

THE HIGH COURT

[2013 No. 12782 P.]

BETWEEN

SEAN HANLEY

PLAINTIFF

AND

MARY HANNON ADMINISTRATOR OF THE ESTATE OF THE LATE MARTIN HANNON AND GERARD NEILAN AND WILLIAM BRANDON
PRACTISING UNDER THE TITLE AND STYLE OF PATRICK J. NEILAN AND SONS, SOLICITORS (INCORPORATING MARTIN J.
NEILAN)

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 13th day of February, 2019

1. The within application is brought by the plaintiff ("Mr. Hanley") for two reliefs. First he seeks to amend his statement of claim and second to join the first defendant ("Mrs. Hannon") as a co-defendant to the proceedings in her personal capacity as distinct from her representative capacity.

Background Facts

2. The plaintiff commenced these proceedings as a litigant in person by the issue of a plenary summons on the 6th November, 2013 followed by a statement of claim in February 2014. In the statement of claim, the plaintiff pleads that Mrs. Hannon is the widow of the late Martin Hannon ("Mr. Hannon"). This is not in dispute. However, the plaintiff also alleges that Mrs. Hannon is the administrator of the estate of her late husband. This is denied on oath by Mrs. Hannon in this application and her evidence in that regard has not been contradicted by Mr. Hanley, despite a subsequent affidavit having been sworn by him.

3. The statement of claim goes on to allege that on the 28th February, 2005, Mr. Hanley purchased two sites known as sites 9 and 10 Ardsallagh Beg, Roscommon from Mr. and Mrs. Hannon who instructed the second and third named defendants as their solicitors in the transaction. Again in her sworn evidence, Mrs. Hannon says that only one site was in fact purchased by Mr. Hanley, the other having been purchased by his son. Again this is not controverted by Mr. Hanley.

4. The statement of claim further pleads that the conveyance between the parties included a covenant whereby Mr. Hanley was to construct a dwelling house within eighteen months of the date of the conveyance. He further pleads that the replies to requisitions on title indicated that Mr. and Mrs. Hannon were applying for planning permission for the sites in question but this did not issue until the 16th January, 2006, leaving Mr. Hanley with only seven months to comply with the covenant to build the house.

5. He further alleges in his statement of claim that the Hannon's failed to comply with conditions 11 and 12 of the planning permission and, although he does not specify what those conditions provided, he claims that as a result of such non-compliance he lost the opportunity to build. In consequence he claims to have suffered loss and damage. He also alleged that the solicitors had failed to comply with an unspecified undertaking on the closing of the sale but the proceedings have been discontinued against the solicitors so that Mrs. Hannon is the only remaining defendant. The only case pleaded against them appears to be an allegation that they failed to comply with an unspecified undertaking given on the closing of the sale.

6. Accordingly, Mr. Hanley claims damages for negligence and breach of contract as a result of the failure to comply with the planning conditions.

7. Mrs. Hannon's solicitors served a notice for particulars on the 20th March, 2014 which appears not to have been replied to and delivered a defence on the 12th October, 2014. In her defence, she raises by way of preliminary objection the Statute of Limitations and also pleads that the plaintiff has been guilty of inordinate delay in bringing the proceedings. She expressly denies that she is the administrator of her late husband's estate and much of the defence is a general traverse of the statement of claim. However, in relation to the allegation that the Hannon's had failed to obtain planning permission, or to obtain it in time, she expressly relies on special condition 11 of the contract which provided as follows:

"The site the subject matter of the sale is not being sold with the benefit of any planning permission and the sale is not subject to the purchaser applying for or obtaining planning permission in respect of the site the subject matter of the sale."

8. It is important to note that Mr. Martin Hannon died on the 3rd February, 2011, some six years after the contract was concluded and over two and a half years prior to the institution of the proceedings.

9. Subsequent to the delivery of the defence, Mr. Hanley served an amended statement of claim in November, 2014 in which he added two new allegations, evidently in response to the defences that had been delivered. First he pleaded that one of the sites was transferred to his son contrary to his express instructions, presumably by the second and third defendant. Second, he says that because clause 11 provided that the sale was not subject to planning permission being obtained by the plaintiff, this infers that it was sold with the benefit of planning permission.

