Neutral Citation Number: [2012] IEHC 105

THE HIGH COURT

COMMERCIAL

[2010 No. 2473 P.]

BETWEEN

PATRICK CUTTLE

PLAINTIFF

AND

ACC BANK PLC TRADING AS ACC BANK

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 30th day of March, 2012

Introduction

1. This case is one of hundreds before the court where a customer of the defendant (the Bank) has brought suit against it arising out of investments made in a financial product marketed and produced by the Bank. It was called the Solid World Bond 5 (the bond).

2. This judgment deals with the plaintiff's application for leave to amend his statement of claim. Should such leave be granted, permission is sought to make analogous amendments to the statements of claim of other plaintiffs who are suing the Bank in similar circumstances.

3. The amendment contemplated involves a plea of fraud against the Bank. The application has been heavily contested.

Jurisdiction

4. Order 28 of the Rules of the Superior Courts permits amendment of pleadings both with and without leave of the court.

5. No leave of the court is required to amend a statement of claim once at any time before the expiration of the time limited for reply and before replying or, where no defence has been delivered, at any time before the expiration of four weeks from the appearance of the defendant who last appeared (Order 28, rule 2). Similar provisions apply in respect of the amendment of a defence which contains a counterclaim.

6. In other circumstances (of which this is one) leave of the court is required in order to effect an amendment to a statement of claim. That is provided for at O. 28, r. 1 which states:-

> *"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."*

7. In *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383 at 401, Geoghegan J. described this as a *"liberal rule"*. The notion behind it is that justice is best served if the real matters in dispute between litigants are brought before the court and determined by it. This is clear from another passage from the judgment of Geoghegan J. in the same case where he said:-

> *"While undoubtedly there is a discretion in the court as to whether to make the order or not and other factors may come into play, the primary consideration of the court must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation."*

8. On an application of this sort, it is not the task of the court to adjudicate on the merits of the proposed amendments or to speculate on the likelihood of their success at trial. In *Cornhill v. Minister for Agriculture* [1998] IEHC 47, O'Sullivan J. in dealing with an application for leave to amend a statement of claim was confronted by two opposing approaches to that issue. The defendants argued that there was an onus on the plaintiffs to establish by credible evidence that the proposed amendments raised a real issue between the parties and that the plaintiffs had failed to do so. The plaintiffs argued that the appropriate test was whether the proposed plea, if part of the original statement of claim, would have survived an application to strike out *in limine* on the basis of having no reasonable prospect of success. O'Sullivan J. clearly preferred the submission of the plaintiffs and expressed the view that:

> *"an amendment of the pleadings should be allowed if it would have been appropriate in the original pleadings and would have withstood an attack under Order 19, rule 28."*

9. In the present case, the parties have agreed that the approach of O'Sullivan J. is the one which I ought to adopt. So the net question is, if these amendments are permitted will they survive an application that they be struck out under the inherent jurisdiction of the court? That jurisdiction allows the court to stop cases with no reasonable prospect of success in their tracks and not permit them to go to trial.

10. This approach of the parties in the present case is consistent with various judicial dicta on amendment of pleadings and in particular with the observations of Clarke J. in *Woori Bank v. KDB Ireland Limited* [2006] IEHC 156. That judge was of opinion that the court should lean in favour of allowing an amendment unless it is clear that the issue sought in the amended pleading must fail. This is not to say that the court ought to enter into the merits of the issues sought to be raised save to the extent of asking itself whether the party seeking the amendment will necessarily fail on the issue which will require to be tried as a result of the amended pleading.

