[2020] IEHC 336

THE HIGH COURT

[2015 No. 2859 P]

BETWEEN

ADVANCED INDUSTRIAL TECHNOLOGY CORPORATION LIMITED

PLAINTIFF

AND

MAIREAD (ORSE MARGARET) CASEY, GREG (ORSE JOHN G.) CASEY AND BRID MURPHY FORMERLY PRACTISING UNDER THE STYLE AND TITLE OF CASEY AND COMPANY SOLICITORS AND ANTHONY O'REGAN, DARRAGH TAAFFE, JAMES CROWLEY, JOSEPH GREANEY, ANDREW HEFFERNAN, CHARLES HURLEY, JOHN MALONEY AND ANDREW CARLOS CLARKE PRACTISING UNDER THE STYLE AND TITLE OF KEANE MAHONY SMITH

DEFENDANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 16th day of June 2020

1. On 3rd June, 2003 Cork County Council brought civil waste management proceedings against Louis J. O'Regan and other defendants in relation to an illegal dump at Weir Island, Barryscourt, Carrigtwohill, Co. Cork.

2. In separate criminal proceedings, Mr. O'Regan pleaded guilty to a waste management offence on 21st February, 2005 in his capacity as secretary of the company that was the second respondent in the waste management action, and was fined €100,000.

3. On 17th July, 2005 judgment was given by Clarke J., as he then was, in the civil action, *Cork County Council v. O'Regan* [2005] IEHC 208, [2009] 3 I.R. 39, in which he directed the respondents to commission a site investigation and report pursuant to s.57 of the Waste Management Act 1996 as a necessary step towards making specific orders to ensure that the waste on the site in question was no longer such as to give rise to risk of environmental pollution. The judgment notes that there were somewhere between 100,000 to 200,000 tonnes of waste on the site.

4. The solicitor defendants in the present case (for practical purposes the first-named defendant), acted for the respondents to the waste management proceedings and in particular for Mr. O'Regan.

5. Subsequent to this judgment, the valuer defendants in the present proceedings (*i.e.*, the fourth and fifth-named defendants) issued a letter on 11th May, 2007 valuing the site in question at €1.3m. On the strength of that valuation, the plaintiff, a UK registered company, extended loan facilities to Mr. O'Regan in a total amount of £900,000 STG secured on the site.

6. When Mr. O'Regan defaulted on the loan in 2011, the plaintiff discovered that the land was effectively worthless as it had been used as an illegal landfill and was extensively polluted with construction waste. According to Cork County Council the clean-up costs were in the order of €42m.

7. On 21st April, 2011 the plaintiff issued summary proceedings against Mr. O'Regan [2011 No. 1731 S]. Those proceedings were adjourned to plenary hearing on 5th March, 2003 but not much seems to have happened to them since then.

8. The present proceedings against the plaintiff's former solicitors and valuers were issued in 2015 and seem to have had something of a tortured history with numerous procedural skirmishes in motions and correspondence. I am now dealing with the latest of those.

9. On 16th November, 2016 the valuer defendants brought a motion seeking to strike out the plaintiff's claim as statute barred and bound to fail. That was adjourned generally on 29th March, 2017.

10. On 20th January, 2017 a reply was delivered by the plaintiff, para. 3 of which complained that the valuer defendants were in breach of duty, in particular, in breach of the duty *"not to earn a secret profit or commission"*.

11. The valuer defendants then brought a second strike-out motion on 18th October, 2018 confined to striking out para. 3 of the plaintiff's reply. That came on for hearing on 25th March, 2019 and I am told that essentially two points were made by the valuer defendants; first of all, the lack of evidence for the plea; and secondly, that in any event it should have been in the statement of claim. Quinn J. gave an *ex tempore* judgment on the motion striking out para. 3 of the reply, but giving liberty to the plaintiff to apply to amend the statement of claim.

12. The effect of that order is that as matters stand right now, there is nothing specifically in the reply expressly addressing the point made by the valuer defendants regarding the statute of limitation in their defence, apart from the general traverse in para. 1 of the reply.

13. It now appears from legal submissions that even apart from making a concealment defence to the statute point, the plaintiff wants to assert an acknowledgement defence. For some reason that wasn't included in the now struck-out para. 3 of the reply, although whether that omission can be made good really depends on whether the statement of claim is to be amended, because if it is that will then trigger a sequence of further amended pleadings allowing an amended defence and an amended reply, at which stage such matters could be revisited (*i.e.*, the plaintiff's replies to the defence of the statute could be set out).

14. The plaintiff sought to take up the liberty to seek to amend the statement of claim contained in Quinn J.'s order, and on 26th August, 2019 issued a notice of motion seeking such an amendment. The amendment doesn't repeat the claim of secret profits that fell foul of Quinn J.'s order, and it is that proposed amended statement of claim with which I now have to deal.

15. The proposed amended statement of claim extends the claim for fraudulent misrepresentation and deceit which is currently confined to the solicitor defendants so as now to apply to all defendants (para. 21). It particularises that claim at para. 40 contending that the valuer defendants either misrepresented or concealed information. The grammar of para. 40 as drafted is somewhat mangled, although presumably the intention is to argue in essence that the valuer defendants made representations which

they knew to be untrue or made representations reckless as to whether such representations were true or false or concealed information that they knew would have had a material bearing.

