd. It should be noted that a related entity, Cantor Fitzgerald Europe, had an involvement in 2011 in providing a particular financial instrument but no claim arises out of this.
7. The Investor had made an application to Dolmen Stockbrokers in February 2011 to open what is described as an “*advisory account*”. The Investor completed and signed a number of forms and letters as part of this application process. The documentation has been

exhibited in a detailed affidavit filed by the senior legal and compliance manager of the stockbrokers.

8. The documentation includes, *inter alia*, an application form filled in and signed by the Investor in respect of the opening of the advisory account with Dolmen Stockbrokers. This application form is dated 21 February 2011. The Investor expressly confirmed and acknowledged that he had been presented with, and had an opportunity to consider, certain specified documentation including information on financial instruments.
9. As part of the application form, the Investor indicated that he would consider investing in equities and derivatives including CFDs, i.e. contracts for difference.
10. The Investor, in that part of the application form which described his attitude to risk, self-identified as a “*risk taker*” by ticking the following box.

“Risk Taker

You are willing to accept high volatility levels and fluctuations in the value of your investments for the prospect of higher returns. You acknowledge that in light of the unpredictable nature of stock markets your investment may carry an increased risk of potential loss in excess of the initial amount invested.”

11. The Investor also ticked a box which indicated that people who knew him would describe him as an “*aggressive risk taker*”.
12. Section 6 B of the application form contained a series of questions in respect of “*Derivatives*”. The first two questions, which concerned the purpose for which the client might consider using derivatives, remained unanswered, with neither the “*Yes*” or “*No*” box ticked.
13. In response to a request to indicate his investment experience in relation to CFDs, the Investor ticked the box marked “*NONE*”. Surprisingly, the Investor then replied to the

question “*How many years have you been investing in these instruments?*” by writing in the answer “*5 yrs*”.

14. The investor acknowledged receipt of a document entitled “*Advisory Terms & Conditions Booklet*”. The Investor is categorised in this booklet as a “*Retail Client*”. This categorisation is stated to afford the “*highest available level client protections*” on his account.
15. The terms and conditions booklet contains the following statement in respect of “*suitability*”.

“Advisory Service – Suitability

In order to offer you an advisory investment service Dolmen must obtain sufficient information to ensure that advice given to you is suitable. Specifically Dolmen must obtain information relating to your investment knowledge and experience, investment objectives, attitude to risk, financial situation and investment preferences.

If you do not provide this information to Dolmen we may not be in a position to recommend a service or transaction or offer investment advice. Dolmen will rely on information provided by you unless it is manifest that the information is out of date, inaccurate or incomplete. It is your responsibility to inform us so we can ensure that investments on your account remain suitable.

Dolmen will manage your account in accordance with the investment aims of which you have advised us. If our account set-up documentation does not reflect your needs or objectives, please set these out separately in writing to us. Dolmen will continue to manage and trade the account in accordance with the information provided

until such time as the information is amended in writing. If there are any limits or restrictions you wish to place on your account you must write to us to inform us – no amendment will be effective until such time as Dolmen is in receipt of your written instruction.”

16. There is some suggestion in the affidavit filed by the compliance manager that the contract between Dolmen Stockbrokers and the Investor was for “*execution only*” transactions. It is not immediately apparent from any of the documentation which has been exhibited that this was, indeed, the position. The terms and conditions booklet refers to both types.
17. At all events even in the case of an “*execution only*” transaction, the terms and conditions booklet states as follows.

“Where you initiate or propose to transact on an execution only basis in a complex instrument Dolmen are required to consider your knowledge and experience in the context of the instrument demanded to determine whether the instrument is appropriate for you. *If on the basis of the information to hand Dolmen considers that the instrument is not appropriate for you we will warn you.* In certain cases if we consider that it is not in your best interests we will refuse to proceed with the transaction. Any determination by Dolmen in this regard (including any warning or refusal to deal) is not investment advice and should not be relied on as such. Dolmen will not be assessing the suitability of the investment for you. *Our obligation is limited to assessing your knowledge and experience.*”

*Emphasis (italics) supplied.

18. The terms and conditions booklet contains, *inter alia*, the following information on “*Complex financial instruments*”.

