Neutral Citation [2016] IEHC 663

THE HIGH COURT

[2011 No. 747 P]

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

PLAINTIFF

AND

GEORGE BEGGAN

AND

MICHAEL KEAVENY AND JAMES WALSH

TRADING UNDER THE STYLE AND TITLE OF KEAVENY WALSH & CO

DEFENDANTS

JUDGMENT of Mr. Justice David Keane delivered on the 16th day of November 2016.

Introduction

1. The first named defendant in these proceedings ('Mr. Beggan'), a businessman, moves to amend his defence to include for the first time: a number of newly pleaded facts; the withdrawal of a claim of conspiracy and the introduction of a counterclaim against the plaintiff bank ('the bank'); the introduction of a counterclaim, or claim for indemnity or contribution, against the second and third named defendants, as the partners in a firm of solicitors that formerly represented him (together 'Keaveny Walsh'); and the introduction of a counterclaim – amounting to the institution of proceedings - against certain other persons not at present parties to the action, namely, Philip Farrelly and Brendan Scully, the two partners in a firm of chartered accountants formerly retained by him, trading under the style and title Farrelly & Scully (together 'Farrelly & Scully'), and a company named Philip Farrelly Financial Services Limited ('Farrelly Financial').

2. Both the bank and the Keaveny Walsh defendants oppose Mr Beggan's application.

Procedural background

3. The bank's action commenced with the issue of a plenary summons on the 26th of January, 2011. It was followed by the delivery of a statement of claim on the 8th March. Mr Beggan delivered his defence on an unspecified date in June and the pleadings between those parties closed when the bank delivered a reply to that defence on the 12th July 2011.

4. The present application was brought by notice of motion dated the 5th May 2015, more than four years after the commencement of the action and almost four years after the pleadings closed. It was then heard over two days on the 8th and 19th May 2015.

The bank's principal claim

5. The primary case that the bank makes against Mr Beggan is a simple one of a type that, since the property collapse of 2008, has become, sadly, very common. The bank pleads that it made three separate loan facilities available to him. The first, in the sum of €750,000, was the subject of a facility letter dated the 10th January 2006. It was for a twenty year term and was to facilitate the development of a commercial site at Portarlington, County Laois. The second and last tranche of that loan was drawn down on the 31st January 2007. The second loan, in the sum of €3.1 million, was the subject of a facility letter dated the 14th December 2006. It was also for a twenty year term and was to assist in the purchase of certain commercial and office units at Summerhaven, Carrick on Shannon, County Leitrim ('the Carrick on Shannon property'). It was drawn down on or about the 16th February 2007. The third loan, an overdraft facility with a limit of €450,000, was the subject of a separate facility letter dated the 14th December 2006. It was repayable on demand and was to assist with the payment of the VAT liability arising on the purchase of the Carrick on Shannon property. It was drawn down on or about the 13th February 2007.

6. The bank contends that, in breach of contract, Mr Beggan defaulted in the repayment of those loans, with the result that the bank wrote to him on the 2nd November 2010 demanding payment of the sum of €4,227.835.71, which it asserts was then due and owing. The bank alleges that Mr Beggan failed to make the payment demanded, or any payment, and that, when the bank's statement of claim was delivered, he was then liable to it in the sum of €4,295,645.09. The bank seeks judgment against Mr Beggan in that amount.

The bank's ancillary claim

7. The bank also pleads that it was a condition of the first loan facility that it was to be secured by way of a first legal mortgage or charge over an investment property in Rathmines, Dublin 6, and that it was a condition of the second loan facility that it was to be secured by a first legal mortgage or charge over the Carrick on Shannon property, the Rathmines property and another investment property in Ranelagh, Dublin 6. The bank contends that, whether expressly or by implication, Mr Beggan represented himself as the sole legal and beneficial owner of the Rathmines and Ranelagh properties.

