

THE HIGH COURT

[2023] IEHC 130
[Record No. 2018/10665P]

BETWEEN

FINBAR TOLAN

PLAINTIFF

AND

**JOHN BRADY AND JOHN DILLON-LEETCH,
BOTH TRADING UNDER THE STYLE AND TITLE OF
DILLON-LEETCH & COMERFORD SOLICITORS**

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 16th day of March, 2023.

Introduction.

1. In these proceedings, the plaintiff is suing his former solicitors in respect of their alleged negligence when representing him in unsuccessful proceedings that he brought against Connaught Gold Co-Operative Society Limited (hereinafter "Connaught Gold"), before the High Court in 2015.

2. In this application, which has come before this Court by what can only be described as a circuitous route, the plaintiff seeks to amend his plenary summons and statement of claim, to include additional particulars of negligence against his former solicitors; to the effect that they were negligent in failing to amend his original proceedings to include a claim for damages for malicious falsehood, as had been advised by junior counsel in his advice of proofs dated 10th February, 2014.

3. The defendants resist the application on a number of grounds, which can be summarised as follows: The plaintiff was aware of the content of the advice of proofs all along, so he should have included the pleas that he wished to make in that regard in his original plenary summons and statement of claim; it was submitted that he should not be allowed to add them into his pleadings at this late stage of the proceedings; secondly, it was submitted that the amendments should not be allowed because the allegations contained in the proposed amendments were bound to fail, as the plaintiff had given instructions to his solicitors that his original pleadings in the case against Connaught Gold were not to be amended, as he wanted his action to get on for hearing as soon as possible; thirdly, it was submitted that the amendments should not be allowed at this stage, as that would cause severe prejudice to the defendants, because it would deprive them of a defence under the statute of limitations.

Background.

4. As noted in the introduction, the origins leading to this application, stretch back a very long way. In order to understand the background against which this application is brought, it is necessary to briefly set out the history of the professional involvement between the plaintiff and the defendants.

5. The plaintiff instituted proceedings against Connaught Gold claiming damages for breach of contract. The plaintiff alleged that by an agreement in writing entered into on 16th July, 2012, it was agreed that as and from 10th August, 2012, the credit period, within which he would be allowed to provide payment for cattle that he bought at the defendant's marts, would be reduced from three weeks to one week.

6. The plaintiff alleged that at a meeting between him and representatives of Connaught Gold, held on 9th August, 2012, they reneged on that agreement and told him that he was barred from future attendance at their marts. As a result, the plaintiff was not able to attend a mart known as Balla Mart which was to be held on 11th August, 2012. The plaintiff alleged that at that mart, representatives of Connaught Gold made statements to persons attending the mart, to the effect that the plaintiff had been barred from attendance at the marts due to credit difficulties that he had. The plaintiff alleged that as a result of his being barred from attendance at the mart and the statements made thereat, rumours spread very quickly that he was experiencing financial difficulties, which led ultimately to the collapse of his business.

7. It is not clear when his proceedings against Connaught Gold were issued. The court has not been provided with a copy of those pleadings. However, it appears that in or about September 2012, he attended at the defendants' offices with a view to engaging them to act on his behalf in the litigation. They accepted the retainer and acted as his solicitors in the action. That action was heard over four days in May 2015 before Kearns P. On 15th May, 2015, Kearns P., in an *ex tempore* judgment, dismissed the plaintiff's action against Connaught Gold.

8. At that stage, the defendants ceased to represent the plaintiff. The plaintiff appealed the judgment to the Court of Appeal. In a written judgment delivered on 5th May, 2016, the Court of Appeal dismissed the plaintiff's appeal; reported at [2016] IECA 131.

9. The plaintiff sought leave to bring a further appeal to the Supreme Court, but that was refused in a written ruling delivered on 28th July, 2016, *sub nom Tolan v. Aurivo Co-Operative Society Limited*, reported at [2016] IESCDET 107.