“The following information does not disclose all the risks and features of trading in derivative products such as CFD’s, warrants, futures and options. The price of derivatives products, are directly dependent upon the value of one or more investment instruments. Volatility in these underlying instruments may have a profound effect on the value of such derivative products. Trading in derivatives is not suitable for many retail clients. You should not deal in derivatives unless you understand the nature of the transactions you are entering into and the extent of your exposure to risk and potential loss.

You should carefully consider, and if necessary, seek professional advice to determine whether trading is appropriate for you in the light of your experience, objectives, financial resources and other relevant circumstances. Different instruments involve different levels of exposure to risk, and in deciding whether to trade in such instruments you should be aware of the following information:

[...]

A CFD provider requires margin in the form of cash or other acceptable collateral, before a position in a CFD can be taken. This is called the ‘initial margin’. The amount of margin is small relative to the underlying value of the contract so that the transactions are ‘leveraged’ or ‘geared’. If the market moves against your position or margin levels are increased, you may be called upon to pay substantial additional funds on short notice to maintain your position.

If you fail to comply with a request for additional funds within the time prescribed, your position may be liquidated at a loss and you will be liable for any resulting deficit. When you go short a CFD, (e.g. have a short position in an underlying security) then risk is unlimited. You should be very familiar with the underlying security of any CFD agreement you enter into.”

19. The Investor subsequently signed a letter addressed to Dolmen Stockbrokers on 7 March 2011. In this letter, the Investor confirmed that he deemed himself to be a “*suitable investor*” (as defined) for the purpose of dealing in contracts for difference instruments. The Investor also expressly stated that he fully understood the risks involved with trading on margin via contracts for difference.
20. It is pleaded in the statement of claim that the Investor executed two separate application forms for contracts for difference on 7 March 2011 at the Financial Intermediary’s office. It seems that one of these applications had been addressed to Cantor Fitzgerald Europe. It should be explained that no claim is made against that latter company. The claim against the separate entity, Cantor Fitzgerald Ireland, is made solely on the basis that it subsequently took over Dolmen Stockbrokers.
21. The statement of claim, at paragraphs 16 and 29, purports to identify inconsistencies between the information provided in these two application forms dated 7 March 2011, and the application form completed by the Investor on 23 February 2011. These inconsistencies relate to the experience of the Investor in dealing and trading in CFDs; and as to the extent of the Investor’s savings. The gravamen of these pleas is that Dolmen Stockbrokers well knew that the information provided in the latter application forms was incorrect.

22. It is further pleaded, at paragraphs 17 to 19, that the (then) compliance manager in Dolmen Stockbrokers had raised certain queries internally as to the suitability of the Investor for a CFD account, and that the response made to those queries was incorrect.

23. The following plea is made at paragraph 21 of the statement of claim.

“At all material times, investments in CFDs are extremely high risk and are not understood by persons (such as the Plaintiff) who do not have extensive or in-depth knowledge and experience of such investments. The Defendants and each of them either knew or ought to have known that the said investments were not, and could not have been, understood by the Plaintiff. Further the combination of a speculative high risk investment in shares (in San Leon Energy) with a high risk investment tool of CFDs placed the overall investment at the highest end of the risk spectrum. The precise level of risk involved in the transaction was never communicated or explained to the Plaintiff. Further, at all material times, the said investments were entirely inappropriate for the Plaintiff’s investment experience, knowledge, financial and investment risk profile and investment objectives. It was also plainly inappropriate to invest the entire of the Plaintiff’s cash resources in high risk speculative investments of this kind.”

24. The statement of claim goes on then to plead that the Investor sustained losses of €901,380 in the first trading year.

25. At paragraph 29 of the statement of claim, a series of pleas, described as “*particulars*” of negligence and/or breach of duty (including statutory duty) and/or misrepresentation, negligent misstatement and/or breach of contract are set out. These include, *inter alia*,

pleas to the effect that Dolmen Stockbrokers failed to ensure that the Investor was a suitable investor for trading in speculative shares and CFDs. It is also pleaded that the stockbrokers failed to identify and/or consider and/or act upon the “*obvious differences*” between the two sets of application forms, i.e. in February and March 2011, respectively.

