Neutral Citation Number: [2006] IEHC 156

THE HIGH COURT
COMMERCIAL

[2004 No. 19386 P]

BETWEEN

WOORI BANK AND HANVIT LSP FINANCE LIMITED

PLAINTIFFS

AND
KDB IRELAND LIMITED

DEFENDANT

Judgment of Mr. Justice Clarke delivered 17th May, 2006.

1. Introduction
1.1 This judgment relates to an application made by the defendant ("KDBI") to amend its defence. The proceedings concern a loan transaction which was entered into by KDBI as part of its role in the managing of certain funds on behalf of the plaintiffs. The transaction would appear to be outside the formal authorisation terms under which the KDBI managed the relevant funds. The transaction gave rise to significant losses. In its existing defence KDBI maintains that the plaintiffs ("Hanvit" and "Woori") were aware of the disputed transaction prior to, or at least as early as, the 19th July, 2002 (the day after the transaction), that Hanvit and Woori either directed or were at least aware of the application of interest arising from the loan for a significant period of time and took no steps to require KDBI to undo the transaction.

1.2 KDBI now seeks to extend its defence in two respects. One category of amendments relates to a proposed plea that Woori and Hanvit knowingly benefited from what are contended to be higher returns available from the transaction in dispute and should have any entitlement to damages reduced by the sum accruing to the plaintiffs and accepted by them.

A further, and separate, proposed amendment relates to the role of a HJ Kim whom, it is contended, introduced the transaction the subject matter of the proceedings to KDBI and who, it is contended, was, at all material times, a director of Hanvit.

While not consenting counsel for the plaintiffs did not strenuously oppose the amendments in the first category to which I have referred. The real issue between the parties is, therefore, whether the proposed amendment relating to the involvement of HJ Kim should be allowed.

1.3 The matter was listed for hearing before me on 5th May last. As a case management conference was due to be conducted by the judge having carriage of the trial (Finlay Geoghegan J.) on 12th May I indicated to the parties that I would inform them of the result of the application prior to the case management conference. Having considered the matter I indicated to the parties that I proposed allowing all of the amendments (including the disputed amendment concerning the role of HJ Kim) but that I would give detailed reasons at a later date. The purpose of this judgment is to set out those reasons.

2. Background
2.1 In order to understand the principal ground of objection put forward on behalf of the plaintiffs to the contested amendment it is necessary to understand the background to the role of HJ Kim in the disputed transaction. Insofar as it is possible to ascertain at this stage it would appear that HJ Kim was, at all material times, a director of Hanvit. KDBI is an Irish company, which is a subsidiary of the Korean Development Bank ("KDB"). It is contended that HJ Kim may well have received his initial appointment as a director of Hanvit on the nomination of KDB.

2.2 However the real controversy between the parties arises out of the possibility that the entire loan transaction which is at the centre of these proceedings may have resulted from wrongdoing on the part of a number of persons including HJ Kim. The plaintiffs placed before the court a form of petition presented to the authorities in Korea by KDB in which KDB indicated its strong belief that they were "additional suspicions that DH Kim and HJ Kim bribed DK Kim with money and that DH Kim, HJ Kim and DK Kim bribed WR Kim." In fairness it should be noted that the petition records that the suspicions are "only based upon the statement that was made by DK Kim during out internal investigation but we have not found any other evidence yet". It would appear that the petition is part of a process in which the Korean authorities may be invited, in a formal fashion, to conduct enquiries into alleged wrongdoing. In that context it is said that, at a minimum, there are strong grounds for suspecting that HJ Kim was involved in wrongdoing in relation to the very transaction which is at the heart of these proceedings and that KDB, and by extension KDBI, share those suspicions. In those circumstances it is suggested that it is inappropriate to permit KDBI seek to rely upon the alleged knowledge of HJ Kim of the transaction.