10. The plaintiff then sought, by notice of motion, to re-enter his action against Connaught Gold, for the purpose of setting aside orders previously made in the proceedings, on the grounds that the proceedings were tainted by bias on the part of the trial judge. In a written judgment delivered on 31st May, 2017, Noonan J. refused the plaintiff's application in that regard: reported at [2017] IEHC 351.

11. The plaintiff appealed that decision to the Court of Appeal; which appeal was dismissed by the Court of Appeal in a judgment delivered by Whelan J., reported at [2018] IECA 267. The plaintiff sought leave to appeal the dismissal of his appeal, to the Supreme Court. That application for leave to appeal was refused by the Supreme Court on 6th November, 2018, reported at [2018] IESCDET 191.

12. On 6th December, 2018 the plaintiff issued the plenary summons in the present proceedings, claiming damages for breach of contract against the defendants. A statement of claim was furnished on 10th July, 2020. By a notice of motion issued on 7th September, 2020, the plaintiff sought judgment in default of defence against the defendants. By notice of motion dated 18th January, 2021, the defendants brought an application to have the plaintiff's action against them struck out pursuant to O.19, r.28, on the grounds that there was no reasonable cause of action set out in the statement of claim and/or the action had no reasonable prospect of success and was bound to fail; in the alternative, they sought an order striking out the plaintiff's claim against them for being frivolous and vexatious.

13. Both motions came before Gearty J. for hearing on 10th June, 2021. In a written judgment delivered on 25th July, 2021, she dismissed the plaintiff's action against the defendants, on the grounds that the proceedings were frivolous and vexatious, and/or were bound to fail, and/or were an abuse of process: reported at [2021] IEHC 548.

14. The plaintiff appealed the decision of Gearty J. to the Court of Appeal. While that appeal was pending before the Court of Appeal, the plaintiff brought an application before that court seeking liberty to adduce new evidence on the hearing of the appeal. In particular, he sought to rely on the advice of proofs that had been furnished by junior counsel in the substantive proceedings against Connaught Gold, which had been furnished on or shortly after 10th February, 2014. He wished to make the case that the defendants

had failed to comply with the directions given by counsel in his advice of proofs; in particular, that they had failed to amend his pleadings against Connaught Gold to include a claim for damages for malicious falsehood.

15. At a hearing held on 26th April, 2022, the Court of Appeal dismissed the plaintiff's substantive appeal against the decision of Gearty J., but allowed him the opportunity to bring an application seeking leave to amend his plenary summons and statement of claim to include the plea that his solicitors had failed to comply with the directions of counsel as contained in the advice of proofs. In the course of its ruling, the Court of Appeal stated as follows: -

"So, we're quite satisfied that the two issues that had been the focus of attention in the early stage of these proceedings would see the defendant succeed and Mr. Tolan fail. It follows from that that we are of the view that Ms. Justice Gearty was fully entitled to reach the conclusions that she did in June. We are also of the view that she was fully within her rights in the way in which she handled the application to readdress matters and to reopen matters in September. In fact, if anything, it's the situation that Mr. Tolan was indulged at that stage.

So, if that was where matters rested, then we would have been in a position to conclude matters, but, as I say, there is this issue of the application in respect of the new evidence. There is the fact of the advice of proofs and what significance then that has or may not have when it seems to us that it would not be just to preclude Mr. Tolan from pursuing that aspect further. So what we are minded to do is to put the matter back on the basis that Mr. Tolan can bring an application that he is minded to do so and that the respondent's solicitors can take their own course of action at that stage and I hope I have made that clear."

16. To that end, the matter was adjourned before the Court of Appeal to 12th July, 2022. When the matter came before the court on that date, the court indicated that having considered the matter in the interim, they were of the view that the High Court, being a court of first instance and from which there was a right of appeal to the Court of Appeal, it would be preferable that the application to amend should be made to the High Court. Accordingly, the plaintiff's application to amend his plenary summons and statement of claim was remitted for determination by the High Court. It is by that somewhat circuitous route, that the matter comes before this Court for determination.

