

BETWEEN

FASTWELL LIMITED

PLAINTIFF

AND

OCL CAPITAL PLC

DEFENDANT

**JUDGMENT of Mr. Justice Tony O'Connor delivered on the 1st day of March, 2017****Introduction**

1. This judgment arises from an application to amend a Statement of Claim delivered on 10th November, 2015 after the cross-examination of a principal witness called by counsel for the plaintiff (Mr. Harry Crosbie ["HC"]) on 30th June, 2016. I have already described the Statement of Claim as "*precise, concise and what is envisaged by the Rules of the Superior Courts*".

2. Unfortunately, that conciseness was dissipated by the plaintiff after the cross examination of HC was concluded. The plaintiff at that stage:-

(i) Submitted that there was a "*contractual matrix*" and referenced discussions which occurred prior to the agreement for lease dated 14th April, 2014 of two kiosks at Grand Canal Harbour, Dublin ("The AFL") and;

(ii) Alluded for the first time to a claim for rectification of the AFL to the effect that an area below the kiosks (namely a stairs and a portion of the basement car park) had been agreed to be part of the AFL even though not described in the AFL or outlined on the attachments to the AFL.

**The Proceedings**

3. Following the issue of a Notice of Motion on behalf of the plaintiff seeking an interlocutory order restraining the defendant from taking any steps on foot of the defendant's notice of termination of the AFL, agreement was reached between the parties for the status quo to be maintained pending the determination of the proceedings.

4. The defendant also sought Security for Costs leading to the plaintiff lodging €100,000.00.

**Original Statement of Claim**

5. The original Statement of Claim challenged the termination notice for the AFL dated 6th July, 2015 on the grounds that a certificate under s. 25 of the Dublin Docks Development Act 1997 ("the 1997 Act") was in fact a planning permission within the meaning of clause eleven of the AFL requiring the procurement of planning permission by the plaintiff under the AFL within six months. It is not necessary in this judgment to describe other alternative pleas including the plea of "common intention" but suffice to say that the defence delivered on 24th December, 2015 was equally focused on the issues between the parties concerning the entitlement to terminate and the enforceability of the termination notice. Affidavits as to documents were exchanged and the proceedings were allocated 30th June 2016 as a trial date on the application of the plaintiff.

**Trial**

6. Mr. Simon Crosbie, director of the plaintiff, gave evidence that he and his mother executed the AFL while his father, HC, was the project manager for the two kiosks.

7. HC was led through his examination in chief to evidence about plans, communications about the issue of a certificate under the 1997 Act and a notification dated 29th April 2015 of a final decision to grant planning permission by Dublin City Council together with some events leading up to and including July 2015. Counsel for the defendant questioned HC about the map appended to the AFL and put it to him that there was clearly no reference to "the sub-floor basement area underneath either kiosk". HC responded: "*There couldn't possibly be a map for the floor underneath, which would be a completely separate document, which is obviously missing*".

8. It is accepted by the plaintiff that "*unbeknownst to it and by reason of error on its part*" the demise by the AFL did not include "*the sub-floor basement area underneath*" ("the excluded areas"). It was clarified in written legal submissions for the hearing of this application on 3rd February, 2017 that the legal team for the plaintiff "*was unaware that the plaintiff had mistakenly believed that the excluded area to be*" included in the AFL.

9. On the second day of trial, counsel for the plaintiff disclosed to this Court that the plaintiff's architect had retrieved an email dated 30th April, 2014 (a date subsequent to the date of the AFL) which had been sent to the solicitors for the defendant. Counsel for the defendant outlined how the failure to communicate plans and drawings had been specifically pleaded by the defendant. In this regard, the Court notes para. 11 of the defence delivered on 24th December, 2015. This email of 30th April, 2014 could be relevant to issues for consideration.

