



THE HIGH COURT

Record No.: 2015/5528P

BETWEEN:

DESMOND REDDY and BRIAN REDDY

Plaintiffs

-and-

HYPER TRUST LIMITED

Defendant

EX TEMPORE JUDGMENT of Mr. Justice Rory Mulcahy delivered on the 24th day of May 2023

Introduction

1. This matter comes before Court in unusual circumstances and involves the Plaintiffs' attempt to prevent the Defendant pursuing in its Defence and Counterclaim two "heads of loss" (to use a neutral term) the Defendants say are not pleaded therein. The Defendant contends that the heads of loss are pleaded and, in the alternative, that it should be entitled to amend its defence to include those pleas. A draft amended Defence and Counterclaim was provided under cover of a letter dated 27 April 2023. The application arises from the inclusion of the two heads of loss in an expert report of Jim Luby ("**the Report**") delivered on behalf of the Defendant on 3 March 2023.

2. The Plaintiffs are former directors of the Defendant company (“**the Company**”) which owns and operates Leopardstown Inn. Following an examinership process in 2015, the Plaintiffs exited the Company, and new investors took control.
3. Shortly thereafter, the Plaintiffs issued proceedings claiming, *inter alia*, trespass by the Defendant relating to a plot of land adjacent to the lands on which the Leopardstown Inn is located. The Plaintiffs had acquired the lands in question from the Company for IR£20,000 in 2000.
4. The Defendants delivered a Defence and Counterclaim in October 2015. By its Counterclaim, the Defendant pleaded that the Plaintiffs had conveyed the lands to themselves at a “gross undervalue” in breach of their obligations to deal with the Company’s property as trustee. The Counterclaim expressly seeks to set aside the transfer to the Plaintiffs or, in the alternative, declarations that the land is held in trust for the company and that the Company is entitled to the proceeds from the use of the lands. The Counterclaim also seeks damages for breach of trust, misfeasance, negligence, and breach of duty. That relief is not expressly pleaded in the alternative to the reliefs seeking to set aside the transfer.
5. The Plaintiffs raised particulars in October 2015, including in relation to the plea that the lands were sold at an undervalue. The Defendant responded in November 2015 by saying that it had had advice that the land was worth at least IR£150,000 in 2000. In their Reply to the Defence and Counterclaim, the Plaintiffs denied that the lands were undervalued.
6. Separately, the Defendant counterclaimed in respect of payments made by the company between 2001 and 2013. At paragraph 38 of the Defence and Counterclaim, it alleges that the Plaintiffs had caused “certain payments” to be made from the Company to the Plaintiffs, or members of their family for purposes unconnected with the Company. These are referred to as “the Unauthorised Payments” in the Defence and Counterclaim.
7. At paragraph 39, it is pleaded that the Company has had difficulty establishing “*the amount of the Unauthorised Payments*” due to what is alleged to be the deliberate shredding of Company records by the Plaintiffs. It pleads that it could only give an

estimate as to “*the amount of the Unauthorised Payments*”. The Counterclaim thereafter lists 19 separate transactions as the Unauthorised Payments.

8. The Defendant also alleges that this was a breach of the Plaintiffs’ duties to the Company as trustees and seeks orders that the Plaintiffs account for such payments or, in the alternative, that such payments are held on trust for the Defendant, in addition to pursuing the damages claim referred to above.
9. The Plaintiffs raised particulars regarding “*each of the alleged Unauthorised Payments.*” The Defendant repeated its inability to provide further information at that time, stating that the information provided would be supplemented.
10. In its Reply to the Defence and Counterclaim delivered in December 2015, the Plaintiffs denied “*each of the alleged Unauthorised Payments*”.
11. The speed with which proceedings had progressed to that point slowed considerably as issues arose in relation to discovery. Ultimately discovery was exchanged in the summer of 2020. Counsel for the Plaintiffs signed a Certificate of Readiness in August 2022. On 2 December 2022, the case was fixed for hearing in July 2023.
12. The parties agreed the exchange of expert reports. The Defendant was required to deliver its expert reports in relation to its Counterclaim in February 2023. There was a slight delay in delivering Mr Luby’s Report which was then delivered in March 2023.
13. Mr Luby’s Report contains two heads of loss which the Plaintiffs assert have not been claimed by the Defendant in these proceedings. These include a claim for damages regarding land transferred in the range of €244,605 to €559,605. This was based on a valuation obtained from Avison Young, a real estate advisor, placing the value of the lands at a range between €270,000 and €585,000.
14. In addition, the Report includes a claim for an additional eight unauthorised payments. These are described in the Report as “additional items not included in defence and counterclaim”. The total value of the eight items is €1,096,192 (in relation to the first six) and €90,177 (the other two). In total, these amounts increase the quantum of the Defendant’s Counterclaim by more than 50%, from €1,936,674 to €3,227,448.