10. Discovery was made by the 3rd defendant in an affidavit sworn on the 22nd April, 2015. Matters thereafter appeared to have proceeded as outlined in an affidavit sworn by Mr. Hanley in this motion on the 4th October, 2018. In relation to the issue of representation, a number of uncontradicted facts emerge from the affidavits sworn on behalf of Mrs. Hannon opposing this motion. The first is that Mr. Hanley was at all times represented by solicitors in relation to the sale. The second is that in instituting and pursuing these proceedings, he has been assisted by a Mr. David O'Shea, a former solicitor who holds two law degrees and practiced as a solicitor for 15 years between 1993 and 2008. Thirdly, in or around 2012 shortly before the institution of these proceedings, Mr. Hanley instructed Messrs. Brendan J Looney, solicitors, to engage in correspondence with the potential defendants in relation to the matter, although that firm never came on record.

11. In his own affidavit, Mr. Hanley avers that in or around October, 2016, Mr. Hanley sought expert assistance in relation to his claim and consulted Mr. Ignatius Gaynor, an architect, who presumably has expertise in relation to planning matters. It would appear that before Mr. Gaynor had carried out any significant investigative work concerning the planning issues in the case, Mr. Hanley set the

matter down for trial and applied for a hearing date on the 18th November, 2016. A hearing date of the 18th July, 2017 was given for the trial.

12. As a result, possibly of Mr. Gaynor's investigations, the plaintiff, with less than a month to go to the trial, for the first time consulted Mr. Paul Kelly solicitor on the 23rd June, 2017. That appears to have been followed by a consultation with Mr. Kelly, Mr. Gaynor, Mr. Hanley and counsel on the 29th June, 2017.

13. This latter meeting proved to be the catalyst for the application that is now before the court. Mr. Hanley says that he learned at this consultation for the first time that he had been the victim of a fraud in relation to the planning and other issues in the case. This fraud, he says, was revealed as a result of his architect investigating earlier planning permissions obtained by the Hannonns in respect of the site and adjoining sites the subject matter of the proceedings. He avers that because only an expert such as Mr. Gaynor would have realised the implications of all of this, he had been the victim of fraudulent concealment and fraudulent misrepresentation by Mr. and Mrs. Hannon, which as a lay person he could not previously have appreciated.

14. This is strongly disputed in an affidavit sworn by Mrs. Hannon's solicitor, Peter H Jones. In summary, Mr. Jones says that this proposition is somewhat difficult to credit given the fact that the relevant planning files are there for anybody to consult and any member of the public without specialist knowledge would readily discern the matters complained of, for example that the development levy had not been paid. Certainly these matters would have been obvious to a person with legal expertise such as Mr. O'Shea or indeed Mr. Looney. One assumes that Mr. Hanley himself, as a developer, would at least have some passing knowledge of planning matters. Although from the outset, the plaintiff's pleaded complaints relate to planning issues, it seems extraordinary to say the least that nobody apparently troubled to look at the planning file until late 2016.

15. The initial affidavit grounding this application was sworn, not by the plaintiff, but by his solicitor. In that first affidavit, Mr. Kelly says that because Mr. Hanley is a lay person, he failed to appreciate that Mrs. Hannon had a personal liability for the breach of contract of which he complains. Furthermore, Mr. Kelly avers that the full extent of the falsity of what was represented by the late Mr. Hannon (and not Mrs. Hannon) to Mr. Hanley only became evident after the consultation with the architect and counsel. At that consultation, he says that counsel advised that the contract was liable to be rescinded.

16. Arising out of these matters, the trial date had to be vacated and the plaintiff issued the within motion on the 1st August, 2017, some twelve and a half years after the conclusion of the contract the subject matter of these proceedings.

17. The proposed amended statement of claim herein is a document that is very significantly different in many respects from the original statement of claim. The most fundamental new plea it seeks to introduce is that prior to the conclusion of the conveyance in issue (and notably not the contract) false and fraudulent representations were made by Mr. Hannon that first, he and Mrs. Hannon would be responsible for obtaining the relevant planning permission and the provision of services such as sewage to the site, second that by virtue of this representation Mr. Hanley would be able to comply with the covenant to build within eighteen months and third that the payment of the purchase money of €110,000 would enable the Hannonns to comply with these representations. It is important to record that the alleged representation made by Mr. Hannon to obtain the planning permission is directly contrary to what the contract actually provided in clause 11 recited above.