8. In this connection, the banks claims that, prior to permitting the drawdown of funds by Mr Beggan, it sought and obtained the necessary undertakings from the Keaveny Walsh defendants, as Mr Beggan's solicitors, that they would ensure that the bank obtained good title to the Rathmines and Ranelagh properties and a first legal charge or mortgage over each, and that they would hold the title and mortgage documents in respect of those properties in trust for the bank. The bank contends that, in breach of those undertakings, the Keaveny Walsh defendants only belatedly registered each of the relevant mortgage deeds as a charge on the properties on the 2nd July 2009. More fundamentally, the bank claims that the security they provide is defective because Mr Beggan's wife, Catherine Beggan, is registered as the co-owner of each of the properties. Thus, the bank alleges that Mr Beggan misrepresented himself as the sole legal and beneficial owner of the properties and that the Keaveny Walsh defendants breached their undertaking to ensure that the bank obtained good title to them.

9. Insofar as may be necessary, the bank claims the following alternative reliefs: specific performance of those undertakings by the Keaveny Walsh defendants; damages in lieu of, or in addition to, that specific performance; and damages for breach of contract, negligence, misrepresentation, breach of undertaking and breach of trust.

Compromise of bank's claim against the Keaveny Walsh defendants
10. It is common case that the bank's claim against the Keaveny Walsh defendants, as just described, was compromised between those parties on the 31st October 2014 on terms whereby the sum of €650,000 was lodged to the credit of Mr Beggan's account with the bank. As the bank acknowledges, this has had the effect of reducing Mr Beggan's alleged indebtedness to it by that amount.

Mr Beggan's defence and the bank's reply
11. The defence delivered on behalf of Mr Beggan on the 10th June 2011 is in large part a traverse, or denial, of every aspect of the bank's claim.

12. However, it also contains the following affirmative pleas. In 2006, when Mr Beggan consulted Farrelly & Scully for professional advice concerning his proposed acquisition of a particular property that would enable him to obtain income tax relief under s. 23 of the Taxes Consolidation Act 1997, he was advised by that firm to acquire the Carrick on Shannon property for that purpose instead. The Carrick on Shannon property was then owned by Philip Farrelly, a partner in that firm. The loan finance of €3.1 million that Mr Beggan used to acquire the property was arranged through Farrelly Financial, which was then managed by Philip Farrelly's nephew. At the time when the relevant loan agreement was entered into, the bank had obtained, and was in possession of, a recent auctioneer's report, attributing a market valuation of €2,348,000 to the property. Philip Farrelly persuaded Mr Beggan to draw down the loan and purchase the property by representing to him that, in view of the government decentralisation policy then in force, it was likely that a government department could be secured as a tenant for the property at an annual rent of no less than €90,000. Philip Farrelly also guaranteed Mr Beggan that he would secure a tenant for the property at an annual rent of €120,000 for the first five years of Mr Beggan's ownership of it. Mr Beggan purchased the property in reliance on that representation and that guarantee. The bank's initial loan offer to Mr Beggan to facilitate the acquisition of the property, set out in a facility letter dated the 13th January 2006, included, as one of a number of conditions precedent to the drawdown of the relevant funds, a requirement that Mr Beggan provide it with evidence of a 'rental guarantee' in respect of the property, whereas the facility letter dated the 14th December 2006, upon which the bank relies as evidence of the agreement entered into between it and Mr Beggan, contains no such condition. The relevant condition precedent was omitted from the second letter pursuant to a conspiracy between the bank and Philip Farrelly. Shortly after Mr Beggan acquired the property, Philip Farrelly's nephew left Farrelly Financial and went to work for the bank.

13. Immediately following the assertions of fact I have just summarised, this aspect of Mr Beggan's defence concludes with the following pleas:

> '11. Given the conspiracy and misrepresentation referred to above it is expressly pleaded that the [said loan of €3.1 million] is void and unenforceable.
>
> 12. Further or in the alternative, [Mr Beggan] is entitled to an indemnity from [Farrelly & Scully] in respect of this loan.'

14. I pause here to make two observations concerning the contents of Mr Beggan's defence, as originally pleaded. The first is that, since neither the partners in Farrelly and Scully nor any person concerned in the affairs of Farrelly Financial is a party to the action as matters stand, none of those persons has yet been offered an opportunity to comment upon, much less meet, any of the foregoing allegations in the context of either the present application or the underlying action.