16. On this application I have received helpful submissions on the motion from Mr. Patrick F. O'Reilly S.C. (with Mr. Stephen Moran B.L.) for the plaintiff and from Mr. Barry Mansfield B.L. for the fourth and fifth-named defendants (the valuer defendants). I should also record that Mr. David Browne B.L. who appears for the first-named defendant (the solicitor defendant) conveyed to the court (through the counsel that did appear) that that defendant wasn't getting involved in the present motion.

Procedural background

17. The general concept is that new substantive pleas (that are not raised by way of answer to defences raised in the defence) should be in a statement of claim rather than a reply.

18. An unapproved note by the plaintiff's counsel of the judgment of Quinn J. was produced to me, which is probably not a complete reflection of the judgment if for no other reason than that it doesn't actually record the point most favourable to the plaintiff, which was the liberty to seek an amendment to the statement of claim that is clearly set out in the order made by Quinn J. The note of the judgment recites the submissions made and then notes the court's conclusions very briefly which were that the principles in *Kennedy v. Midland Oil Company* (1976) 110 I.L.T.R. 26, were relevant and that the plaintiff has not been in a position to refer to any evidence. *Kennedy v. Midland Oil* relates not to the question of whether a new plea can be included in a reply, but rather to whether a plea can be advanced without there being adequate particulars of it in a context where particulars were not supplied because the party in question had no evidence at that point in time to support the plea sought to be made. The court held that the defendant's plea should be struck out as that party had failed to furnish particulars of it, but underlying that was a lack of evidence to support the proposed plea. Thus, Quinn J.'s order seems to be really based on the lack of evidence for the particular plea sought to be made by the plaintiff at the time here, rather than based on the fact that it was in a reply rather than in a statement of claim. But the latter point is also of relevance.

19. Benedict Ó Floinn in *Practice and Procedure in the Superior Courts*, 2nd ed. (Dublin, Tottel Publishing, 2008), p. 212, assays the following summary of the law: *"Where a reply contains what is, in effect, a new plea, that portion may be struck out as embarrassing (*Keane v Ryan *76 ILTR 69) although the court may direct that the statement of claim ought to be amended:* O'Sullivan v. Hamilton *15 ILTR 96 and Byrne v. Duckett 10 LR Ir 24."*

20. *O'Sullivan v. Hamilton* (1881) 15 I.L.T.R 96 was a case where Morris C.J. said the plaintiff *"should have amended his statement of claim"* following an additional plea in a demurrer. *In Byrne v. Duckett* (1882) 10 L.R. Ir. 24, Fitzgerald B. (Palles C. B. and Dowse B. concurring) held that a new plea in a reply should be set aside, but went on to add *"The Plaintiff may amend his statement of claim"*. There was no great formality about that

amendment - the court simply went on directly to allow the amendment where it was more appropriate to the statement of claim rather than the reply.

21. Quinn J. admittedly didn't direct that the statement of claim should be amended, but rather that a motion could be brought to that effect; but on the other hand he wasn't actually asked to allow the amendment himself.

Test for amendment of pleadings

22. The law on amendment of pleadings has been one of the more inconsistent areas of jurisprudence as I noted in *Habte v. Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405, although maybe it is not over-optimistic to hope that in recent jurisprudence the fog is beginning to lift slightly.

23. On the latter interpretation one could venture to suggest that at least some general observations are becoming clear:

    (i). the main principle in relation to amendments is that the jurisdiction is intended to be liberal: *Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2019] IECA 360 (Unreported, Court of Appeal, Donnelly J. (Baker and Costello JJ. concurring), 16th December, 2019) at para. 12; and *Croke v. Waterford Crystal Ltd* [2004] IESC 97, [2005] 2 I.R. 383, [2005] 1 I.L.R.M. 321;

    (ii). there is no rule against radical amendments as such (*Persona*), and the amendment can introduce a new cause of action (*Croke*), which may involve new reliefs and new grounds; and

    (iii). the central considerations are the interests of justice and allowing the real issues between the parties to be addressed (see generally the review of the authorities in *Habte*).

24. In the light of those general considerations, there are three general criteria that emerge from the jurisprudence and that were endorsed by Peart J. in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296, [2018] 2 I.L.R.M. 56 at para. 78. Those criteria well transcend the specific judicial review context of the *B.W.* decision and are essentially the absence of irremediable prejudice, explanation and arguability.

