

THE HIGH COURT

[2022] IEHC 367

[2018-3417-P]

BETWEEN

P.C. (A MINOR) SUING BY HER FATHER AND NEXT FRIEND R.C.

PLAINTIFF

AND

DYLAN DORAN, BRENDAN DORAN, BERNADETTE DAWSON AND KILDARE COUNTY COUNCIL

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 13th day of June, 2022

1. This is an application by the fourth named defendant, Kildare County Council, to amend its defence. For the reasons set out below I am allowing the application.
2. The plaintiff's father in her personal injury summons of the 18 April 2018 seeks damages for personal injuries the plaintiff sustained when she was bitten by a dog at premises owned by the fourth named defendant and rented by the other three defendants. The fourth named defendant filed its defence on the 25 February 2019. By letter dated 7 October 2019, the fourth named defendant sought the plaintiff's consent to amend the defence in the terms as set out in an attached draft. The plaintiff's solicitors did not reply to that letter and the fourth named defendant issued the within motion fifteen months later.
3. The amended defence is a fully reworked defence rather than just the original defence with some additional paragraphs. It includes a preliminary objection that was not included in the original defence. The plaintiff contends that the amended defence raises new issues of controversy including an express plea that the personal injury summons contains no sustainable cause of action against the defendant.
4. The fourth named defendant relies on O.28 r.1 which provides as follows:

"The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."
5. The fourth named defendant contends that the amendment is necessary for the purpose of determining the real questions in controversy between the parties and relies on the decision of Gilligan J. in *Croake v. Waterford Crystal Ltd* [2005] 2 I.R. 388, which acknowledges that the court's primary consideration "must be whether the amendments

are necessary for the purpose of determining the real questions of controversy in the litigation”.

6. The fourth named defendant contends that the amended defence arises from the same facts and does not alter the case that the plaintiff will be making at trial. It categorises the “new” preliminary objection as giving rise to legal argument only rather than any new facts, as occurred in *D.G. Gross Premium Masterfund (In Liquidation) v. PNC Global Investment Service (Euro) Ltd now known as BMY Mellon Investments Service (International) Ltd* [2016] IEHC 742 wherein McGovern J., in allowing the amendment sought, found that the amended defence sought to raise legal consequences flowing from matters already canvassed in the original defence.
7. The fourth named defendant says that it decided to seek to amend the defence on the advice of their senior counsel following a liability consultation. The plaintiff criticises them for failing to explain or to explain adequately why those matters were not pleaded earlier, and heavily criticises their delay in proceeding with this application fifteen months after their letter advising the plaintiff’s solicitors of the need to amend the defence, which followed eight months after they filed the original defence. Counsel for the plaintiff urges the court to take account of the fourth named defendant’s conduct in this regard, in determining how its discretion should be exercised.
8. The plaintiff counsel’s main focus was on the prejudice she claimed her minor client will suffer if the amendments are allowed. She accepts that this is, to use the phrase of Clarke J. in *Woori Bank v. KBD Ireland Ltd* [2006] IEHC 156, logistical prejudice. She is concerned at the prospect of a motion to dismiss, the need to file a reply (which she says would not apply to the original defence) and the possibility of requiring further evidence being required from their engineer. The fourth named defendant disputes any such prejudice and claims that any steps required of the plaintiff arising from the amended defence would have been required and/or prudent whether the amendments were made or not, and that any costs flowing therefrom should be left to the trial judge.

Are the amendments necessary to determine the real issues of controversy between the parties?

9. The original defence makes several general pleas including putting the plaintiff to full proof of all matters pleaded in the indorsement of claim, other than some minor admitted matters. It denies the defendant was responsible for the control of their tenants’ dog at the material time as alleged or at all, and denies that it owed any duty of care to the plaintiff or had any responsibility for the care and management of the dog. Significantly at para. 2.1 of the original defence, the fourth named defendant pleads that it is a stranger to the within action as they had no responsibility in the care, management, or supervision of the dog, that the dog was owned and managed by the other defendants, and that in the premises there is no cause of action shown against them, and that the proceedings ought to be dismissed as against them.
10. The amended defence is more specific. It claims that the plaintiff’s claim is misconceived and bad in law in circumstances where the personal injury summons contains no

sustainable cause of action as against the fourth named defendant. The amended defence denies the application of the Occupier's Liability Act 1995 or the Control of Dogs Act 1986, or that the personal injury summons identifies any cause of action for breach of contract, or any contractual relationship or breach of contract, as against the fourth named defendant. A number of the remaining pleas are largely similar to the pleas contained in the original defence, but it seems that the fourth named defendant determined it better to phrase its defence in the amended manner.