EVENTS LEADING UP TO APPLICATION TO AMEND

26. The original version of the statement of claim had pleaded breach of statutory duty in general terms, but had not provided details of the specific statutory provisions said to have been breached. Particulars were subsequently provided on 27 October 2017 in response to a request for particulars served on behalf of the second named defendant, i.e. the stockbrokers. It was stated that the plaintiff would rely on the EC (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007) and the Investment Intermediaries Act 1995. A number of individual regulations were recited, although these did not include regulation 76 upon which much emphasis is now placed.
27. Thereafter, the Investor’s solicitors purported to serve what were described as “*further particulars of wrongdoing*” on 23 January 2020. These further particulars were unsolicited, in the sense that the replies for particulars served on behalf of Dolmen Stockbrokers had already been responded to several years earlier and no further request made.
28. There then followed a period of procedural skirmishing, with Dolmen Stockbrokers objecting to the failure to serve a notice of intention to proceed; to the late delivery of a reply to defence; and to the propriety of serving unsolicited particulars. It was said in correspondence that the allegations comprised in the notice of further particulars do not currently form part of the plaintiff’s pleaded claim; and that if the plaintiff wished to

introduce these allegations then he should bring an application for leave to amend his statement of claim.

29. The Investor formally maintains the position that an amendment of the pleadings is not necessary in that the material can properly be provided by way of particulars. Notwithstanding this formal position, the Investor has moved an application for leave to amend. This is done in circumstances where the second named defendant has made it clear in correspondence that it will not accept that particulars have been properly delivered.
30. The motion for leave to amend came on for hearing before me commencing on 12 October 2021. The hearing spilled into a second day.
31. The plaintiff has issued separate motions seeking discovery and replies to particulars. These motions have been adjourned pending the outcome of the application for leave to amend the statement of claim.
32. Finally, it should be explained that judgment in default of appearance has been entered against the first named defendant, i.e. the financial intermediary. For reasons which are not entirely clear, the financial intermediary has since purported to enter an appearance. At all events, the financial intermediary did not attempt to participate in the application for leave to amend.

THE PROPOSED AMENDMENTS

33. The proposed amendments fall into two tranches as follows. The first tranche relates to the interactions between the Financial Intermediary (the first named defendant) and Dolmen Stockbrokers (the second named defendant). These amendments are all predicated on alleged breaches of sections 26 and 28 of the Investment Intermediaries Act 1995. It is alleged, *inter alia*, that the Financial Intermediary was regulated as a

“*restricted activity investment product intermediary*”, and was not permitted to engage in trading derivative instruments such as CFDs; that Dolmen Stockbrokers should not have accepted orders transmitted by the Financial Intermediary; and that Dolmen Stockbrokers failed to cause reasonable enquiry to be made that the Financial Intermediary complied with the Act.

34. The second tranche of proposed amendments relates to the EC (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007). These are the domestic regulations which had governed the provision of investment services in financial instruments at the time the transactions the subject-matter of these proceedings were entered into in the year 2011. The regulations had transposed the European Directive on markets in financial instruments (Directive 2004/39/EC). This Directive is often referred to by the shorthand “*MiFID I*”. It has since been replaced by a recast Directive, Directive 2014/65/EU, referred to as “*MiFID II*”.
35. The proposed amendments comprise pleas to the effect that Dolmen Stockbrokers had breached two provisions of the EC (Markets in Financial Instruments) Regulations 2007, namely regulation 76 and regulation 94. Regulation 76 requires an investment firm to ensure, *inter alia*, that appropriate information is provided in a comprehensible form to clients or potential clients, so that they are reasonably able to understand the nature and risk of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis.
36. When providing “*investment advice*” or “*portfolio management*”, an investment firm is required to obtain all of the information about (a) the client’s or potential client’s knowledge and experience in the investment field relevant to the specific type of product or service offered to the client by the investment firm, (b) the client’s financial situation,

and (c) the client's investment objectives, that is necessary to enable the firm to recommend investment services and financial instruments that are suitable for the client.