Absence of irremediable prejudice

25. Two factors are important here. Firstly, to count against an amendment, prejudice must be irremediable in the sense of not being capable of being dealt with by orders for costs or other directions: see *Persona*. In fairness to Mr. Mansfield he doesn't strenuously argue that the prejudice here can't be remedied in that manner. Secondly, merely having to answer a potentially winning point is not prejudice in this sense. As put by Posner J. in *Reed v. Illinois* (Case 14-1749, U.S. Court of Appeals for the 7th Circuit, 30th October, 2015) at p. 9, *"What is unfair in the present context is to deny, without a good reason, a party's right to press a potentially winning argument"* (see *W.T. v. Minister for Justice and Equality* [2016] IEHC 108, [2016] 2 JIC 1514 (Unreported, High Court, 15th February, 2016) at para. 23). The Court of Appeal of Jersey also used similar language recently in

Home Farm Developments Limited v. Le Sueur [2015] JCA 242 (Unreported, 25th November, 2015) at para. 51, suggesting that justice would be served if a *"potentially winning point"* were to be favourably considered in the context of amendment of pleadings. The matter was put by Clarke J., as he then was, in *Woori Bank v. KDB Ireland Ltd* [2006] IEHC 156 (Unreported, High Court, 17th May, 2006) at para. 3.2, to the effect that *"the prejudice must stem … from the fact of the belated alteration in the pleadings rather than the presence (if allowed) of the amendment itself"*.

26. More fundamentally, on the present facts, comparing para. 40 of the proposed amended statement of claim with paras. 39(k) and (l) of the original statement of claim, it is clear that both deliberate misstatement of the value and deliberate withholding of information are already pleaded, so here the plaintiff could have proceeded in a variety of ways:

    (i). it could have served a notice of further particulars of claim of breach of duty;

    (ii). it could alternatively have pleaded in the reply that the deliberate concealment and deliberate misrepresentation already pleaded in the statement of claim constitute fraudulent concealment for the purposes of s.71(1) of the Statute of Limitations 1957; or

    (iii). alternatively there is the course now being taken which is to seek an amendment.

27. Thus, despite the fact that the amendment now involves an express articulation of fraud, which of course is a weighty matter, what is already pleaded is fraud in all but name. In such a context, the test of absence of irremediable prejudice is satisfied here.

Explanation

28. Mr. O'Reilly says that the manner in which the matter was pleaded originally was down to human error. The fact that para. 3 of the reply was struck out by Quinn J. certainly means that an error was committed by the plaintiff's legal advisers at some point along the line. Mr. Mansfield said he didn't require the matter to be adjourned for the explanation to be put on affidavit and was prepared for the court to take the explanation of mistake by legal advisers from Mr. O'Reilly, so I propose to do so. On that basis, the criterion of explanation is also satisfied.

Arguability

29. In general, arguability is not a massively high bar although perhaps it is higher than usual in an allegation of professional negligence or fraud. The plaintiff has an expert report backing up the original allegation of professional negligence: see report of Dennehy Auctioneers of 31st March, 2015.

30. What constitutes adequate particularisation and adequate evidence of course depends to some extent on the claim actually made, a point emphasised by Lord Hoffmann in *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 at para. 55, where he said that *"as Lord Nicholls of Birkenhead explained in* In re H (Sexual Abuse: Standard of Proof) (Minors) *[1996] AC 563, 586, some things are inherently more likely*

than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not." Maybe strictly speaking it depends which part of Regent's Park we are talking about, but nonetheless what is true in relation to proof of the ultimate question in the proceedings is to a lesser extent true in assessing the question of arguability, which has to be carried out in the light of the nature of the allegation (in this case, fraud), and thus in the present context in the light of the definition of fraud.

31. In *Superwood Holdings Plc v. Sun Alliance* [1995] 3 I.R. 303 at paras. 327-328, the Supreme Court endorsed the definition of fraud adopted by the House of Lords in *Derry v. Peek* (1889) 14 App. Cas. 337, and in particular the statement of Lord Herschell at p. 374 that *"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."*.

32. Two other dimensions of this issue are important here. Firstly, the requirement that the fraud be particularised; and secondly, the requirement that the plea of fraud be backed up by evidence.

33. In terms of the requirement of particularisation set out in caselaw (see for example *Keaney v. Sullivan* [2015] IESC 75 (Unreported, Supreme Court, Dunne J. (Clarke and Charleton JJ. concurring), 23rd July, 2015), that has been adequately done in the draft amended statement of claim here, in particular at para. 44.

34. Turning to the question of whether these pleas have been backed up by evidence, it seems to me that without doing massive injustice to it, the centre of gravity of Mr. Mansfield's argument was that there wasn't any or any adequate evidence of fraudulent concealment or misrepresentation such that it could be said that the proposed amended statement of claim truly assisted in addressing the real issues and the controversy between the parties. He particularly relied on a submission that the expert report on behalf of the plaintiff didn't provide evidence of fraud and that the note of the information provided by Mr. O'Regan refers to negligence rather than fraud.

35. However, bearing in mind that the definition of fraud goes beyond purely deliberate acts and includes acts that are reckless or careless as to whether the representation be true or false, in such a context the evidence of what the valuers did and didn't do combined with the evidence of what they knew from Mr. O'Regan is for the purposes of an amendment application sufficient to provide an adequate factual foundation for making the claim, at the very least on the standard of whether the statements, actions or omissions were so careless or reckless as to amount to fraud. Whether that will be borne out at the trial is obviously very much a separate question.

Order

36. Accordingly, I will allow the amendments sought to the statement of claim subject to the correction of the grammar and structure of para. 40 and I will hear from the parties as to the timescale from here and any consequential directions.