15. The second observation I would make is that, notwithstanding the various assertions of fact just described, Mr Beggan's defence, as drafted and signed by Counsel and delivered on his behalf by the firm of solicitors then acting for him, contains no counterclaim against either the bank or Farrelly & Scully or, certainly, no counterclaim against either in the form required under the relevant rule of court: see O. 21, r. 10 and r.11 of the Rules of the Superior Courts ('RSC'). Nor is there any suggestion of any attempt made on behalf of Mr Beggan to serve the partners in Farrelly & Scully with that defence as non-parties against whom a counterclaim was being set up; see O. 21, r. 11. This is particularly surprising since, as has just been mentioned, the defence asserts an entitlement to an indemnity from that firm in respect of the loan.

16. In its reply, the bank joins issue with Mr Beggan's defence. In particular, it denies that it entered into any conspiracy with Philip Farrelly or Philip Farrelly's nephew, a claim that it pleads is scandalous and unnecessary (as those terms are understood under O. 19, r. 27 of the RSC) and which the bank reserves the right to apply to have struck out on that basis. The bank also denies that it made any misrepresentation to Mr Beggan or that Mr Beggan's defence as delivered discloses any basis for any such plea against it, with the result that the bank reserves the right to apply to have that plea struck out as well.

Mr Beggan's application

17. Mr Beggan now seeks to amend his defence in, what I think it fair to describe as, a fundamental and wide-ranging way, almost four years after delivering it.

18. The proposed amendments are very extensive. Nevertheless, I would endeavour to summarise them in the following way.

i. the further particularisation of Mr Beggan's defence

19. Mr Beggan wants to 'chop and change' the allegations of fact that he makes in his defence against Farrelly & Scully in order to replace the claim of conspiracy that the defence originally contained with one that the partners in that firm are liable to him instead for breach of contract, negligence and breach of duty (including breach of statutory duty).

20. Mr Beggan seeks to add to his defence the following specific allegations against Farrelly Financial; (a) that it held itself out as offering independent mortgage brokering advice to him in connection with his acquisition of the Carrick on Shannon property; (b) that it failed to disclose a conflict of interest in that regard, specifically that the manager of its business had a financial interest in the property; and (c) and that it was aware at all material times when brokering a mortgage loan of €3.1 million on Mr Beggan's behalf both of his financial circumstances and repayment capacity and, as the alter ego of Philip Farrelly, of the recent valuation of the property on behalf of the bank in the sum of €2.348 million.

21. In expanding upon his allegations against the bank, Mr Beggan clarifies that he makes the novel and unusual claim that it was at his insistence – whether instead of, or in addition to, that of the bank is not clear – that the bank's original loan offer was to include a condition precedent to the drawdown of any funds by him that he provide it with evidence of a rental guarantee in respect of the property and that, accordingly, in dropping that condition from the loan facility ultimately provided and in allowing Mr Beggan to draw down those funds without first providing any such evidence, the bank acted in breach of its obligations to him.

22. Without wishing to be in any way facetious, it seems that Mr Beggan wants to introduce into, or amplify within, his defence a

claim that the bank failed to comply with a condition precedent to the execution of the said loan agreement that it would include a requirement that he provide it with evidence of a rental guarantee as a condition precedent to the drawdown by him of any funds. Or more simply put, Mr Beggan now wishes to include an express plea to the effect that the bank breached an obligation that it had assumed at his insistence to protect him from himself.

23. Mr Beggan also wants to add a plea that, before he signed his agreement to the relevant loan facility, he sought and obtained confirmation from a manager with the bank that the bank's preconditions that he furnish it both with evidence of a rental guarantee and with a professional valuation of the property had been fulfilled.

24. In the course of submissions, Counsel on behalf of the bank indicated that it has no objection to the proposed amendments just described, insofar as they comprise only the further particularisation of Mr Beggan's defence to its claim against him. Consequently, I can see no reason why those amendments should not be allowed, and I will order accordingly.