37. Regulation 94 stipulates, *inter alia*, that an investment firm shall obtain from clients or potential clients such information as is necessary for the firm to have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria:
- (i) it meets the investment objectives of the client in question;
 - (ii) it is such that the client is able financially to bear any related investment risks consistent with the client's investment objectives;
 - (iii) it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of the client's portfolio.
38. It is alleged, as part of the proposed amendments to the statement of claim, that Dolmen Stockbrokers failed to ascertain properly the Investor's financial situation and/or investment objectives, such as would have been necessary to permit it to recommend suitable investment services and financial instruments. It is pleaded that Dolmen Stockbrokers failed to obtain all of the requisite information about the Investor's knowledge and experience in the investment field relevant to the specific type of product/service offered. The earlier plea that the information in respect of the Investor's experience in dealing in CFDs, as stated on the application forms of March 2011, was incorrect, is repeated, and this is said to entail a breach of regulation 76.
39. It is further pleaded that, in breach of regulation 94, Dolmen Stockbrokers did not have a reasonable basis for believing that the investment satisfied the following criteria: (i) that it met with the investment objectives of the Investor; (ii) that it was such that the Investor

was able to financially bear any related risks consistent with his investment objectives; and (iii) that the Investor had the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

LEGAL TEST FOR APPLICATION TO AMEND

40. 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. 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.
41. 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. [...]"

42. In the present case, the application for leave to amend is opposed solely on the basis that the proposed amendments fail to disclose a reasonable cause of action and are bound to fail. This ground of opposition presents a question of principle as to the extent to which it is permissible, on a procedural motion to amend, to embark upon a consideration of the merits of the proposed amendments.
43. The court has helpfully been referred to two authorities on this question as follows. The first is the judgment of the High Court in *Woori Bank v. KDB Ireland Ltd* [2006] IEHC 156 (Clarke J.). There, it was held (at paragraph 21) 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.

44. The second judgment relied upon, *Cuttle v. ACC Bank plc* [2012] IEHC 105 (Kelly J.), elaborates upon this theme and draws an analogy of sorts between an application to amend and an application to dismiss proceedings as an abuse of process. The judgment emphasises that it is not the task of the court to adjudicate on the merits of the proposed amendments or to speculate on the likelihood of their success at trial. The judgment goes on to say that the appropriate test is whether the proposed amendment, had it been part of the original statement of claim, would have survived an application to strike out *in limine* on the basis of having no reasonable prospect of success. (The parties in *Cuttle* had been in agreement that this was the appropriate test to apply).
45. The judgment then states that the court, in the exercise of its discretion to grant leave to amend, must bear in mind the very limited circumstances in which an application to strike out or dismiss proceedings can be successfully made.
46. The general approach in *Cuttle* has since been endorsed by the Court of Appeal in *Dormer v. Allied Irish Bank plc* [2017] IECA 199.
47. It should be explained, however, that *Woori Bank* and *Cuttle* were both cases where the proposed amendments sought to introduce a *new issue* into the existing proceedings. By contrast, in the present case, the amendments merely elaborate upon existing pleas. The principal facts now sought to be relied upon in support of the allegation that there had been a breach of the EC (Markets in Financial Instruments) Regulations 2007 are set out in the original statement of claim. For example, the alleged discrepancy between the various application forms completed by the Investor in February and March 2011, respectively, is already part of the pleaded case. It is also part of the pleaded case that Dolmen Stockbrokers acted in breach of duty in recommending or advising that a “*highly inexperienced equity investor*” should commit his entire cash savings to an investment in high risk shares via contracts for difference.

48. Against this background, any analogy between an application for leave to amend and an application to dismiss proceedings is far weaker than in a case in which it is sought to introduce a *new issue* by way of amendment. This is because, in ruling on the application for leave to amend, the court is confined to considering the proposed amendments. The court cannot go further and dismiss parts of the statement of claim as originally pleaded. This could only be done if an application to dismiss had been brought. Where, as in the present case, the proposed amendments merely elaborate upon existing pleas, the refusal of leave to amend would not remove the underlying issue from the case. Dolmen Stockbrokers would, for example, still have to respond at trial to the claim that the investments were “*entirely inappropriate*” having regard to the Investor’s supposed lack of experience, knowledge and understanding.
49. The refusal of leave to amend, far from assisting in the determination of the real questions in controversy between the parties, is instead likely to create confusion. The refusal would, presumably, be relied upon by the defendant as entailing a finding by this court in respect of the underlying merits of the case. There would then be an unnecessary debate as to the implications of the ruling on the application to amend. It is preferable, and more consistent with the stated purpose of Order 28, rule 1 of the Rules of the Superior Courts, to allow the amendments. The precise legal basis for the extant claim for breach of statutory duty will have been clarified, and it will then be a matter for the trial judge to rule on the merits of that claim.
50. An attempt to assimilate an application to amend with an application to dismiss also runs the risk of procedural unfairness. A plaintiff who advances an application to amend on the understanding that the court will not enter upon an appraisal of the underlying merits of the amendment (unless it is manifest that the issue sought to be raised by the amended pleading must necessarily fail) may find him or herself criticised for omitting to have