The Evidence.

17. The plaintiff swore his grounding affidavit in respect of this application on 10th May, 2022. In that affidavit he stated that it was only after Gearty J. had given her decision on the defendants' application to strike out his proceedings as being frivolous and vexatious, that he obtained a copy of the advice of proofs for the first time on 25th February, 2022 (at other times the plaintiff has alleged that he first obtained this document on 9th February, 2022). In the affidavit, the plaintiff exhibited a copy of the advice of proofs that had been furnished in the substantive proceedings against Connaught Gold, by Mr. Stuart Conaty BL on 10th February, 2014.

18. In the course of a detailed and considered advice of proofs, junior counsel noted that there were certain frailties in relation to the plaintiff's action being based solely on breach of contract grounds. He recommended that as an alternative ground, the statement of claim should be amended to include a claim for damages for malicious falsehood, in respect of the statements allegedly made by the representatives of Connaught Gold at Balla Mart on 11th August, 2012. In particular, counsel directed that the following steps should be taken pre-trial:

"(i) Agents should consult with the Defendants [sic] with regard to the issues set out in this advice on proof [...]

(iii) Agents should take instructions from the Plaintiff with regard to the amending of the Statement of Claim to set out a claim for damages for malicious falsehood. [...]"

19. The plaintiff went on in the affidavit to state that he wished to make the amendments to his plenary summons and statement of claim, to plead that the defendants had been negligent in failing to comply with the directions and advices given by junior counsel in his advice on proofs dated 10th February, 2014.

20. A replying affidavit was sworn by the first defendant on 23rd May, 2022. In that affidavit, the first defendant stated that the plaintiff was at all material times aware of the information underpinning the complaint that he wished to make by way of the amendments to his pleadings. He further stated that the defendants were prejudiced in defending any new proceedings by virtue of the proposed amendments. He stated that the proposed amendments were an attempt to resurrect a case with information that had always been within the plaintiff's possession, power or procurement and which could have

been addressed with an expert report in a timely fashion. He stated that at that time, being the date when he swore his affidavit, the plaintiff had not obtained any report from an expert, indicating that there were any grounds on which it could be alleged that the defendants were guilty of professional negligence. In support of the defendant's opposition to the plaintiff's application to amend his proceedings, the first defendant stated that he also relied on the affidavit sworn by him earlier in the proceedings on 15th March, 2022.

21. To paraphrase the content of the affidavit sworn by Mr. Brady on 15th March, 2022, he stated that at all times, the plaintiff had been kept up to date in relation to all advices of junior counsel, including his letter of advices dated 30th January, 2014 and his advice of proofs dated 10th February, 2014. The first defendant stated that the plaintiff was very "hands on" in relation to his litigation against Connaught Gold. He regularly attended at the solicitor's offices, both by appointment and on occasions, unannounced. He stated that the plaintiff was particularly anxious that the case should get on for hearing as soon as possible. He stated that the plaintiff was informed about the possibility of amending the pleadings to include a claim for damages for malicious falsehood, but the plaintiff did not want to countenance the adjournment of the hearing date that he had obtained.

22. The key assertions made by the first defendant in relation to his discussions with the plaintiff concerning the advice of proofs, were set out in the following way at paras. 23 and 24 of his affidavit:

"23. I certainly did discuss the letter of advices from Stuart Conaty BL, of 30 January 2014, which, inter alia, addressed the issue of malicious falsehood. The Plaintiff was only concerned with getting his case on and heard.

24. I also discussed the advice on proofs, of 10 February 2014, with the Plaintiff and provided him with a copy of same. I recall the advice on proofs coming through via email from Stuart Conaty BL as the Plaintiff and I were in the office awaiting same. In this regard I beg to refer to the said email of Stuart Conaty BL, dated 11 February 2014 at 15.03 [at JB1e]. I made notes on the margin of the advice of proofs and placed asterisks beside certain items which were discussed. This is further evidence that I would have discussed them with the Plaintiff as I wrote on them while discussing them with the Plaintiff. In this regard I beg to refer to the Advice on Proofs exhibited at exhibit FT4 of the Plaintiff's affidavit."