25. Mr Beggan also now seeks, as part of his defence, to introduce claims of negligence, breach of contract, breach of duty and breach of fiduciary duty, and a claim for indemnity and contribution, against the Keaveny Walsh defendants. He wishes to do so on the following basis: (a) that they were instructed to have carriage of the purchase of the Carrick on Shannon property; (b) that they were specifically instructed in that regard to ensure that the contract for sale included a rental guarantee clause for 5 years in the sum of €90,000 *per annum*; (c) that they failed to ensure that the relevant clause was included in the contract for sale; (d) that they were instructed to act for him as his professional advisers in connection with the drawdown of each of the loans at issue; (e) that they were aware at all material times of his repayment capacity; and (f) that they failed to obtain good title to the property for him.

26. A further proposed amendment recites that, if Mr Beggan is found liable to the bank, he will then serve a counterclaim on the Keaveny Walsh defendants, Farrelly & Scully and Farrelly Financial, pursuant to O. 21, r. 10 of the RSC, as well as seeking an indemnity or contribution from the Keaveny Walsh defendants. I pause to observe that O. 21, r. 10 of the RSC permits no such procedure but, rather, requires a defendant who wishes to set up a counterclaim to do so by adding it to his defence. I should also observe that it would be conceptually incoherent under the RSC and, in particular, O. 21, r.14 of those rules to purport to bring a counterclaim as a separate follow on action after the principal claim has been determined. It is either a counterclaim in the action or a claim in an independent action pursued subsequent to the action – it cannot be both. It follows that I must refuse leave to make that amendment.

ii. the withdrawal of the conspiracy claim against the bank and Farrelly & Scully

27. Mr Beggan proposes to delete that plea from his defence. Not surprisingly, the bank does not object to that amendment, and I propose to allow it.

iii. Counterclaims

28. As presaged by the various proposed amendments to his defence that I have already described, Mr Beggan wishes to amend that pleading further by adding a series of new and extensive counterclaims against the bank, the Keaveny Walsh defendants, Farrelly & Scully, and Farrelly Financial.

29. Mr Beggan wishes to counterclaim against the bank, in essence, that:

> a) It knew or ought to have known that the property it was lending him €3.55 million to acquire (being €3.1 million as the purchase price and €450,000 in VAT) had an independently assessed current market value of €2.348 million.
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> b) In breach of contract and in breach of a duty of care owed to Mr Beggan, it failed to inform him of that valuation.
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> c) It was on notice of Mr Beggan's repayment capacity in relation to the loan facilities that it provided to him.
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> d) It was aware of his insistence, and reliance, upon the inclusion by it in the relevant loan facility agreement of a condition precedent to the drawdown of any funds by him that he provide it with evidence of a rental guarantee in respect of the property but, in breach of contract and in breach of a duty of care owed to Mr Beggan, it failed to include such a condition precedent in that agreement.
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> e) It represented to him through its servants or agents that such a condition precedent was included in the loan facility agreement that he signed, which representation was false.
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> f) In breach of contract and in breach of a duty of care owed to Mr Beggan, it failed to advise him to seek, and failed to provide him with an opportunity to obtain, independent legal advice prior to entering into the loan agreements at issue.
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> g) And that Mr Beggan is entitled to appropriate declarations and an award of damages against the bank for negligence and breach of duty.

30. Mr Beggan wishes to counterclaim against the Keaveny Walsh defendants broadly on foot of the facts set out in the proposed amendments to his defence already described but with the addition in that counterclaim of a further claim that those defendants failed to disclose a conflict of interest in respect of their carriage of the purchase of the Carrick on Shannon property on his behalf in that they had acted previously on behalf of the vendor Philip Farrelly in connection with the latter's other business interests. On that basis, Mr Beggan wants to claim damages against the Keaveny Walsh defendants for negligence, breach of contract and breach of duty (including breach of fiduciary duty).

31. Mr Beggan wishes to bring Farrelly & Scully into the action as additional defendants in order to counterclaim against the partners in that firm on the basis of new allegations of fact that they are liable to him in damages for negligent misrepresentation, negligence, breach of contract and breach of duty (including breach of statutory duty and fiduciary duty).