11. I ought now to say a word about the jurisdiction to strike out *in limine*.

12. In *Barry v. Buckley* [1981] I.R. 306, Costello J. reanimated and confirmed the inherent jurisdiction of the court to strike out or stay proceedings over and above that contained in Order 19, rule 28. The inherent jurisdiction may be utilised if the proceedings are frivolous or vexatious or are bound to fail. He said that this jurisdiction *"exists to ensure that an abuse of the process of the Courts does not take place."* If, therefore, the court is satisfied that the plaintiff's case must fail then *"it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant".* Whilst this is a jurisdiction that is capable of being exercised in virtually any type of case, it must be borne in mind that it is an order that will only be made in very clear cases. As Costello J. said, the jurisdiction is one to be *"exercised sparingly and only in clear cases"*. A similar approach was adopted by McCarthy J. in *Sun Fat Chan v. Osseous Limited*, who said that *"generally, the High Court should be slow to entertain an application of this kind"*. The explanation for this restrained approach was as that judge said:-

> *"Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture."*

13. It follows that in approaching the exercise of my discretion here and in asking myself whether the amendments, had they been in the original statement of claim, would have survived a strikeout application, I must bear in mind the very limited circumstances in which such an application can be successfully made.

The Bond

14. The opening lines of the promotional material produced by the Bank to market the bond posed the following question:-

> *"Where can you get a 100% secure investment linked to 85% of an uncapped return on some of the most renowned stocks in the world? With the ACC Bank Solid World Bond 5 you can achieve this for a minimum investment of only €2,500, allowing you ease of access to equity markets.*
>
> *Equity markets can be both profitable and risky. The Solid World Bond 5 gives you the potential to capitalise on any stock market growth, while you have the peace of mind that your capital is 100% protected. Allowing you the best of both worlds!"*

15. In essence, an investor was invited to make a minimum investment of €2,500. The investment was for a five year eleven month term. If a basket of stocks rose, the investor would get 85% of any net growth in it. The brochure spoke about the *"excellent historical performance of stocks – average return of 241.94% achieved over the last five year, eleven month periods"*.

16. If, however, the stocks did not perform as hoped and there was no growth or even decline then the capital was protected and at the end of the investment term was returned to the investor.

17. From the point of view of a person who had funds that they could invest for almost six years, it was a fairly low risk affair. The worst they could do would be to have their capital returned at the end of the investment term. Their hope was that the basket of stocks would appreciate in value and give them a better return than they might have achieved by simply placing the funds on deposit.

18. Of course, if one borrowed the money in order to make the investment, an entirely different result would ensue in the event of the basket of stocks falling in value. True, the capital amount borrowed would be repaid, but in the absence of growth in the basket of shares, the interest on the borrowing would have to be paid. That is what happened to Mr. Cuttle and the many other plaintiffs who are before this Court arising out of their investment in this bond.

The Statement of Claim

19. In his statement of claim, the plaintiff alleges that representations were made to him in order to induce him to borrow money from the defendant in order to invest in the bond.

20. The representations made are taken in part from the promotional material from which I have already quoted. The alleged representations include the statement that past performance may not be a reliable guide to future performance and that investments might fall as well as rise in value.

21. The statement of claim goes on to recite that in February 2004, a Mr. Pat Allen, a manager in the Bank who had formerly dealt with the plaintiff's account made an unsolicited direct approach to the plaintiff. The plaintiff subsequently met with representatives of the Bank who advised him in relation to the product and represented to him, *inter alia*, that he would at least break even as a result of his borrowing to invest in the product. The representatives of the defendant are alleged to have classified the plaintiff's appetite for risk as medium. It is now sought to amend this so as to read *"low"*.

22. On foot of the representations and advice on 12th March, 2004, the plaintiff entered into a loan agreement with the defendant whereby he borrowed €100,000 and invested it in the bond.

23. The statement of claim then sets out the terms and conditions attached to the bond.

24. It contains an allegation that the Bank owed the plaintiff duties of a fiduciary nature which were necessarily implied in the terms of the agreements entered into between the parties. These included a duty to avoid conflicts of interest; a duty of fidelity to the plaintiff; a duty not to profit from the plaintiff without his informed consent; a duty of full disclosure of all relevant material information; a duty to seek to avoid conflicts of interest; a duty not to make the investment in the bond contingent on the plaintiff entering into the loan agreement with the defendant; a duty to communicate with the plaintiff in a way that was clear, fair and not misleading together with many other analogous obligations.