23. The first defendant went on to state that at 16.44 hours that day, he sent an email to the actuaries, who had been retained to act on behalf of the plaintiff, which email had been sent on foot of a discussion with the plaintiff in preparation for the trial. He stated that that demonstrated that he had been acting on foot of the advice on proofs in preparation for the upcoming trial, which was then scheduled to take place some days later, on 18th February, 2014. He went on to state that as matters transpired, the trial date was vacated, which the plaintiff was not happy about. He exhibited a copy of the email that he had sent to the actuaries.

24. The first defendant went on to state that the plaintiff was advised that his case could proceed on other areas of law and misrepresentation, but unfortunately for the plaintiff, he only wanted to get his case on and would not countenance any possible delays to the case; hence his refusal to consider any application to adjourn the matter. The first defendant stated that the plaintiff had been "*advised of the claim for malicious falsehood but he did not want to countenance the adjournment of his hearing date*".

25. The first defendant went on in the affidavit to state that upon the conclusion of the proceedings before the High Court, the plaintiff indicated that he wished to appeal the decision that had been handed down. He was advised that his legal team would not be in a position to represent him in the appeal, as they did not envisage any grounds of appeal. However, the first defendant stated that the plaintiff had been advised on 3rd June, 2015, that he could come to the office and "identify those parts of your files which you require copies of and copies for that purpose". The first defendant exhibited the letter in which that offer was made. He stated that in the circumstances, the plaintiff had been afforded the opportunity to inspect his file at the offices. In addition, he stated that the plaintiff had been provided with a booklet of the pleadings. He concluded by stating that the plaintiff had been provided with a copy of each and every document in his file during the running of his case. The first defendant stated that it was disingenuous of the plaintiff to state that he had not had a copy of the advices of counsel.

26. The first defendant concluded his affidavit by stating as follows at para. 32:

"The Plaintiff was fully apprised of all the advices, evidence and reports that he now seeks to introduce by way of fresh evidence. The Plaintiff did not want to engage with any matter that would jeopardise the progression of his case. The

Plaintiff is now trying to pivot his case with new grounds based on matters that were always within his knowledge and possession."

27. Finally, the plaintiff swore a further affidavit on 15th February, 2023, in which he exhibited an expert report from Mr. Sean Sexton, solicitor, dated 10th February, 2023. It is not necessary to quote the conclusions given by Mr. Sexton in his report, save to note that he had formed the opinion that the defendants had failed in their duty of care to the plaintiff by failing to ensure that counsel's advices and directions and, in particular, his advice on proofs, were complied with. He was of the opinion that the failure of the defendants to carry out their duty in this regard, had resulted in the full facts of the case not being before the learned High Court judge hearing the substantive action, as same had not been properly pleaded. He stated that if the case had been properly pleaded, in his opinion the outcome of the action could have been different.

The Plaintiff's Submissions.

28. The plaintiff submitted that he only received a copy of counsel's advice of proofs in the month of February 2022. He submitted that it was not until he saw that document, that he realised the adverse effect that failure to amend his pleadings in the substantive action against Connaught Gold, had had on his chances of success in that action.

29. The plaintiff submitted that the defendants were negligent in failing to take the steps that had been directed by Mr. Conaty BL in his advice of proofs. The plaintiff stated that he had obtained an expert opinion, which supported his contention in that regard.

30. Insofar as the defendants had submitted that they had not sought to amend the original pleadings, because the plaintiff had specifically instructed them not to do so, as he was most anxious that the hearing of his action would not be delayed; the plaintiff denied that he had given any such instruction to the defendants.

31. The plaintiff denied that the content of the advice of proofs had ever been brought to his attention. Insofar as it was alleged by the defendants that he was present in the office having a consultation with his solicitor when the advice of proofs arrived by email; the plaintiff pointed out that, despite the defendants providing a detailed bill of costs at the conclusion of the action in the High Court, there was no mention of any consultation having been held on 11th February, 2014, or on any date, to discuss the advice of proofs received from counsel.