32. Specifically, Mr Beggan now wishes to claim against Farrelly & Scully that:

> (a) Philip Farrelly was both the vendor of the Carrick-on-Shannon property and a partner in that firm.
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> (b) The firm dissuaded Mr Beggan from purchasing the s. 23 investment properties he had in mind and persuaded him

instead to purchase the Carrick-on-Shannon property

(c) In doing so, the firm represented to Mr. Beggan that: (i) the Carrick-on-Shannon property was more suitable for his investment and tax requirements than the properties he had in mind; (ii) that the 'real market value' of that property was €3.1 million; (iii) that, as vendor of the property, Philip Farrelly would provide a rental guarantee of €90,000.00 for five years from the date of the closing of its sale; (iv) that a government agency would rent the main part of the property at €120,000.00 per annum; and (v) that tenants were in place for four of the five shop units within the property and that a tenant had already been lined up for the one remaining vacant unit at a rental of €10,500 *per annum*.

(d) The foregoing representations were false because: (i) the property was not suitable for Mr Beggan's investment and tax requirements; (ii) the real market value of the property was €2.348 million and not €3.1 million; (iii) Philip Farrelly did not provide the said rental guarantee or the said payments; (iv) no government agency rented any part of the property; and (v) there was no tenant for the vacant shop unit.

33. Mr Beggan also wishes to bring Farrelly Financial into the action as a further additional defendant in order to counterclaim against it. The extensive claims that Mr Beggan wants to advance against Farrelly Financial in significant part replicate those against Farrelly & Scully already described, on the basis of an intended plea that Farrelly Financial is the alter ego of the partners in Farrelly & Scully. In addition to those claims, Mr Beggan wishes to plead that Farrelly Financial arranged finance for him with the bank; that it did so for reward; and that it had a conflict of interest in doing so because of its close connection with Philip Farrelly as both a partner in Farrelly & Scully and the vendor of the Carrick on Shannon property. Mr Beggan wishes to seek a declaration that all of this amounted to negligence on the part of Farrelly Financial and wishes to claim damages against that company for that negligence and for breach of contract.

Applicable principles of law
(i) amendment of pleadings

34. O. 28, r. 1 of the RSC permits the Court, at any stage of proceedings to allow any party to amend a pleading 'in such manner and on such terms as may be just.' That rule goes on to provide that 'all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.' The discretion conferred by the rule is a wide one and, where an amendment, if allowed, will not in any way prejudice or embarrass the opposing party by the introduction of new allegations of fact, no injustice is done by permitting it, even if it amounts to the addition of a new cause of action based on the same facts or substantially the same facts that would be otherwise statute-barred: *Krops v The Irish Forestry Board Ltd.* [1995] 2 I.R. 113.

35. As the rule is a liberal one, it cannot be overborne by undue concern with the procedural conduct of the applicant, so that where an amendment can be made without irremediable prejudice to the other party or parties and thus enable the real issues to be tried, the amendment should be made; *Croke v Waterford Crystal Ltd. & Anor.* [2005] 1 I.L.R.M. 321.

36. While there is no reason why a party seeking to add a new cause, arising out of the same facts or substantially the same facts as already pleaded should not be permitted to make the necessary amendment, an amendment will not be permitted if the effect is entirely to alter the nature of the case originally made, and a party will not be permitted to add fresh claims which have become statute barred; per Finnegan J., Murray C.J. and Kearns J. concurring, in *Allen v Irish Holemasters Ltd* [2008] 1 ILRM 81 at 86-7. Similarly, the addition of a new cause of action by amendment will be permitted notwithstanding that by the date of amendment the Statute of Limitations had run but only if the facts already pleaded are sufficient to support the new cause of action, and, while facts may be added to clarify the original claim, that may not be done if they are new facts; *Smyth v Tunney* [2009] 3 I.R. 322.

(ii) counterclaim

37. It is implicit in O. 21, r. 10 and r. 11 of the RSC that a defendant may set up a counterclaim which raises questions between himself and the plaintiff 'along with any other persons.'

38. S. 6 of the Statute of Limitations Act 1957 ('the Statute') provides that, for the purposes of that Act, a counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the counterclaim is pleaded. It is common case that each of Mr Beggan's counterclaims would now be statute-barred if brought in separate proceedings but would be within time by operation of the provision just described if the court were to grant leave to Mr Beggan to amend his defence to include them.