3. The Law
3.1 The Supreme Court has recently addressed the question of amendment of pleadings in *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383. In the course of his judgment (speaking for the court) Geoghegan J. indicated that there had been an over emphasis in a number of cases on an obligation to give good reasons for having to amend the pleadings. In that context it may be said that some doubt was cast upon *Shepperton Investment Company Limited v. Concast Limited (1975) Ltd* (Unreported, High Court, Barron J. December 21st 1992); *McFadden v. Dundalk and Dowdallshill Coursing Club Limited* (Unreported, Supreme Court, April 22nd, 1994); and *Palamos Properties v. Brooks* (1996) 3 I.R. 597 insofar as those cases may have placed a significant weight upon the absence of a good reason for the case having not being properly pleaded in the first place. In expressing that view the court reaffirmed *O'Leary v. Minister for Transport Energy and Communications* [2001] 1 ILRM 132 and held that the principal consideration in an amendment application was to the effect that pleadings should be amended so as to ensure that the real questions of controversy between the parties should be determined in the litigation. That principle is, of course, subject to the limitation that amendments should not be made where to allow same would cause prejudice to the other party. This latter fact is, in turn, subject to the limitation that where it is possible to deal with the prejudice in a fair and just manner by means other than excluding the party from relying upon the matters sought to be pleaded (such as by an appropriate order for costs) then the amendment should be allowed and the prejudice dealt with in the appropriate way.

3.2 In addressing the question of prejudice it is, of course, important to recollect that a party does not require any leave of the court to formulate its pleading (whether of claim or defence), in any manner it chooses in the first place. A party has a very wide discretion as to the manner in which it may plead its case or its response. Insofar as there are limitations, same stem from the rules of court which permit aspects of pleadings to be struck out in the unusual and limited circumstances where the pleadings may be found to be inappropriate by being, for example, vexatious, scandalous or disclosing no cause of action. Subject to those limitations a party is at large as to how it pleads. Where a party fails to include an appropriate plea it may be placed in a position of requiring a court order to

amend. However the starting point for a consideration of whether to allow the amendment should be to have regard to the fact that the party could have included the plea in the first place without requiring any leave from the court. Prejudice needs to be seen against that background. The prejudice that needs to be established must be a prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered. The prejudice must stem, therefore, from the fact of the belated alteration in the pleadings rather than the presence (if allowed) of the amendment itself. Such prejudice can, in principle, arise in one of two ways.

4. Prejudice

4.1 Firstly a party resisting the amendment may be able to satisfy the court that, by virtue of the absence of the amended plea in the first place, steps have been taken which now make it impossible or significantly more difficult to deal with the case should the amendment be allowed. No such prejudice is contended for in this case.

4.2 Secondly a party may be able to persuade the court that what I might call logistical prejudice would occur if the amendment is allowed. This will particularly be the case where the amendment is sought at a very late stage and could have the effect of significantly disrupting the intended proceedings. In such cases it may be that an amendment which could properly have been made at an earlier stage might be refused because to permit the amendment would have the effect of so altering an imminent trial as to require a significant adjournment to the prejudice of the party against whom the amendment is sought. It may well be that in the context of modern case management and the undoubted intention of the rules applicable to the Commercial Court (which rules are obviously predicated on an efficient and managed pre-trial process coupled with an early trial of the issues) that such logistical prejudice may loom larger in the considerations of the court.

The effectiveness of case management can be significantly reduced if parties who do not comply with the directions of the court can escape the consequences of such failure without significant adverse results. Similarly belated applications to amend (after, for example, the parties have filed witness statements and the like) can have a significant effect on the ability to conduct a trial in a timely and orderly fashion. In that context it should also be noted that the nature of the relief sought can be a material factor in assessing the adverse consequences of a delay in trial. For example claims for specific performance or other similar proceedings (whose existence can have an effect on the ability of parties to deal in a commercial fashion with their assets) should be disposed of as quickly as possible and amendments which could have the effect of significantly delaying such proceedings can, in an appropriate case, give rise to a significant degree of what I have described as logistical prejudice.