adduced affidavit evidence in respect of the merits of their claim. In the present case, Dolmen Stockbrokers are highly critical of the failure of the Investor to have sworn an affidavit himself. The absence of direct evidence from the Investor is said to fail to meet the threshold of a “*credible basis*” for the claim as required to resist an application to dismiss (*Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21; [2014] 2 I.R. 301 (at paragraph 19)). For the reasons explained at paragraphs 75 and 76 below, this objection is not well founded. For present purposes, the very fact that the objection was made highlights the difficulties in allowing a motion for leave to amend to be recast as a form of reverse application to dismiss.

51. The modern case law emphasises the need to ensure that the real issues in controversy between the parties are brought out. As explained by the Supreme Court in *Moorehouse* (cited earlier), an application for leave to amend should ordinarily be allowed unless it causes prejudice to the other side. Save in those cases where the proposed amendments introduce a new claim or issue into the proceedings, it seems preferable that any more detailed consideration of the underlying merits of the claim be deferred unless and until an application to dismiss is brought.
52. The appropriate sequence of events is to allow an amendment, and, if necessary, for an application to dismiss to be brought subsequently. There are practical benefits in this approach. First, the court, in deciding whether or not to dismiss the claim, will be entitled to look at the *entire* of the case made. It will not be confined to the proposed amendments. Secondly, by precluding a defendant from hijacking an application for leave to amend and translating same into an application to dismiss, the court avoids the risk of potential unfairness.
53. As it happens, in the present case I am satisfied, for the reasons which follow, that the proposed amendments would survive an application to dismiss.

TEST GOVERNING AN APPLICATION TO DISMISS

54. The jurisdiction to strike out or to dismiss proceedings is intended to protect against an abuse of process. The principal question for the court in determining such an application is whether the *institution* of the proceedings represents an abuse of process. It is not enough that the court might be satisfied that the case is a very weak one and is likely to be successfully defended. Rather, the court must be satisfied that the proceedings disclose no cause of action and/or are bound to fail.
55. For the reasons explained by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* (at paragraphs 16 to 18), it is important to distinguish between the jurisdiction to strike out and/or to dismiss proceedings pursuant to (i) Order 19 of the Rules of the Superior Courts, and (ii) the court's inherent jurisdiction. An application under the Rules of the Superior Courts is designed to deal with circumstances where the case as pleaded does not disclose any cause of action. For this exercise, the court must assume that the facts—however unlikely that they might appear—are as asserted in the pleadings.
56. By contrast, in an application pursuant to the court's inherent jurisdiction, the court may to a very limited extent consider the underlying merits of the case. If it can be established that there is no credible basis for suggesting that the facts are as asserted, and that the proceedings are bound to fail on the merits, then the proceedings can be dismissed as an abuse of process. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted, and which are necessary for success in the proceedings.

57. The limitation on the assessment of credibility has been explained as follows by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* (at paragraph 19):

“It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail. It must be recalled that a plaintiff, like any other party, has available the range of procedures provided for in the RSC to assist in establishing the facts at trial. Documents can be discovered both from opposing parties and, indeed, third parties. Interrogatories can be delivered. Witnesses can be subpoenaed and can, if appropriate, be required to bring their documents with them. Other devices may be available in particular types of cases. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan v. Osseous Ltd.* [1992] I.R. 425, at p. 428, that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.”