39. The said effect of S. 6 of the Statute of Limitations was confirmed in the following terms by O'Hanlon J. in *Strick v Tracey* (High Court, unreported, 10th June 1993):

> 'It may seem inequitable that a claim against a party who was not a party to the original proceedings, and perhaps knew nothing about them, should, if it is introduced by way of counterclaim in proceedings to which he was never previously a party, be regarded for the purpose of the Statute of Limitations as having been commenced on the same date as the action in which the counterclaim is pleaded. However, in the absence of any authority to the contrary, I feel bound to give the words of the Statute their plain meaning and accordingly this disposes of the plea entered by two of the defendants to the counterclaim that the plaintiff's claim against them is barred by operation of the Statute.'

40. I apprehend that the mischief that s. 6 of the Statute is intended to prevent is that a tardy or unscrupulous plaintiff should benefit from his own delay in commencing proceedings so close to the expiration of an applicable limitation period that a defendant is effectively prevented from bringing any counterclaim governed by the same limitation period arising from the same events. A perhaps unintended consequence of the legislative solution to that problem provided by s. 6 of the Statute is that the relevant limitation period may be extended not only against a plaintiff but also against a non-party who may be entirely unaware of the existence of the proceedings, since, as previously noted, a defendant may set up a counterclaim against the plaintiff 'along with any other persons.' The tardier a defendant is permitted to be in the delivery of his defence and counterclaim in those circumstances, the greater the potential extension of the limitation period he is able to obtain against any such person, subject only to the backstop represented by the expiration of the limitation period calculated from the date of the commencement of the plaintiff's action.

41. However, unlike *Strick*, this is not a case in which the Statute is raised as a defence to a counterclaim without regard to the express provisions of s. 6. Rather, the potentially inequitable effect of the operation of s. 6, should Mr Beggan be allowed to amend his defence to include a counterclaim after the limitation period has otherwise expired, is relied upon as a factor to be weighed in the just exercise of the court's discretion to grant or refuse that application.

42. In support of his application, Mr Beggan invokes the decision of Laffoy J. in *Shell Ireland Ltd v McGrath & Ors* [2006] 2 ILRM 299, whereby certain defendants in that private law action were permitted to amend their defence and counterclaim to introduce various public law claims and to join the appropriate State parties to the proceedings for that purpose, despite the State's arguments that those defendants had no *locus standi* to bring those claims and were, in any event, out of time to do so under the applicable time limits prescribed by O. 84 of the RSC. Mr Beggan relies upon the conclusion of Laffoy J. (at 315) that, since those were arguments that could be raised by way of reply or defence to the proposed counterclaim, it would not be appropriate to refuse leave to amend on the basis of those considerations. Of course, the position is different here since, if leave to amend is granted, s. 6 of the Statute will then operate to extend the applicable limitation period, thus depriving the intended defendants to Mr Beggan's proposed counterclaims of the statute-bar defence that would be available to them if those claims were pursued in a separate action.

The arguments raised

43. In seeking leave to amend his defence in the manner already described, Mr Beggan invokes an unqualified entitlement to a liberal application of the general principle that 'all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties', on the basis that neither the bank nor the Keaveny Walsh defendants have identified any irremediable prejudice that would follow from such amendment, and that any logistical prejudice that might follow can be dealt with through the appropriate orders or directions of the Court.

44. The Keaveny Walsh defendants and the bank contend that it would be inappropriate and unjust to permit the amendments sought. They do so on broadly the following grounds:

> (a) The amendments sought amount to the assertion of new causes of action, based on new facts, and entirely alter the nature of the case originally made (insofar as any case was actually made) against Farrelly & Scully, or otherwise make an entirely new case against each of the intended counterclaim defendants, all of which claims would be statute barred if brought by way of an independent action or actions.
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> (b) The amendments sought should be refused in the exercise of the Court's discretion under O. 28, r. 1 of the RSC since the claims concerned should be disposed of more properly in an independent action than by way of counterclaim in these proceedings.
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> (c) The amendments sought will cause irremediable prejudice to the Keaveny Walsh defendants if permitted, since those defendants have already compromised the existing claims against them by the bank.
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> (d) The amendments sought are not necessary for the purpose of determining the real questions in controversy between the parties.
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> (e) That there is no sufficient connection between the intended counterclaim against the Keaveny Walsh defendants and the original cause of action, nor between the relief sought against those intended defendants and that sought against Mr Beggan, such as would warrant permitting the amendment of Mr Beggan's defence to include those claims; *Shell E & P Ireland Ltd. v Philip McGrath & Ors* [2006] 2 ILRM 299.
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> (f) The amendments sought involve the introduction of new claims most, if not all, of which are manifestly bound to fail; *Woori Bank & Anor. v KDB Ireland Ltd*. [2006] IEHC 156. In this respect, the bank points to the proposed assertion of a claim against them for reckless lending, although no such tort exists in Irish law; see *Harrold v Nua Mortgages Ltd* [2015] IEHC 15, following *Healy v Stepstone Mortgage Funding Ltd* [2014] IEHC 134; *ICS Building Society v Grant* [2010] IEHC 17 and *McConnon v. President of Ireland* [2012] IEHC 84. The Keaveny Walsh defendants point to the absence of any, or any sufficient, independent expert opinion in respect of two of the three claims of professional negligence that Mr Beggan wishes to advance against them, as establishing that those claims are advanced irresponsibly in a manner that amounts to an abuse of the process of the Court; *Cooke v Cronin* [1999] IESC 54 and *Greene v Triangle Developments Ltd.* [2008] IEHC 52; but *cf Murray v Budds* [2015] IECA 269.
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> (g) A factor to be taken into account is the unjustifiable and inexcusable delay of Mr Beggan in seeking to amend his pleadings; *Allen v Irish Holemasters Ltd* [2008] 1 ILRM 81 (at 87). If the matter is finely balanced (though not otherwise), this tilts the balance between the competing interests of justice against permitting the amendment; *Porterridge Trading Ltd. v First Active plc* [2007] IEHC 313. Mr Beggan has not directly provided any reason or justification for the delay in this case and the reason put forward on affidavit by his solicitor on his behalf - that Mr Beggan 'was not in possession of all of the relevant facts' - is so hopelessly, if not deliberately, vague as to amount to the provision of no adequate justification or excuse at all. Similarly, the fact that, since the commencement of these proceedings, Mr Beggan has changed his legal representation three times, as well as acting for a period as a litigant in person, and that there has been 'some procedural confusion', apparently as a result, cannot provide an adequate explanation or excuse for the delay.

Analysis

45. It seems to me that Mr Beggan has no good answer to the first of the objections adumbrated in the preceding paragraph. Without leave to amend his defence by the inclusion of the various counterclaims he now wishes to advance, it is common case that Mr Beggan's claims would be statute barred if pursued instead by way of an independent action. Conversely, if leave to amend were granted, the statute-bar would fall away by operation of s. 6 of the Statute of Limitations. In the earlier part of this judgment, I have identified the very broad extent to which Mr Beggan's proposed amendments involve the assertion of new and different claims against each of the intended counterclaim defendants based on new and different facts. Accordingly, the principles identified by the Supreme Court in both *Allen v Holemasters Ltd* and *Smyth v Tunney* impel the refusal of Mr Beggan's application, since the effect of the amendments sought would be entirely to alter the nature of the case originally made by him through the addition of claims that are otherwise statute barred.

46. Even if that were not so, in exercising its discretion under O. 28, r. 1 of the RSC in respect of a proposed amendment that involves the introduction of a counterclaim, it seems to me that, where the issue is raised, the Court must consider whether the claim concerned should more properly be disposed of in an independent action than by way of counterclaim. This follows from the jurisdiction conferred on the Court by O. 21, r. 14 of the RSC. Under that rule, the defendant to a counterclaim who contends that the claim should be disposed of in an independent action instead may apply for - and insofar as may be just obtain - an order excluding that counterclaim from the action concerned. In those circumstances, it would serve no useful purpose, and would not be conducive to the efficient administration of justice, to prevent that issue from being raised, and considered, in the context of Mr Beggan's application to amend his defence by the inclusion of various counterclaims.

47. The fact that any such determination would permit the proposed defendants to rely on a statute bar is not a material consideration, since the counterclaim procedure is not intended as a lifeline to an otherwise statute-barred claim; *Ernst & Young v Butte Mining plc (No. 2)* [1997] 2 All ER 471 at 482.