11. The plaintiff contends that the amended defence raises new issues of controversy. I do not agree. The amended defence is perhaps more focused but, like the original defence, puts the plaintiff on full proof of her case, and disputes that it owed her any duty of care or that any cause of action is shown against it. The amended pleas arise from the same facts and insofar as the amended defence contains more specific pleas, those are largely legal issues including the inclusion of a preliminary objection. I am therefore satisfied that the amendments fall within the category of being necessary to determine the real issues of controversy between the parties, namely whether there is any cause of action against the fourth named defendant, and whether the fourth named defendant owed the plaintiff any duty of care or any contractual, statutory, or common law obligation.

The fourth named defendant's conduct; delay

12. The plaintiff relies on the fourth named defendant's delay as a factor to be considered. There were some nine months between the filing of the original defence and the fourth named defendant's solicitor notifying the plaintiff's solicitors of the proposed amended defence. I do not consider that to be a substantial delay of any magnitude. The plaintiff also relies on the delay of some fifteen months in issuing the motion. This occurred during the covid-19 pandemic, at a time when the fourth named defendant changed its solicitors, and a time when the plaintiff did not reply to the correspondence from the fourth named defendant arising from its request for the plaintiff's consent to the proposed amendment.
13. Neither period of delay has persuaded the court to refuse the defendant's request.

The adequacy of reasons given

14. The plaintiff criticises the paucity of the defendant's explanation for the need to amend, i.e. senior counsel's advice as following a liability consultation. That is not a surprising or inadequate reason. Even if it was, Clarke J. in *Porterrigde Trading Ltd v. First Active Plc* [2007] IEHC 313 suggests that this is not an issue on which any great weight is to be placed, "save where there is a fine balance involved in assessing the competing interests of justice arising". No such fine balance arises here. The defendant's explanation is therefore both credible and sufficient.

Prejudice

15. An important issue in the exercise of the court's discretion is the prejudice that the plaintiff will suffer if the amendments are permitted. Whilst I appreciate the plaintiff's concerns, particularly in relation to the prospect of a motion to dismiss, which she seemed to view as inevitable, I do not consider that her exposure to such a strategy by

the fourth named defendant is significantly greater whether the amendments sought are granted or not. Either way, the plaintiff must prove her case that the fourth named defendant is responsible for the injury she suffered, by virtue of owning the property on which their tenants' dog inflicted injuries on her. It is open to the fourth named defendant to issue a motion to dismiss, or to wait until the trial and make its case there that there is no cause of action, duty of care or statutory, contractual or common law duty owed by it to the plaintiff. The plaintiff's exposure to such arguments, whether by way of an interlocutory motion, preliminary objection, or substantive defence, is a prejudice created not by the lateness of the amended defence but rather by the nature of the plaintiff's claim, and the fourth named defendant's defence. Clarke J. in *Woori Bank v. KDP Ireland Ltd* [2006] IEHC 156 identified the prejudice that needs to be established as "a prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered. The prejudice must stem, therefore, from the fact of the belated alteration in the pleadings rather than the presence (if allowed) of the amendment itself."