58. I turn next to apply these principles to the proposed amendments in respect of which leave to amend is sought.

EC (MARKETS IN FINANCIAL INSTRUMENTS) REGULATIONS 2007***Submissions***

59. Dolmen Stockbrokers' contention that the claim for damages for the alleged breach of the EC (Markets in Financial Instruments) Regulations 2007 is bound to fail is advanced by reference to the following two arguments. First, it is said that even if a breach of the Regulations were established (which is denied), same would not sound in damages. As of the date of the impugned transactions in the year 2011, the Regulations did not afford an aggrieved client of a regulated firm a right of action in damages even where the firm was in breach. A right of action was only introduced subsequently, by section 44 of the Central Bank (Supervision and Enforcement) Act 2013, but this amendment is said not to avail the Investor as it does not have retrospective effect.
60. This interpretation of the domestic legislation is said to be consistent with EU law. The Court of Justice of the European Union has confirmed that it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with the obligations imposed by the European Directive on markets in financial instruments (Directive 2004/39/EC), subject to observance of the principles of equivalence and effectiveness (Case C-604/11, *Genil 48 SL*). It is said to follow, by parity of reasoning, that it is for the individual Member States to determine whether a breach of domestic legislation implementing the Directive should give rise to a right of action for damages.
61. This submission on EU law is correct insofar as it goes. It is not, however, determinative of the separate question as to whether such a right of action had been provided for under domestic law at the time of the impugned transactions.
62. Secondly, it is said that the claim is unsustainable in light of the contractual relationship between the Investor and the Stockbrokers. Reliance is placed on the documentation signed by the Investor in February 2011 as part of his application to open an advisory account. It is said that the Investor, having ordered his contractual relationship on the

basis of his representation that he understood the risk associated with dealing in shares and contracts for difference, cannot now claim that those transactions were unsuitable. The judgments in *European Property Fund plc v. Ulster Bank Ireland Ltd* [2015] IEHC 425 and *McCaughey v. Anglo Irish Bank Corporation Ltd* [2011] IEHC 546; [2012] 4 I.R. 417 were cited in support of this proposition.

Findings of the court

63. The question of whether the breach of any particular statutory provision gives rise to an action for damages is ultimately a matter of statutory interpretation. It is not necessary that the legislation *expressly* state that damages lie: an action for damages may be implicit from the scheme of the legislation. Factors to be considered in interpreting the underlying legislation will include, *inter alia*, whether the legislation protects an identifiable class of individuals; whether any alternative remedies are provided for under the legislation; and the subject-matter of the legislation: an action for damages may be more readily implied in the case of, for example, legislation which regulates health and safety.
64. Dolmen Stockbrokers have not sought to analyse the EC (Markets in Financial Instruments) Regulations 2007 in any detail, with a view to demonstrating that no action for damages lies. Rather, the essence of their argument is that it is to be inferred from the *subsequent* introduction of an express right of action under the Central Bank (Supervision and Enforcement) Act 2013 that no such right existed before. It is asked rhetorically that if there was already a private law right of action in damages under the original legislation, what then was the point of making an amendment?
65. With respect, it is generally impermissible to rely on a subsequent amendment to interpret earlier legislation. (See D. Dodd, *Statutory Interpretation in Ireland*, 2008, Bloomsbury Professional, §§4.33 to 4.35, citing, in particular, *Carney v. Balkan Tours Ltd*

[1997] 1 I.R. 153). The question of whether a breach, in the year 2011, of the EC (Markets in Financial Instruments) Regulations 2007 gave rise to a right to damages on the part of an adversely affected client of a regulated investment firm falls to be determined by reference to the legislation as it stood on that date. The trial judge will have to consider, for example, whether the protections provided for “*retail clients*” were intended to be enforceable by an action for damages.

66. It does not follow as a corollary of the introduction of an express right of action some years later that there was not previously an implied right. It cannot be inferred that the only sensible explanation for the legislative amendment is that the Oireachtas must have “*known*”—notwithstanding the absence of any decided judgment either way—that there was no private right of action in damages where an investor suffered loss as a result of a breach of financial services legislation by a regulated firm, and had resolved to correct this supposed mischief. It is at least as plausible to suggest that the amendment was merely declaratory of an existing right of action, and that the purpose of the amendment was to provide transparency and certainty in the context of legislation which is intended to protect retail clients.
67. It should be reiterated that this court is not deciding, on the procedural application to amend, whether or not an action for damages for breach of the EC (Markets in Financial Instruments) Regulations 2007 had existed in 2011. That is ultimately a matter for the trial judge. It is sufficient for the purpose of this amendment application to find that the arguments in favour of the existence of such a right in 2011 are not bound to fail.
68. Turning to the second line of argument advanced on behalf of Dolmen Stockbrokers, the facts of the present case are clearly distinguishable from those of *European Property Fund plc*. There, the High Court (Costello J.) had acceded, in part, to an application to dismiss proceedings as bound to fail. It was held that the plaintiffs were precluded, by