4.3 I was not, however, satisfied that any question of such prejudice, in the ordinary sense of the term, can be said to arise in this case. It seems unlikely that the trial of this action will take place before October. Nothing that was advanced at the hearing leads me to believe that the likely date of trial will be delayed if the amendment is allowed. Similarly it does not appear that the plaintiffs can point to any significant prejudice that derives from the fact that the pleading in respect of the role of HJ Kim now sought to be included in the defence was not made at the time the defence was originally filed.

4.4 Insofar as delay is relied on in opposition to the proposed amendment it may well be the case that some criticism can be directed to KDBI for the apparent failure to identify that the role of HJ Kim (a fact known to the client) was material (where the materiality but not the fact was known to the legal team). The geographical separation of the principals who knew the facts from the legal team together with the different legal systems applicable may provide a partial explanation. In any event I was not satisfied that any culpable delay was such as ought materially effect my decision.

4.5 It seems to me that the contention of the plaintiffs is more analogous to a claim that the pleadings should not be amended because the matter now sought to be relied on is one which is bound to fail. I now turn to that issue. While neither side was in a position to point to any direct authority on the question it seems to me that the closest analogy with the facts of the current case is to be found in the jurisprudence of the courts concerning the raising of issues belatedly in circumstances where the claim (at least as against an intended new part) may be statute barred.

5. Issues Bound to Fail

5.1 In *Hynes v. The Western Health Board and Another* (Unreported, High Court, Clarke J. 8th March, 2006) I considered the authorities in relation to the jointure of a party where the case against that party might be statute barred and came to the following view (at p. 8):-

> "3.4 I am, therefore, satisfied that the court should not, in a clear case, join a defendant where it is manifest that the case as against that defendant is statute barred and where it is also clear that the defendant concerned intends to rely upon the statute.
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> 3.5 However I am also of the view that O'Reilly v. Granville is authority for the proposition that the court should not enter into an enquiry as to whether a claim may or may not be statute barred on the hearing of a procedural motion seeking to join a defendant (or, as here, where a defendant having been joined seeks by a similar procedural motion to have the earlier order set aside). On that aspect of the matter the only question which the court should ask itself on such an application is as to whether the claim as against the defendant concerned is clearly statute barred. If there is doubt whatsoever about that fact, then the defendant should be joined, if it is otherwise appropriate so to do, and the issue of the claim being or not being statute barred should be dealt with in the ordinary way as appropriate to the circumstances of the case including, if so appropriate, by means of a preliminary issue".

5.2 It seems to me that a similar approach should be adopted by the court in respect of an amendment to pleadings whether of claim or of defence. The underlying principle must be the same. Just as a significant factor in the jurisprudence reviewed in *Hynes*, which favours the proposition that the court should lean towards joining a defendant, is the fact that the defendant could have been joined without leave had the plaintiff named the defendant in the proceedings as originally issued, similarly a party can include whatever materials they choose in a pleading subject only to the overriding jurisdiction of the court to strike out elements of the pleading which are inappropriate.

Therefore the court should lean in favour of allowing an amendment if, in the words of *Hynes*, it is otherwise appropriate so to do, unless it is manifest that the issue sought to be raised by the amended pleading must necessarily fail. The court should not, on a procedural motion to amend, enter into the merits or otherwise of the issue sought to be raised save to the extent of asking itself whether the issue which would be required to be tried as a result of the amended pleading is one which must necessarily fail from the perspective of the party seeking the amendment.

6. Application to Facts of this Case

6.1 There may well be significant difficulties which KDBI will have to surmount if it is to succeed in its defence on the grounds sought

to be relied on by means of the contested application to amend. Whether it is possible or appropriate to place any reliance upon knowledge which might be attributed to the plaintiffs, and Hanvit in particular, by virtue of the fact that HJ Kim was a director of Hanvit in circumstances where it may be established that HJ Kim was, himself, involved in wrongdoing, must be open to doubt. However it did not appear to me that I could conclude, at this stage, that any such knowledge could not, under any circumstances, provide a defence to KDBI.