32. In summary, the plaintiff submitted that because he only received the advice of proofs in February 2022, and as he had an expert's report, which supported his claim in negligence, it was an appropriate case in which to allow an amendment of his pleadings. The plaintiff submitted that the circumstances of the case came within the classes of cases where it was appropriate to allow an amendment of pleadings, as set out in the judgment of the Court of Appeal in *Stafford v. Rice* [2022] IECA 47.

Submissions on behalf of the Defendants.

33. Mr. Lucey SC resisted the plaintiff's application on a number of grounds. He submitted that the present application was merely a further attempt by the plaintiff to pivot away from a decision with which he did not agree. He had brought the original proceedings against Connaught Gold in the High Court. They had failed. He had appealed to the Court of Appeal. That appeal was unsuccessful. He then sought to impugn the judgment given in the High Court in separate proceedings; they too had failed in both the High Court and the Court of Appeal. The Supreme Court had refused to entertain a further appeal on two occasions.

34. The plaintiff had then issued the present proceedings against the defendants alleging that they were negligent in (a) failing to call certain witnesses at the trial heard by Kearns P., and (b) on grounds of permitting a possible claim of "reverse bias" to occur; whereby the plaintiff argued that due to a connection by marriage between Kearns P. and a relative of a partner in the defendants' firm, that had the plaintiff been successful in his substantive action against Connaught Gold, the defendant in those proceedings might have successfully challenged that judgment on grounds of bias on the part of the trial judge.

35. Mr. Lucey pointed out that both of these allegations of negligence and breach of contract against the defendants had been rejected by Gearty J. in the High Court and by the Court of Appeal on appeal. Gearty J. had found that the plaintiff's action against the defendants was frivolous and vexatious and was bound to fail. She had struck out the plaintiff's action. The plaintiff had appealed that decision unsuccessfully to the Court of Appeal, which had upheld the High Court decision, but had allowed the plaintiff to bring the present application to amend his pleadings before the High Court.

36. Counsel submitted that by attempting to admit new evidence in the form of the advice of proofs and seeking to amend the pleadings to include a claim that the defendants had been negligent for failure to comply with the directions given by counsel therein; the

plaintiff was merely trying to litigate a fresh cause of action, which had never been part of his original claim against the defendants. It was submitted that that should not be allowed.

37. Counsel submitted that while it could be said that the courts tend to lean in favour of permitting amendments, so as to ensure that all matters in issue are properly before the court of trial; it was well settled that the courts would not permit amendments to be made to enable the inclusion of new causes of action, which would otherwise be statute barred. In this regard counsel referred to principles nine and ten as set out in the judgment of Collins J. in the *Stafford* case at para. 35.

38. However, counsel very properly conceded that that rule was not an absolute one. He referred the court to principle twelve in the same judgment, which stated that there were authorities which suggested that amendments to pleadings could be allowed, but on condition that they would only take effect from the date of delivery of the amended pleadings.

39. Counsel submitted that the present application was an attempt to introduce entirely new facts, which were not related to the previous complaints made by the plaintiff in his original pleadings and were an attempt to avoid a defence available to the defendants under the statute of limitations.

40. In the alternative, it was submitted that the plaintiff should not be allowed to amend the proceedings to include the claim in relation to non-compliance with the advice of proofs, because he had had the opportunity to make that case at the outset. He had all the necessary information from when his original action against Connaught Gold had concluded in the High Court. He had been given access to the file at that stage.

41. In the alternative, it was submitted that it was clear that his claim in relation to the advice of proofs and the failure to amend the original pleadings, was bound to fail, having regard to the evidence set out in the affidavit sworn by the first defendant on 15th March, 2022. Wherein, it had been stated that the plaintiff had been adamant that he wanted his action brought on for hearing as soon as possible and would not countenance any delay; on which account, he had instructed that the action was to proceed to a hearing, without any amendment of the pleadings.