48. In *Butte Mining*, the plaintiff accounting firm had obtained judgment in a fees action against the defendant company. The company then sought to counterclaim in that action for fraud, negligence and breach of contract in the plaintiff's conduct of the assignments for which those fees had been charged. By that time, the limitation period for service of a writ in England – that is to say, for the institution of a separate action – had expired, whereas, by virtue of s. 35(1)(a) of the UK Limitation Act 1980 (a provision broadly similar to s. 6 of the Statute of Limitations), a counterclaim was immune from existing accrued limitation defences. The plaintiff applied for an order that the counterclaim be struck out under a rule of court in that jurisdiction (RSC Ord 15, r 5(2)) broadly equivalent to O. 21, r. 14 of the RSC.

49. In considering that application, Lightman J. identified the overriding discretionary jurisdiction conferred under the relevant rule as a safeguard against the misuse of the counterclaim procedure, before continuing (at 479):

> 'This construction is entirely in accord with the history of the counterclaim and the authorities. Section 24(3) of the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66) created the counterclaim for the statutory purpose of enabling all matters in dispute between the parties to be completely and finally determined and all multiplicity of disputes with respect to any of those matters to be avoided. The counterclaim was devised and designed for use for the purposes of procedural convenience, enabling the subject matter of claim and counterclaim to be tried in one action: see e.g. *Beddall v. Maitland* (1881) 17 Ch.D. 174 and cases cited. If this procedure is invoked where there is no such procedural convenience, the court is afforded the means to take the appropriate counter-measures. I should add that the availability of a counterclaim is not intended to affect the substantive rights of the parties, but afford a means for determining those rights: see *Stumore v. Campbell & Co. [1892] 1 Q.B. 314, 316.*'

50. Having identified the conceptual basis of the Court's discretion, Lightman J. proceeded to identify and apply the appropriate test for its exercise. The test involves a balancing of the considerations of procedural convenience in favour of and against disposal of the subject matter of the counterclaim in a separate action. Amongst the considerations that Lightman J. weighed in the balance were the following; first, whether there was any, or any sufficient, connection between the subject matter of the two actions or mutuality between the parties; and second, whether there was any relevant prejudice either way (assessing logistical prejudice as a primary consideration and limitation consequences as 'at best only a secondary consideration').

51. Applying a similar analysis to the circumstances of the present application, I have come to the conclusion that, in this case as in *Butte Mining*, the balance strongly favours disposal of the subject matter of the counterclaim in a separate action. The subject matter of the two actions is quite separate and distinct and there is an absence of mutuality between the parties. That remaining part of the main action is a narrow claim for monies had and received between a bank and its customer, whereas Mr Beggan wishes to make wide-ranging and discrete counterclaims of misrepresentation, breach of contract and professional negligence not only as a customer against the bank but also as a client against a firm of solicitors, a firm of accountants and a financial services company. The debt action should be relatively short whereas the counterclaims are likely to involve substantial preparations and a more lengthy trial in each case. It is unjust that an action that has already been delayed for over four years should now be delayed any longer than is absolutely necessary in getting to trial.

52. Accordingly, for this reason also I would refuse Mr Beggan's application for leave to amend his pleadings.

53. In view of the conclusion that I have reached in upholding the two principal objections relied upon in opposition to Mr Beggan's application, it is unnecessary to consider the range of additional objections raised on behalf of the bank and the Keaveny Walsh defendants, and I do not propose to do so. Nor do I propose to address Mr Beggan's application for leave to serve a notice of indemnity and contribution on the Keaveny Walsh defendants as it seems to me that there is no provision for such leave under O. 16, r. 12 of the RSC. On the contrary, the relevant rule permits such notice to be issued and served 'without leave.' Even if leave were required, no attempt has been made to apprise the Court of the particular claim to be made, or the issue or question to be specified, in that notice. Accordingly, I consider this aspect of Mr Beggan's application to be fundamentally misconceived.

Conclusion

54. Mr Beggan's application for leave to amend his defence, save in the limited respects indicated earlier in this judgment, is refused.