16. A respondent to a motion to dismiss would have to show far more tangible prejudice, possibly verging on irremediable prejudice and more than a prejudice that could be ameliorated by something like an adjournment or an appropriate costs order. I find support for that in the decision of McMenamin J. in *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21, where he stated "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." Support for this approach can also be found in the decision of Clarke J. in *Potteridge Trading Ltd v. First Active Plc*, referring to the possibility that some additional element of effort and expense will, even in the simplest of cases, inevitably result from an alteration in the course of the proceedings. He stated "To the extent that extra legal costs are incurred then the court can deal with same by making an appropriate order as to such costs."
17. The plaintiff's counsel stated that she did not intend to file a reply to the original defence, but says she will now have to file one to the amended defence. On that basis she asked the court to direct the defendant to indemnify the plaintiff in relation to that and any other expenses arising from the amended defence if the court allows the amendments to be made. I am not satisfied that any additional costs to the plaintiff can be definitively identified as arising from the amended defence furnished by the plaintiff eight months after the original defence, and well before any request for voluntary discovery or the matter being set down for trial. The matter might be different if the application to amend was made at a very late stage, such as on the morning of the hearing as occurred in *Bell v. Pederson* [1995] 3 I.R. 511.

Conclusion

18. This is a relatively unusual amendment for an applicant to make as rather than a few extra paragraphs, it seeks to replace the entirety of the defence. Nevertheless, I am satisfied that the amended defence sought to be made arises from the same set of facts, raises legal consequences from those facts already raised, and can be said to be necessary for the purpose of determining the real questions in controversy between the parties. The reasons why the pleas are not included in the original defence are credible and sufficient. The fourth named defendant's delay of eight months in advising the plaintiff's solicitors of the need to make the amendment, and of fifteen months in bringing this application, do not persuade the court to refuse to allow the amendment. Finally, the prejudice identified by the plaintiff is not of any sufficient magnitude (if it is a prejudice at all), given the relatively early stage in the litigation at which the fourth named defendant identified its need to amend its defence. I am therefore going to allow the fourth named defendant's application to deliver its amended defence in the terms as exhibited.

Indicative view on costs

19. Order 28 r.13 states "The costs of and occasioned by any amendment made pursuant to rules 2 and 3 shall be borne by the party making the same, unless the Court shall otherwise order".
20. Counsel for the plaintiff urges on the court what she says is the court's traditional approach to applications of this kind, granting costs to the opposing party, and cites *Bell v. Pederson* [1996] ILRM 290, *Wolfe v. Wolfe* [2001] 1 I.R. 311 and *Porterridge Trading Ltd. First Active Plc* [2008] IEHC 42. She also emphasises that the plaintiff is a minor and contends that it was reasonable for the plaintiff to oppose the application given the extensive nature of the amendments, i.e. a brand new defence. In those circumstances she disputes that her refusal to consent to the amendment as sought was unreasonable and therefore seeks her costs.
21. The fourth named defendant proposes no order as to costs. Counsel opposes the plaintiff's application for costs and claims that consent was unreasonably withheld, and relies on the decision of Simons J. in *Stafford (as Statutory Receiver of Hollioake Ltd ((in Receivership)) v Rice & Ors* [2021] IEHC 344 and Clarke J. in *Porterridge Trading Ltd v First Active Plc & Ors* [2008] IEHC 42 in persuading the court to disapply the normal approach of O.28 r.13, and disallowing the plaintiff's costs.
22. Order 28 r.13 requires the party seeking the amendment to bear the costs unless the court shall otherwise order. There is no exception expressly provided for where consent had been unreasonably withheld, but there is a line of jurisprudence where the court has adopted that approach, but clearly as an exception to the norm.
23. Whilst I accept that this plaintiff withheld her consent to the defendant's request to amend its defence, given the nature of the extent of amendments sought and, in effect, the replacement of the original defence with a brand new defence, and the plaintiff's concern that this could expose her to a motion to dismiss, I do not consider that her consent was necessarily unreasonably withheld and therefore leaving it to the court to

determine whether the amendments should be permitted. I therefore award costs to the plaintiff in accordance with the "norm" as envisaged by O.28 r.13.

24. For the avoidance of doubt, I do not require the defendant to pay any costs that the plaintiff may contend were caused by the amended defence, including filing a reply thereto. The costs order I have indicated in favour of the plaintiff relates only to their costs in defending this motion, and should be adjudicated upon in default of agreement.
25. I will list the matter before me at 10:30 a.m. on 17 June to allow the parties to make any submissions they wish in relation to costs and final orders, however I do not require written submissions.