42. It was submitted that the court should refuse the plaintiff's application to amend the plenary summons and statement of claim, with the consequence that the plaintiff's action against the defendants was at an end.

Conclusions.

43. Order 28, r.1 of the Rules of the Superior Courts provides as follows: -

1. 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.

44. The law in relation to the amendment of pleadings was summarised by Collins J. when delivering the judgment of the Court of Appeal in *Stafford v. Rice*. The relevant principles were set out at para. 23 of the judgment. There was broad agreement that the principles of most relevance to the present application were those set out at numbers 9-12:

"(9) Particular considerations apply where it is said that the effect of permitting an amendment would be to deprive a defendant of a limitation defence that would otherwise be available to it. In contrast to the position where a new defendant is joined to proceedings (where, by virtue of Order 15, Rule 13 RSC, the proceedings against that party are deemed to have begun only on the making of the joinder order¹), where a new claim is added by way of amendment of existing proceedings pursuant to Order 28, that claim is deemed to have been made from the date of the commencement of the proceedings: Mangan v Murphy [2006] IEHC 317, at pages 4-5. As Mangan v Murphy illustrates, the addition of a new claim by way of amendment thus has the potential to cause serious prejudice to a defendant if that defendant would have a basis for pleading a limitation defence if that new claim were advanced by way of separate proceedings rather than amendment of the existing proceedings.

(10) Accordingly, as a "general rule", an amendment setting up a new claim will not be permitted where that claim would (or might) be statute-barred if made in proceedings issued at the time of the amendment: Weldon v Neal (1887) 19 QBD 394. It is not necessary for a defendant to establish as a matter of probability that the new claim is statute-barred: a real possibility that the claim is barred will suffice: see, e.g., Mangan v Murphy at page 6 (it is "clear that there is a possibility that allowing the amendment would cause prejudice to the defendants by excluding them from reliance upon the Statute of Limitations") and Smyth v

Tunney [2009] IESC 5, [2009] 3 IR 322, per Finnegan J at para 30 (the "Statute of Limitations may well have run and the defendants would be prejudiced by the amendments sought as to additional publication")

(11) However, that rule is not an absolute one and ought not to be applied overly rigidly. Where a plaintiff seeks to amend their pleadings to add a new cause of action arising out of "the same facts or substantially the same facts" as have already been pleaded, the amendment may be permitted: Krops, per Keane J at 121. The "addition of a new cause of action by amendment will be permitted notwithstanding that by the date of the amendment the Statute of Limitations had run if the facts pleaded are sufficient to support the new cause of action. Facts may be added by amendment if they serve only to clarify the original claim but not if they are new facts": Smyth v Tunney, per Finnegan J at para 29. In such circumstances – neatly illustrated by the facts of Krops – permitting a new claim to be made by way of amendment causes no material prejudice to the defendant because they are already on notice of a claim(s) arising from the same facts, which they will have had an opportunity to investigate. The new claim cannot therefore be characterised as a "stale claim" or one which unfairly reopens a past transaction(s) which the defendant might otherwise have legitimately regarded as closed.

(12) There is some suggestion in the authorities that the power of the High Court under Order 28 to permit an amendment "on such terms as may be just" would allow the court to permit a new claim to be added by way of amendment expressly on terms that the amendment will take effect only from the date of the amendment order. The judgment of Birmingham J in Rossmore Properties Limited can be read as indicating that he intended that the order made by him in that case should have that effect. The issue was also considered by the High Court (Barniville J) in Microsoft Ireland Operations Limited v Arabic Computer Systems [2021] IEHC 538, at para 82. While expressing a tentative view that the terms of Order 28 gave such a power, it was not necessary for Barniville J to reach any concluded view in the circumstances of that case: para 109. The issue was not argued in this appeal and its resolution must await a case in which it properly falls for determination. I therefore express no view on the point."