virtue of their having agreed to certain contractual exclusionary terms, from pursuing a claim for, *inter alia*, misrepresentation and mis-selling. It had been an express term of the contractual relationship that the plaintiffs were not relying, and had not relied, on any communication (written or oral) of the other party as investment advice or as a recommendation to enter the impugned transactions. The plaintiffs had been categorised as “*professional clients*” for the purpose of the EC (Markets in Financial Instruments) Regulations 2007.

69. The High Court held that the exclusionary terms were clear and enforceable, and that they precluded the plaintiffs from bringing any of the claims against the defendant other than a plea of fraud or fraudulent concealment.
70. By contrast, the Investor in the present case had been characterised as a “*retail client*”, which categorisation is stated in the terms and conditions to afford the “*highest available level client protections*”. Dolmen Stockbrokers have not brought the court’s attention to any exclusionary terms similar to those at play in *European Property Fund plc*. Moreover, it does not appear from the judgment in that case that a claim for breach of statutory duty had been pursued.
71. Similarly, the result in *McCaughey v. Anglo Irish Bank Corporation Ltd* also turned, in large part, on the existence of detailed exemption clauses. There does not appear to have been any case made pursuant to the EC (Markets in Financial Instruments) Regulations 2007. Tellingly, the judgment records that leave to amend the pleadings, so as to include a claim under the consumer protection legislation, had been allowed but was not ultimately taken up by the plaintiff. The grant of leave to amend suggests that the court did not consider that the exemption clauses meant that a claim for breach of statutory duty was bound to fail.

72. Returning to the present case, the claim for breach of statutory duty advanced in the proposed amendments is novel and legally complex. There does not appear to be any case law directly on point as to whether an investment firm is entitled, in the fulfilment of its obligations under the EC (Markets in Financial Instruments) Regulations 2007, to rely on a retail client's own *subjective* assessment of their investment experience. It is at least arguable that regulation 76 envisages that the investment firm will carry out its own *objective* assessment. Separately, an issue arises as to whether Dolmen Stockbrokers were put on inquiry in consequence of a seeming discrepancy in the description of the Investor's experience as between the various application forms.
73. This is also a case where the discovery of documents may be significant. It has been pleaded as part of the original statement of claim that the (then) compliance manager in Dolmen Stockbrokers had raised certain queries internally as to the suitability of the Investor for a CFD account, and that the response made to those queries was incorrect. The Investor is entitled to pursue this further by way of discovery. It would be potentially unfair to refuse leave to amend in circumstances where discovery has not yet been made in these proceedings. His application for discovery has been adjourned pending the outcome of the application to amend.
74. It should be reiterated that it is not for this court, on the procedural application to amend, to determine the extent, if any, to which Dolmen Stockbrokers are entitled to rely on the content of the application forms signed by the Investor in the context of the Regulations. That is ultimately a matter for the trial judge. It is sufficient for the purpose of this amendment application to find that, for the reasons outlined above, the legal position is not clear-cut, and the claim cannot be said, at this stage, to be bound to fail.
75. Finally, it is convenient at this point to address the objection that the Investor did not himself swear an affidavit in support of his application to amend. The rationale

underlying this objection appears to have been that in order to demonstrate that there was a “*credible basis*” for his claim, as per *Lopes v. Minister for Justice Equality and Law Reform* (cited earlier), the plaintiff should have gone on affidavit himself.