18. The amendments go on to plead that the representations were false and fraudulent by virtue of the fact that Mr. Hannon was in breach of earlier planning permissions for an adjoining site by failing to provide the necessary sewage services and to pay the relevant development levy to the planning authority. This meant that building would not be permitted on the site being acquired by Mr. Hanley until such time as Mr. Hannon complied with the earlier planning permission and that the €110,000 would not in fact be sufficient for this purpose.

19. The plaintiff pleads further the failure to disclose all these matters to him was fraudulent. He also complains of the fact that the Hannonns allowed the planning permission to lapse and failed to apply for an extension of the permission and that there was a conspiracy between Mr. and Mrs. Hannon to damage the plaintiff's economic interests by virtue of the foregoing matters. It seems highly probable that all of these pleas arise from the instruction of the architect Mr. Gaynor, and properly qualified lawyers, for the first time by Mr. Hanley when the trial was imminent.

20. It is thus clear that the amendments sought by the plaintiff introduce significant new facts, plead a number of new causes of action and seek new relief in the form of rescission. It is important to note that Mrs. Hannon's uncontroverted evidence is that she knew nothing of her late husband's business dealings and is entirely ignorant of the matters now sought to be introduced.

Legal Principles

21. Dealing first with the amendment application, the relevant rule of the Rules of the Superior Courts is O.28 r.1 which provides:

"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."

As I noted recently in *Knowles v. ESB* [2018] IEHC 761 at para. 20:

"As has often been pointed out, the starting point must be that amendments will in general be allowed in the absence of irremediable prejudice so that the court can do justice between the parties in respect of the real questions in controversy. The fact that the application is made late in the day is of course a factor to be considered but by no means conclusive and it is no function of the court to punish a party for a failure to plead its case in a timely manner."

22. The issue of prejudice arising from the proposed amendments is a central consideration for the court. One such prejudice is of course the fact that evidence now required for the purposes of dealing with the claim as amended may no longer be available.

23. As noted above, one of the primary new allegations now made in the case is that express, presumably verbal, representations were made by Mr. Hannon which were allegedly false and fraudulent and have led to loss being suffered by Mr. Hanley. There is no suggestion that Mrs. Hannon was party to any of these representations and as I have noted, her evidence is that she knew nothing of them. Those representations it would seem were likely made in early 2005 or perhaps late 2004 but in any event, the only person who could deal with the allegations now raised is obviously Mr. Hannon, who died in 2011.

24. There is thus an obvious and immediate irremediable prejudice to the defendant were the plaintiff to be allowed to introduce these amendments now. It seems to me that the case as originally pleaded by Mr. Hanley turned in large measure on the contents of the

relevant documents themselves which included the contract, the conveyance and the planning permissions. To that extent, although it is very much in issue, it may have been possible for Mrs. Hannon to meet the pleaded case even in the absence of her late husband. The case now sought to be made is however radically and fundamentally different. It is not clear to me how Mrs. Hannon could be expected to defend such a claim in the absence of her husband's evidence being available.

25. Given also that these claims are sought to be introduced more than twelve years after both the contract and conveyance, the issue clearly also arises as to whether Mrs. Hannon would be deprived of a defence she would otherwise have had under the Statute of Limitations if these amendments were permitted.

26. This again was something I commented upon in *Knowles* (at para. 26):

"Where the amendment does not arise out of new facts, even if it does amount to a new cause of action, it may still be allowed – see *Krops v. Irish Forestry Board* [1995] 2 I.R. 113 and *Croke v. Waterford Crystal* [2005] 2 I.R. 383. Both of those cases were considered by the Supreme Court in *Smyth v. Tunney* [2009] 3 I.R. 322. The court's judgment was delivered by Finnegan J., who said (at p. 334):

'In summary, the law as to amendment now is that an amendment will be allowed if it is necessary for the purposes of determining the real issues in controversy between the parties. 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 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*. Simple errors such as an error in date or an error as to location which do not prejudice the defendant and enable the real questions in controversy between the parties to be determined will be permitted.' (My emphasis)."