45. It is not appropriate for this Court on the hearing of an interlocutory application, which is heard on affidavit evidence, to determine issues that would properly fall for determination at the trial of the action and upon which both oral evidence, with examination-in-chief and cross-examination, and documentary evidence, would be provided. Thus, it is not appropriate for this Court to determine whether the content of the advice of proofs was brought to the plaintiff's attention prior to his substantive action against Connaught Gold being brought on for hearing in May 2015, and, if so, what instructions he gave in light of the advices contained therein.

46. However, insofar as the defendants have argued at the hearing of this application, that the plaintiff ought not to be allowed to amend his pleadings, because his allegations made therein are bound to fail, having regard to the averments of Mr. Brady in his affidavit sworn on 15th March, 2022; the court must examine the state of the evidence before it on the affidavits, to see if that assertion is correct.

47. The plaintiff is adamant that he did not see the advice of proofs, until he obtained it in February 2022. The first defendant has made two points in contradiction of that assertion. First, he says that when the plaintiff was pursuing his appeal of the substantive action to the Court of Appeal, he was given access to the litigation file. He was permitted to take whatever documents he required for the purpose of his appeal. Secondly, he states that, on the day that the advice of proofs came in to the solicitor's office by email, the plaintiff happened to be there having a consultation with the first defendant. They discussed the possible amendment of the pleadings. The first defendant states that the plaintiff was totally against any amendment of the pleadings, as he did not want the hearing of his action to be delayed on any account. As the time, the hearing was scheduled to commence some days later on 18th February, 2014.

48. That is a very significant averment by the first defendant. He appears to accept that counsel had directed that the pleadings should be amended. That is plainly evident from the advice of proofs. However, he makes the case that the plaintiff was informed that that was something that he should do to enhance his chances of being successful in the litigation against Connaught Gold; but despite the advices of counsel as contained in the advice of proofs, the plaintiff gave instructions to go against those advices and proceed to a hearing, without amending the pleadings.

49. It sometimes happens that a client will not accept the advices of his counsel and solicitor. A client will sometimes give instructions to proceed in a manner that is contrary to the legal advice that is given by his lawyers. That is his right. However, when a client acts in that way, one would expect to find a detailed memorandum drawn up by the solicitor, and possibly signed by the client, recording the fact that the client had been made aware of the advices of counsel, but had instructed that, notwithstanding that advice, he wished to proceed in a different way.

50. It is significant that no such memorandum appears to have been drawn up by the first defendant in this case. Certainly no such memorandum was put before the court.

51. In addition, while no bill of costs was produced in evidence, the plaintiff stated in argument and in his written submissions, that while he had received a detailed bill of costs from the defendants following his unsuccessful action in the High Court, which he stated had included charges for the smallest of items; there was no mention therein of any consultation with the solicitor on the day that the advice of proofs was received from counsel.

52. One can only say that if there had been a detailed consultation between the solicitor and the plaintiff to discuss counsel's advice of proofs, one would expect to see a charge for such consultation in the bill of costs. However, no bill of costs has been exhibited in this case. Its omission tends to support the plaintiff's assertions in this regard.

53. In relation to the second limb of the assertion that the plaintiff had knowledge of the advice of proofs, because he had been given access to the file for the purpose of mounting his appeal in the substantive action against Connaught Gold; one has to remember that at that time, the plaintiff was focussing on pursuing an appeal in his action against Connaught Gold. Therefore, the content of a private document containing advices of his counsel for the conduct of the trial in the High Court, would probably not have jumped out at him as being relevant for the appeal.

54. Accordingly, while not making any finding as to when the plaintiff first learned of the content of counsel's advice of proofs, I cannot find on the evidence before me, that he definitely knew of its content before the time that he alleges that he received it, in February 2022. Accordingly, this argument against allowing the amendment of the pleadings, does not succeed.