10. Counsel for the defendant emphasised how the email, which had not been identified in the Statement of Claim, came after the date of the AFL. Having been afforded time by this Court, the defendant's solicitors identified the email from their own email retention system without much delay. The Court does not attribute any blame to the legal advisors for the parties who drafted and exchanged pleadings without reference to this email because the neither the plaintiff nor its agents had averted to any such email or attachment prior to the second day of trial.

11. I repeat my view expressed last July that the pleadings which had been exchanged, and if relied upon solely, could have allowed for the trial to be completed within a day of the two days allotted for the trial based on the estimate of counsel for the Plaintiff. However, the reliance of counsel for the plaintiff on the "*contractual matrix*", the introduction of events after the execution of the AFL which had not been pleaded and the new claim for rectification caused the trial's duration to be extended. Counsel for the plaintiff examined HC for over an hour and a half while counsel for the defendant cross examined HC within an hour. I do not accept

the submission that the defendant contributed to under estimating the duration of the trial. The plaintiff remains solely responsible for the information given to the Court when seeking the trial date. Moreover, my decision on 1st July, 2016 to adjourn the balance of the trial to the following term beginning in October 2016 is directly attributable to the unexpected new matters and lengthening of the trial at the then very busy time for the Chancery Division to which the proceedings were assigned.

12. Having listened to counsel for the parties, I gave liberty on 1st July, 2016 to the plaintiff to deliver a supplemental affidavit as to documents in order to include the email of 30th April, 2014 and to amend its Statement of Claim about the events which the plaintiff wished to rely upon subsequent to the date of the AFL. At that time the claim for rectification was not mentioned specifically.

13. A timetable for the completion of matters prior to the resumption of the trial was included in my order made on 1st July, 2016 which provided for the exchange of submissions and the compilation of authorities to be relied upon.

14. In accordance with my order, these proceedings were mentioned in this Court on 27th October, 2016 for the purpose of identifying a date to resume the trial of the action. I was then brought through an indexed and leafed booklet of the proposed amended Statement of Claim with a copy of the communications between the solicitors for the parties in relation to their concerns and responses. Counsel for the defendant submitted that the then proposed amended Statement of Claim went beyond the scope of what I had envisaged and I repeat my acceptance of that submission. Counsel for the plaintiff agreed that a specific motion to amend the Statement of Claim should be heard and determined.

15. Therefore, the Court on 3rd February, 2017 had a full day of hearing the plaintiff's application for the extensive amendment of its Statement of Claim. During the course of that hearing the extensive amendments were narrowed down and confined to the following additional paragraphs:-

*"7. Prior to the conclusion of the AFL the plaintiff's development plans for the kiosks ("the plans") had been fully discussed by the plaintiff with the defendants, their servants and agents, including Mr. Michael May, a director of the defendant and Mr. Ray Peers, a director of Q-Park, the company responsible for the day to day management of the grand canal park, both of whom had been authorised and \ or were held out by the defendant its servants and agents as having been authorised to negotiate with the plaintiff on the defendant's behalf. The defendant's solicitor, Mr. Michael Neary of Eversheds, who is similarly authorised and \ or held out, was also at the date of conclusion of the AFL fully cognisant of the plans (which were subsequently forwarded to him by email from the plaintiff's architect on 13th April, 2014 but of which he was cognisant previously) and had the location and nature of the proposed development described to him on site by the plaintiff, its servant and agent.*

*8. In particular, and without prejudice to the foregoing, at the date of the AFL and as part of the factual matrix against which same must be construed, it was a fact that all parties to the AFL, their servants and agents were fully cognisant not only of the nature and contents of the Plans but also of the fact that the works proposed by same extended beyond the footprint of the Demised Premises as defined in the AFL and \ or included works to the basement car park and reconfiguration car parking spaces therein and \ or had the continuing common intention that the works should be so carried out in accordance with the Plans.*

*10. The first planning permission constituted a planning permission within the meaning of clause eleven of the AFL as interpreted against the factual matrix set out in paragraphs seven and eight herein.*