27. As I have already explained, the amendments sought here go far beyond merely pleading a new cause of action based on the same facts but in effect, make an entirely new case which, in the light of the events to which I have referred, the defendant could not now reasonably be expected to answer at this remove in time.

28. Although as I have said, delay in making an application to amend is not of itself fatal, it is nonetheless an important factor, and one which calls for explanation, again as explained in *Knowles* (at para. 28):

"The recent jurisprudence further establishes that there is an onus on a party seeking amendment, especially as here very late in the day, to explain why the matter was not pleaded in the first place and why the delay occurred. As Finnegan J., speaking for the Supreme Court, observed in *Allen v. Irish Holmasters Ltd* [2007] IESC 33:

'There is an obligation on the party seeking to amend pleadings to give good reason for having to do so. [...] If delay is not justifiable or excusable then that is a factor to be taken into consideration as part of the matters to be weighed in deciding whether or not the court will allow amendment.' "

29. Mr. Hanley through his counsel submitted that insofar as fraud is now pleaded, he is entitled to rely on s. 71 of the Statute of Limitations, 1957 which provides:

"71-(1) where, in the case of an action for which a period of limitation is fixed by this Act, either-

(a) The action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

Conclusions

30. In the present case, in truth the only reason advanced by the plaintiff for this late application to amend is that he is a litigant in person who did not appreciate the significance of certain matters at the time he instituted his proceedings. It is not however suggested that there are matters only now coming to light of which he did not know, or could not reasonably have known. He must of course have always been aware of the alleged representations made to him by Mr. Hannon, even if their significance, as now suggested, escaped him at the time.

31. Similarly, the fact that he was unaware of the relevant planning issues that have now come to the fore by virtue of Mr. Gaynor's investigation cannot in my view be relied upon as an excusing circumstance. It was always open from the outset to Mr. Hanley to engage an expert and the fact of the matter is that he only chose to do so when the case was going to trial. To that extent therefore, the alleged fraud of which he now complains could with reasonable diligence have been discovered long ago, even if one accepts that it required the input of an expert to reveal it, a proposition which in my view is highly dubious.

32. Litigants in person are of course entitled to precisely the same rights as represented parties to litigation. If they choose to pursue legal proceedings without the benefit of legal or other advice from properly qualified professionals, they cannot be heard to say that they are entitled to be treated differently to represented parties by virtue of a conscious choice on their part to eschew the assistance of such professionals. Accordingly, no good reason has been advanced on behalf of Mr. Hanley for the failure to plead his case, a case commenced in any event very late in the day, in a proper manner.

33. For those reasons therefore, in my view, the application to amend must fail.

34. Turning now to the application to join Mrs. Hannon in her personal capacity as a defendant, it seems to me that precisely the same considerations apply to this application as applied to the application to amend. The failure to join Mrs. Hannon originally in the proceedings is again said to stem from the fact that Mr. Hanley did not know any better. He has certainly known for a considerable period of time however, at the latest October 2014 when Mrs. Hannon delivered her defence, that she was contesting the fact that she was the administrator of her late husband's estate. That is also her clear evidence on oath and Mr. Hanley has chosen not to engage with it despite filing a subsequent affidavit which tends to suggest that he is not in a position to produce any evidence to support what he originally alleged.

35. In my view, Mrs. Hannon was perfectly entitled to defend the proceedings up to the present time on the basis that they were entirely misconceived against her in circumstances where she is not in fact the administrator of her husband's estate and that she

would not be required to engage further with any of the merits on this account. It is now proposed to join her in circumstances where she will have to endeavour to call to mind, even if she were in a position to do so, events going back now some fourteen years in a case which, were it to be instituted today against her, would be manifestly statute barred. I cannot see other than that she would be significantly prejudiced by being joined as a defendant to the proceedings at this stage and it would in my view be unjust to do so.

36. For these reasons therefore, I propose to refuse the plaintiff's application herein.