55. The defendants' main argument against allowing the amendments was on grounds of prejudice. They argued that, unlike where a defendant is joined into an action, where such joinder only takes effect as and from the date of joinder, thereby preserving any defence such defendant may have under the statute of limitations; when a plaintiff is allowed to amend his pleadings, such amendment takes effect from the date of issuance of the original proceedings. Thus, the defendant argues, that if the plaintiff is allowed to amend the pleadings in the manner sought, he will be able to introduce a new cause of action at this late stage, but with the benefit of the earlier date of institution of proceedings; thereby depriving the defendants of a defence under the statute of limitations.

56. I do not think that that argument is well founded for two reasons. First, I am not persuaded that what the plaintiff complains of in his amended statement of claim is in fact a new cause of action. The plaintiff had always sued the defendants for alleged negligence in and about their handling of his action against Connaught Gold. That has remained the focus of his action, albeit he has sought to add new particulars of the ways in which he alleges they were negligent in the handling of his case.

57. He has not tried to bring in a new cause of action arising out of a separate transaction. That could happen, for example, if a client were to sue his solicitor for alleged negligence in and about the purchase on his behalf of a new house. He may allege that his solicitor did not investigate title in a thorough manner. If the client were to seek at a later stage, to amend his pleadings, so as to sue his solicitor in respect of alleged negligence in the drawing up of a will, or in relation to his handling of litigation arising out of an RTA, it could well be argued that while the cause of action remained the same, being negligence and breach of contract, they were, in effect, separate causes of action arising out of separate transactions.

58. That is not the case here, where the plaintiff has at all times sued in respect of what he regards as being the negligence and breach of contract on the part of the defendant in their handling of his litigation against Connaught Gold. Thus, while not so deciding, I am not at all sure that a defence based on the statute of limitations would avail the defendants as a means of blocking the plaintiff's complaints in respect of the alleged failure to follow the advices contained in counsel's advice of proofs.

59. Even if I am wrong in that, I am satisfied that any perceived prejudice to the defendants can be removed by providing that the amendments should be allowed, but only with effect from the date of delivery of the amended pleadings, thereby preserving any defence that the defendants may have under the statute of limitations, if the matters complained of in the amendments are deemed to constitute a fresh cause of action.

60. A further ground which persuades the court to allow the amendments, is that the plaintiff is a lay litigant. If he is correct, that he only received the advice of proofs in February 2022, it would appear that he has been pursuing professional negligence proceedings against his former solicitors without all relevant evidence; namely, a full copy of the litigation file. That placed him at a considerable litigious disadvantage. It would be akin to a situation where a plaintiff was trying to run a medical negligence action against a hospital, in respect of treatment received while an in-patient in the hospital, but without a full copy of the hospital records.

61. Now that the plaintiff has obtained the relevant documentation and on foot of that, has received an expert opinion, which tends to support his claim that there was negligence on the part of his solicitors, it is in the interest of justice that the plaintiff be permitted to make the amendments sought, so as to put his case fully before the court at the trial of the action.

62. In making these comments, I emphasise again that I am making no determination as to when the plaintiff first received the advice of proofs; or what instructions he may or may not have given to his solicitor in advance of the trial of the action against Connaught Gold in May 2015. In particular, I make no finding that there is any substance to the allegations of negligence made by the plaintiff in his amended pleadings. All of that will have to be determined at the trial of the action.

63. For the reasons set out herein, I will allow the plaintiff to amend his plenary summons and statement of claim in the manner set out in the proposed amended plenary summons and amended statement of claim as exhibited at FT3 to his affidavit sworn on 10th May, 2022. The order will provide that the amendments are only to take effect as and from the date of delivery of the amended plenary summons and statement of claim to the defendants.

64. It should be made clear that by allowing the amendments to the plenary summons and the statement of claim, that does not in any way revive the other allegations already

contained in the plenary summons and statement of claim. Insofar as the plaintiff's case rested on those grounds, they have already been dismissed by the judgment of Gearty J., which was affirmed on appeal by the Court of Appeal.

65. As this judgment is being delivered electronically, the parties will have two weeks within which to file brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

66. The matter will be listed for mention at 10.30 hours on 31st March, 2023 for the purpose of making final orders.