15. Correspondence was exchanged between the parties in which the parties disputed whether or not these claims were included in the Defendant's Defence and Counterclaim. The Plaintiff sought undertakings that the Defendant would not pursue these claims, which undertakings were not forthcoming. Ultimately the within motion issued, seeking to preclude the Defendant from pursuing claims in respect of the above-mentioned sums and from relying on the relevant portions of Mr Luby's Report. In its reply, the Defendant contends that the matters are pleaded but seeks to amend its Defence and Counterclaim "*for good order and without prejudice to its position that the amounts claimed fall squarely within the pleadings*".
16. There are, therefore, two issues to be determined in respect of each of the heads of loss now claimed. First, whether the claim for either or both of the heads of loss are included in the pleaded Counterclaim. Second, if not, whether the Defendant should be permitted to amend its Counterclaim to include those claims. The second question only arises if the first is answered in the negative in respect of either head of loss.

Are the claims pleaded?

17. In **ASI Sugar Ltd v Greencore Group plc [2003] IEHC 131** the purpose of pleadings is described in the following terms:

"The function of pleadings is to define with clarity and precision the issues of fact and law between the parties. Where issues are so defined each party will have given fair and proper notice to his opponent of the case he has to meet and each party will be enabled to prepare his own case for trial. Discovery can be directed to the issues and the delay and expense thereby incurred minimised: this is particularly important in a case such as the present where discovery even with the issues so defined will be extensive. Further this will enable the court to be aware of the issues before it and the Trial Judge will thereby be better enabled to control the hearing and confine the same within the limits of the pleadings."

18. Taking that as a correct statement of the law, whether a plea can be said to "fall squarely" within the pleadings, to use the Defendant's term, can be assessed by

considering whether the other party has been given fair and proper notice of the claim such as to enable it to prepare for trial.

19. Approaching the matter from this perspective, I am satisfied that the Defendant's claim for damages in respect of the undervalue of the lands the subject of the 2020 transfer is sufficiently identified in the claim to have put the Plaintiff on notice that it was an issue in the case and to enable them to prepare for trial on that issue.
20. The question of whether the lands had been transferred at an undervalue was clearly in issue between the parties. Moreover, the Defendant had particularised that claim in response to a query from the Plaintiffs, by identifying what it claimed was the 'true' value of the lands. The Plaintiffs have denied that the lands were transferred at an undervalue. It could readily have been anticipated from the pleadings, therefore, that the Defendant would lead evidence at the trial regarding the value of the lands and that the Plaintiffs might therefore have to address that evidence at the hearing of the action.
21. The Defence and Counterclaim includes claims for damages under various heads, including for breach of trust. The Defendant expressly pleads that the transfer of the lands at an undervalue constituted a breach of trust. Although the damages claim is not expressly linked to this aspect of the Defence and Counterclaim, nor is it expressly confined to the Unauthorised Payments. In my view, therefore, the issues of material fact and law between the parties regarding the transfer have been pleaded with sufficient clarity to give the Plaintiffs fair notice of this case and to deal with it at trial.
22. It may be, as the Plaintiffs contend, that the Defendant cannot, at the same time, succeed in a claim for loss in the value of the lands and, in effect, the return of the lands, but that does not mean that both claims do not fall within the pleadings. Insofar as the Defendant claims damages, the Plaintiffs say that it is not clear for what the Defendant is seeking damages, whether, for example, it is for the difference in value of the lands, the loss of use, or the loss of rental income from the lands. In my view, these represent particulars of the pleaded claim and can readily be addressed by seeking further particulars.

23. As set out below, even if I am wrong in this conclusion, or had concluded otherwise, I would have little hesitation in allowing the amendment of the Defence and Counterclaim proposed regarding this issue, were it necessitated.
24. I am not, however, satisfied that the claim in respect of the additional unauthorised payments identified in Mr Luby's Report is within the pleaded case. The Defendant's argument that the pleas at paragraphs 38 and 39 make clear that the information therein is not complete due to what it claims is the improper shredding by the Plaintiffs of the Company's records, and that it was clear from the pleadings that additional unauthorised payments may be identified in due course once further investigations could be completed.
25. In my view, however, what appears from the pleadings is a claim in relation to 19 particular transactions, and a plea that the precise amount of each of those particular transactions may be further particularised in due course. There is no indication in the pleadings, or indeed in anything else which was exchanged between the parties until the Report of Mr Luby was provided, that there would be a claim in respect of *any* other payments, let alone the eight individual payments now identified. On no view could it be said that the Plaintiffs were on fair and proper notice that they would have to meet a claim in relation to these eight transactions, or in a position, before 3 March 2023, to prepare for them.
26. It may be the case that some of the transactions at issue were marked with notifications in the discovery exchanged, but the provision of discovery is not a substitute for pleadings and, in any event, these notations could not, in my view, be sufficient to put the Plaintiffs on notice of these claims.
27. In light of that conclusion, it is necessary to consider whether the Defendant's proposed amendment of its Defence and Counterclaim regarding the Unauthorised Payments should be allowed.

Should the proposed amendment be allowed?