6.2 I could not, therefore, conclude that the issues sought to be raised by KDBI in the amended defence were bound to fail.

6.3 Insofar as reliance was placed in opposition to the amendment on a contention that much of the basis for the proposed defence is based on hearsay, I came to the view that it would be inappropriate to conclude, at this stage, as to the admissibility of evidence where issues undoubtedly arise which will require to be resolved either before or at trial. If it were manifestly clear that KDBI had no admissible evidence available to substantiate its proposed defence so that it could now be concluded that the defence, so far as the issues raised by the amendment are concerned, was bound to fail, then the situation might be different. I was not satisfied that no such evidence might be available and accordingly was not satisfied that the relevant defence was bound to fail.

6.4 I also considered whether it would be otherwise inappropriate to allow the amendment having regard to the position adopted by KDB (as parent of KDBI) in the Korean petition to which I have referred. Counsel for KDBI, at the hearing before me, indicated that the substance of the defence which he wished to raise by virtue of the proposed amendment would remain, irrespective of whether the court was to find that HJ Kim was involved in wrongdoing or not. Obviously there may be additional difficulties in establishing that ground of defence in the event that the court is satisfied, on whatever evidence may ultimately be before it, that HJ Kim was involved in wrongdoing. In addition to the other questions which may arise as to the extent to which KDBI can rely upon the knowledge of HJ Kim (such as questions concerning the extent of his role in Hanvit and the extent to which his knowledge may be taken to be the knowledge of Hanvit), there would also, in that eventuality, be questions as to whether reliance can be placed upon his knowledge at all by virtue of it being established (if it is) that he was involved in wrongdoing. The fact that it may be more difficult for KDBI to sustain the ground of defence in that eventuality does not, in my view, take away from the contention of counsel on behalf of KDBI that the defence nonetheless remains open as a possibility, notwithstanding a finding of wrongdoing on the part of HJ Kim and, for the reasons which I have indicated above, it seems to me that such a defence is not bound to fail. In those circumstances it did not appear to me to be inappropriate for KDBI to seek to rely on such a defence to the extent that it would have been appropriate for the court to refuse it leave to amend the defence to permit reliance upon such grounds.

6.5 In addition certain questions were raised at the hearing as to what KDBI's position was in relation to the contention that HJ Kim may have been involved in wrongdoing. It is clear that the Korean petition suggests a strong suspicion on the part of KDB to that effect. If evidence is given at the trial which suggests that KDB and KDBI do not believe that HJ Kim was guilty of any wrongdoing then it will, of course, be open to the plaintiffs to invite an explanation as to the consistency of that evidence given with the petition. It may be that an explanation could be given which the court would accept.

It is not appropriate to assume, at this stage, that it may not be possible for KDBI to persuade the court that HJ Kim was not involved in wrongdoing (or, indeed, that there is insufficient evidence to reach such a conclusion), and that that position, as adopted at the hearing, is not inconsistent with the contents of the petition. Equally it is not appropriate to assume that, in the event that KDBI accepts at the hearing that it is probable that HJ Kim was involved in wrongdoing, that it would, nonetheless, be excluded from relying on the defence now sought to be included. In the circumstances it did not seem to me that there is anything inappropriate in KDBI seeking to rely upon the defence sought to be included.

7. Conclusions

7.1 In summary therefore I come to the view that no prejudice, whether substantive or logistical, of any significance will occur should the amendment be allowed. In those circumstances the amendment should ordinarily be allowed if it is (as I am satisfied is the case) necessary to allow for the real questions in controversy between the parties to be litigated.

I was also satisfied that that position should only be departed from where it is clear that the issue sought to be litigated by reason of the amendment is one which is bound to fail from the perspective of the party seeking the amendment. In a case, such as this, where an amendment is sought to a defence and where no prejudice can be established by the amendment, I was satisfied that same should ordinarily be allowed unless it is clear that the point of defence raised in the proposed amendment would be bound to fail. For the reasons indicated above I was not so satisfied on the facts of this case and for that reason I allowed all of the amendments sought.