*11. Furthermore and without prejudice to the foregoing, if, which is denied, the certificate did not constitute a planning permission within the meaning of the AFL, the AFL did not reflect the continuing common intention of the parties at the date thereof as set out in the same paragraphs with the consequence that the plaintiff is entitled to an order rectifying the AFL to provide that a certificate for works in accordance with the Plans albeit extending beyond the footprint of the Demised Premises and \ or into the basement car park shall constitute planning permission for the purposes of clause eleven of the AFL."*

16. The revised amended Statement of Claim also included the following additional prayer:-

*"If necessary, an order rectifying the AFL to provide that planning permission, for the purposes of clause eleven, includes permission for a development in accordance with the Plans."*

17. The particulars of loss repeated the claim for "Henry A. Crosbie consultancy fee" of "€45,600" despite Mr. Simon Crosbie and HC having given evidence already that there were no invoices for same and that it would only be payable "on completion of the kiosks".

### **The Law**

18. Order 28(1) of the Rules of the Superior Courts ("RSC") permits the Court "at any stage of the proceedings" to grant leave for the amendment of pleadings "in such manner and on such terms as may be just" while the amendment shall be as "necessary for the purpose of determining the questions in controversy between the parties".

19. The Supreme Court in *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383 stated at para 36 that this "is intended to be a liberal rule" subject to taking into account other factors.

20. O'Sullivan J. in *Cornhill v. Minister for Agriculture* [1998] IEHC 47 stated at para. 21 that:-

*"An amendment to the pleadings should be allowed if it would have been appropriate in the original pleadings, would have withstood an attack under Order 19(28) of the RSC and provided no injustice (in the sense contemplated by the authorities) is thereby done to the opposing party."*

21. Kelly J. in *Cuttle v. ACC Bank* [2012] IEHC 105 at para. 8 stressed that it is not for the Court in this type of application to adjudicate on the merits of the proposed amendment or to speculate on the likelihood of its success at trial.

22. I also acknowledge O'Sullivan J.'s view in *Cornhill* at para 19 that the Court does not in this type of application seek to punish for mistakes made in the conduct of cases.

### **Defendant's Submissions**

23. It was submitted for the defendant that the injustice contemplated by the authorities requires the Court to consider the following:-

(i) The plaintiff has had the benefit of pre-trial written submissions and the evidence of the principal witness who was cross-examined on the basis of the original Statement of Claim. This rather unusual mid-trial application for amendment is more than technical in nature and is a substantive amendment (albeit refined at the hearing at this application) which is inconsistent with the original claim.

(ii) No evidential basis has been advanced on affidavit to explain the inconsistent grounds for the alternative pleas or the significant delay in notifying the defendant and the Court of the exact amendments sought;

(iii) The claim for rectification to include the "excluded areas" in the plans which allegedly informed the AFL has no basis because of the evidence already given by HC which indicated that he had understood that there was a map different to the map attached to the AFL.

#### **Determination**

24. However regrettable the inconvenience and prolonging of these proceedings by the plaintiff's late application to amend its Statement of Claim, the Court finds that those issues of prejudice can be dealt with by terms which may be imposed in any order of the Court granting leave provided those terms are fulfilled.

25. I am indeed attentive to the argument that the plaintiff will be putting forward pleas in the alternative in the revised amended Statement of Claim which may appear inconsistent with its original position. However, it is too early to make a determination about the effect of such inconsistencies. In those circumstances, I am not persuaded that the proposed amendment should be struck out in limine as might arise in an analogous application under O.19 (28) of the RSC.

26. Nevertheless, I take the point that HC has been cross-examined. Subject to hearing a compelling argument for allowing HC to give further evidence, I will include a ruling in the order to be perfected that HC should not now be allowed to revisit his evidence which was tested by the cross-examination undertaken by counsel for the defendant.

27. The absence of an explanation by the plaintiff for the delay in adopting a different and potentially inconsistent position during the trial can go to the weight of the evidence, some of which remains to be adduced.