28. The Plaintiffs' counsel very fairly acknowledged that the Courts' approach to amendments is permissive and that an amendment will typically only be refused where

the other party would be significantly prejudiced by the amendment. The position is explained in **Croke v Waterford Crystal Ltd** [2004] IESC 97; [2005] 2 IR 383 in which the Court adopted the following statement of principle from **DPP v Corbett** [2001] ILRM 674

“The day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party. While courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendments should be made. If there might be prejudice which could be overcome by an adjournment then the amendments should be made and an adjournment also granted to overcome the possible prejudice and if the amendments might put the other 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.” (at p. 678)

29. In **Woori Bank v KDB Ireland Limited** [2006] IEHC 156, Clarke J (as he then was) considered regarding refusals of amendments in the case of prejudice and stated:

“This latter fact is, in turn, subject to the limitation that where it is possible to deal with the prejudice in a fair and just manner by means other than excluding the party from relying upon the matters sought to be pleaded (such as by an appropriate order for costs) then the amendment should be allowed and the prejudice dealt with in the appropriate way.”

30. In that case, the Court distinguished between substantive prejudice – where a party may be prejudiced by having changed their position in circumstances where a claim was not originally included in the pleadings – and logistical prejudice, for instance, delay. The Court also made clear in that case that the starting point for a consideration of prejudice is that the claim could have been included in the proceedings from the outset.

31. The Plaintiffs claim that they will be prejudiced if now required to meet the claim. It is stated by the first Plaintiff that it took him three years to gather the necessary

information to deal with the original 19 claimed unauthorised payments and that it will take a further significant period of time to deal with these claims. Discovery will be required. Additional documents have already had to be disclosed by the Defendant in light of Mr Luby's Report, and they point to deficits in the information they have. The Plaintiffs point to the fact that both Plaintiffs are in their 70s (the first Plaintiff is 79), and the fact that the proceedings are ready for hearing after a considerable delay. They contend that they should not be required to wait in order to deal with these claims. They point to the very significant and unexplained delay by the Defendant in advancing these new claims.

32. The Defendant argues that all of the relevant documents have already been disclosed and note that the Plaintiffs' expert provided a responding report to Mr Luby's in April 2023 which did not suggest that the expert was not able to deal with these claims, although the claims were not addressed.
33. The Defendant relies on what it says was the Plaintiffs' unlawful destruction of the Company's records to explain the failure to include these claims at the outset. The Plaintiffs deny any such inappropriate behaviour. Both parties accepted that I could not reach any conclusion on this disputed issue but the Defendant says that, insofar as this *might* justify a delay in advancing a claim, the Court should not refuse an amendment. The Defendant's counsel very reasonably accepted that there was no real excuse for the delay in having advanced these claims since the exchange of discovery in 2020.
34. Having regard to all the issues identified by the parties, I do not believe that the Plaintiffs have established that they will be prejudiced in the defence of the Counterclaim to such an extent that the amendment sought should be refused and that it is possible to deal with the potential prejudice to the Plaintiffs in a manner which falls short of excluding what is a significant new claim. At worst, in my view, a short adjournment of the proceedings may be required and even then, possibly only a short adjournment of the aspect of the proceedings dealing with these eight additional payments, although this may not be practicable. Although some emphasis was placed on the Plaintiffs' age, no infirmity was identified which suggests that their ability to defend the claim will be adversely affected by a short delay.

35. In this regard, I note that the Defendant contends that it has already made discovery of all relevant documents though this certainly needs to be clarified given the Plaintiffs contention regarding the absence of bank statements evidencing some of the alleged unauthorised transactions. Moreover, the Defendant's claim regarding these payments seems to be based simply on Mr Luby's Report which states that some payments recorded in bank records are unexplained. Although there is some force to the Plaintiffs' contention that once the allegation is made, they have to meet it and "explain" the payments, it seems to me that the onus remains on the Defendant to prove its Counterclaim, not on the Plaintiffs to disprove it.
36. I accept that the Plaintiffs will have to receive confirmation regarding discovery but that this can be addressed in very early course. The Plaintiffs have been on notice of these new claims since the start of March and the trial is not due to commence until July 2023.
37. In the circumstances, I propose allowing the amendments and allowing a short period in order to enable the Plaintiffs to consider whether they wish to seek an adjournment of the proceedings in order to deal with this new claim. As I understand it, the Defendant does not oppose such an adjournment but also expressed a desire to have the proceedings dealt with. On the return date, the Court can give directions in order to ensure that the matter is ready for hearing either in July 2023 or in early course thereafter.
38. In circumstances where I am allowing the amendment of this aspect of the Defendant's Counterclaim, I propose allowing the amendment of the claim in relation to the transfer of lands and affording the Plaintiffs an opportunity to raise particulars on this aspect of the Counterclaim. I do not think that the Plaintiffs suffer any prejudice in having to deal with this claim, nor that any adjournment of the proceedings could be required to enable the Plaintiffs to deal with it. Had I not been satisfied that the claim was not already included in the pleadings, there would thus have been no basis to refuse the amendment.