76. With respect, no such affidavit evidence was necessary for the purpose of the application to amend. No factual dispute, relevant to the application to amend, arose which required to be addressed. The affidavit filed by the compliance manager consists largely of legal argument and submission. The compliance manager does not purport to have had any direct involvement in the events of 2011. The compliance manager merely exhibits the contemporaneous documentation and then proceeds to set out, at length, her own views on the *legal effect* of same. This is inappropriate and has no place in an affidavit. It did not merit a replying affidavit from the plaintiff personally.
77. The authenticity of the documentation exhibited on behalf of Dolmen Stockbrokers has not been challenged. It has not been submitted on behalf of the plaintiff that he did not sign the exhibited forms nor that he signed them by mistake as to their meaning. Accordingly, no affidavit evidence was required. Rather, the dispute between the parties centres on the legal implications of the Investor having signed this documentation, and the extent to which it can be relied upon as discharging the obligations of an investment firm under the EC (Markets in Financial Instruments) Regulations 2007. Even allowing that a retail client may have self-identified as an experienced investor, there is still a legal argument to be made as to the obligations upon the investment firm. This is especially so given the existence of certain discrepancies between the information provided in the two application forms dated 7 March 2011, and the earlier application form completed by the Investor on 23 February 2011.

INVESTMENT INTERMEDIARIES ACT 1995

78. Dolmen Stockbrokers submit that the claim for damages for the alleged breaches of sections 26 and 28 of the Investment Intermediaries Act 1995 is bound to fail because the Act is inapplicable. Upon the commencement of the EC (Markets in Financial Instruments) Regulations 2007, the provisions of the earlier legislation were disapplied in respect of investment firms with effect from 1 November 2007.
79. An “*investment firm*” is defined, in regulation 3, as meaning:
- “any person ... which person’s regular occupation or business is the provision of one or more investment services to third parties on a professional basis.”
80. It is averred, at paragraph 9 of the compliance manager’s affidavit, that Cantor Fitzgerald Ireland Ltd is an “*investment firm*”.
81. Counsel for the Investor makes the technical objection that it is the status of Dolmen Stockbrokers in 2011, rather than the status of its successor, Cantor Fitzgerald Ireland Ltd, in 2021, that is relevant. The averment is said to be confined to the latter company’s status. In response, counsel for the defendant refers the court to another paragraph of the compliance manager’s affidavit.
82. The argument that Dolmen Stockbrokers had not been subject to regulation under the Investment Intermediaries Act 1995 at the time of the relevant events in 2011 would, if well founded, be a complete answer to the claim under the Act. It is not possible, however, on the basis of the affidavit evidence to reach a concluded view on the company’s status. The affidavit evidence is ambivalent, and, in any event, it is ultimately a mixed question of fact and law as to whether a particular entity fulfils the statutory definition.

83. More fundamentally, however, it would not be in keeping with the purpose of Order 28, rule 1 to refuse leave to amend in respect of the proposed amendments regarding the Investment Intermediaries Act 1995. The gravamen of the case is that Dolmen Stockbrokers did not comply with their regulatory obligations. One of the very first issues which the trial judge will have to decide is whether the stockbrokers were subject to regulation under either the Investment Intermediaries Act 1995 or the EC (Markets in Financial Instruments) Regulations 2007. The plaintiff is entitled, on the basis of the affidavit evidence to date, to advance these alternative arguments.
84. The resolution of the question as to which regulatory regime applied in 2011 is unlikely to take up much time at the trial of the action nor to add materially to the legal costs. It is preferable to allow the amendments, so as to ensure that the trial judge can address all of the issues in controversy between the parties. It would be premature for this court to purport to decide this preliminary issue.

CONCLUSION AND FORM OF ORDER

85. The plaintiff is granted leave to amend his statement of claim pursuant to Order 28, rule 1 of the Rules of the Superior Courts. The permitted amendments are as per the draft amended statement of claim exhibited. The amended statement of claim is to be delivered within 28 days of the perfection of the order. The second named defendant is to deliver its amended defence within 28 days thereafter.
86. Insofar as the allocation of legal costs is concerned, my *provisional* view is that the plaintiff is entitled to recover two-thirds of his costs of the motion for leave to amend. Whereas an application to court was necessitated, it could have been dealt with as a “*short*” motion in a Monday list but for the second named defendant’s unsuccessful objection. In the event, the application to amend ran into a second day. This costs order

is proposed for reasons similar to those explained in *Stafford v. Rice* [2021] IEHC 344.

If either party wishes to contend for a different form of order, they should file written

legal submissions within three weeks of today's date.

Appearances

Esmonde Keane SC and Alan Keating for the plaintiff instructed by Augustus Cullen Law LLP
Paul Gardiner SC, John Breslin SC and Stephen B Byrne for the second named defendant
instructed by Maples and Calder (Ireland) LLP

Approved
Gemma S. Mans