28. The exercise of the Court's discretion in relation to the equitable reliefs sought can be addressed at this stage and I propose doing so.

29. Suffice to say that although the claim for the "extended areas" to be included in the plans associated with the AFL may be stateable, the claim may yet be cast as tenuous in light of all of the evidence. This issue can be addressed in the judgment following the completion of the trial

30. Having regard to the overriding interest to administer justice and to finalise the issues of controversy between the parties about the AFL and the plans for the kiosks in these proceedings, the Court grants leave to the plaintiff to amend (within seven days of the perfection of the order following this judgment) the original Statement of Claim according to the revised Statement of Claim produced in the early part of the afternoon of the hearing of this application on 3rd February, 2016 subject to the following terms, the reasons for which are given after each paragraph:-

(i) The plaintiff, if it acts on foot of the leave given, will confine its claim in the amended Statement of Claim to damages in lieu of all other remedies which it has sought to date if it is unable to satisfy the Court on an early date to be fixed following delivery of this judgment that it will suffer irreparable loss by reason of a failure to obtain each and every one of the other reliefs sought.

Reason:- The kiosks according to the information available to this Court at this stage have not been developed due to the dispute which led to the issue of the summons and the Notice of Motion seeking interlocutory relief in July, 2015. I am not aware of any imminent plan or work to develop or operate the kiosks by the plaintiff company other than some abandoned plans and work, the cost of which may or may not be a legal obligation for the plaintiff to discharge. In addition, the plaintiff was obliged by reason of its financial circumstances to give Security for Costs which indicates potential precariousness which the Court cannot ignore when seeking to avoid injustice in exercising its power to grant leave to amend. In this regard I am concerned with the effect of further delays and cost caused by the plaintiff in the seeking to amend its claim at such a late stage.

(ii) In view of the additional cost which can be anticipated in having further days of hearing over and above the two days estimated for the original hearing, I shall hear the parties about staying these proceedings until an increased amount of Security for Costs is lodged in court. There are papers already available to the Court concerning the compromised motion seeking Security for Costs at a time when there was no application for amendment. This Court will offer the same early day mentioned previously for this issue to be addressed so that security for the anticipated increased costs of trial and payment of expense connected with this application can be determined by this Court if necessary before lodgement or payment as this Court may further direct having heard the parties.

Reason: The plaintiff agreed to lodge Security for Costs in these proceedings in advance of obtaining a date for the hearing when it estimated that the trial would last two days. Unless the financial circumstances of the plaintiff have improved, it appears just and appropriate to increase the amount of the Security for Costs which was given by the plaintiff because it alone is responsible for this application, the further written legal submissions which will be necessitated by the changes to the claim and the additional time to finish the trial. I repeat that I will fix after delivering this judgment an early date for all of these incidental issues to be addressed including, if necessary, directions for the delivery of particulars of damages claimed by the plaintiff which may require investigation by the defendant before the resumption of the trial.

(iii) The defendant is also given leave to deliver a defence to the amended Statement of Claim within 28 days from the date of delivery of the amended Statement of Claim and the plaintiff will have the 14 days provided by the Order 23 (2) of the RSC for any reply to that defence.

Reason: It may be desirable for the defendant to plead in answer to specific facts which are introduced by the revised amendments to the Statement of Claim and for a reply to be delivered in order to narrow the focus of the balance of the

trial.

30. The Court will now hear Counsel about setting a date in the near future for a hearing in relation to any submissions against limiting the reliefs sought to damages, the sum of the increased security to be lodged, the discharge of costs connected with this application, the date for completion of all matters to fulfil all conditions attached to the order granting leave to amend the Statement of Claim and such further desirable directions including those in relation to particulars of losses claimed and the conduct of the resumed trial.

31. I shall retain, subject to any future management of the lists for this Court, seisin of the proceedings in order to save time and expense for the parties and the Court in advancing matters and the conclusion of these proceedings. I trust that the parties will be able to apply to me by early June for a date later in 2017 to resume the trial.