25. The statement of claim goes on to allege that the Bank acted as an investment business firm within the meaning of the Investment Intermediaries Act 1995 and was bound by the code of conduct introduced pursuant to s. 37 of that Act.

26. The statement of claim then goes on to identify the wrongs allegedly committed by the Bank. This part reads as follows:-

> *"16. Wrongfully and in breach of the various duties and contractual terms particularised ante the defendant caused the plaintiff to enter into transactions that were unsuitable for the plaintiff and caused the plaintiff loss and damage and the defendant made the representations referred to above negligently. Without prejudice to the specific particulars set out hereunder, the marketing of the Solid World Bond product as a borrow to invest product made it wholly unsuitable for the plaintiff or indeed any investor. Given that the plaintiff was borrowing money from the defendant to invest in the*

product taking into account the cost of the said borrowing and the tax that the plaintiff would have to pay on any gains, the product would have had to far outperform the market's view of the likely performance of the basket of shares in order for the plaintiff to make any or any significant gain.

Particulars

(a) in offering the Solid World Bond and the related loan agreement as a single transaction, the defendant placed itself in a position where its interests conflicted with those of the plaintiff;

(b) the defendant failed to explain the said conflict of interest to the plaintiff and in particular failed to explain to the plaintiff that the Solid World Bond was not a suitable product to borrow money to invest in;

(c) the defendant failed to explain to the plaintiff that the coexistence of the loan agreement with the investment in the Solid World Bond made the transaction a hugely favourable and profitable one from the defendant's perspective;

(d) the defendant failed to explain that a very significant percentage of the money borrowed, which the plaintiff's experts estimate may have been as much as 79% of the sum borrowed, was placed straight back on an interest bearing deposit, an arrangement that conferred no benefit whatsoever on the plaintiff but which generated at least 0.75% fees per annum of the sum in the difference between the interest charged on the loan and interest earned on the deposit;

(e) the defendant failed to explain to the plaintiff that of the balance of the monies borrowed at least 4% was paid in fees to the defendant with the remaining 17% of thereabouts used to purchase an option which the plaintiff apprehends was sold by an entity connected to the plaintiff's parent Rabo Bank, to cover the upside promise and pay further commissions;

(f) had the defendant informed the plaintiff of the small cost of the upside promise, it would have been immediately apparent to the plaintiff that the market regarded it as most unlikely that the Solid World Bond 5 would deliver any significant return or any return sufficient to off-set the cost of the loan transaction;

(g) the defendant caused the plaintiff to enter into an entirely unsuitable combination of back to back transactions. The defendant entirely failed to advise the plaintiff in a clear, meaningful or informed fashion as to the true import of the transactions having regard to the fact that the plaintiff was borrowing to invest in the bonds;

(h) the defendant failed to explain to the plaintiff that historical data furnished in relation to the shares 'tracked' by the Solid World Bond was not a reliable guide to the suitability of the Solid World Bond as an investment. In particular, as referred to ante, the defendant failed to point out the small cost of the upside promise, which would have immediately alerted the plaintiff that the market regarded it as most unlikely that the historical performance would be replicated. The defendant knew or ought to have known that an instrument that cost the defendant an estimated 17% in the market was hopelessly and grossly misrepresented by demonstration of historical performance;

(i) in light of the fact that the plaintiff and other investors in the Solid World Bond were borrowing money from the defendant to invest in the bond the 'independent analyst feature' was not a material or reliable way of indicating the suitability or otherwise of the investments;

(j) the defendant provided illustrations of the performance of the Solid World Bond and linked tracker and loan agreement that presented the various outcomes as being equally liable to occur in circumstances where this was seriously misleading. The defendant knew or ought to have known that the likely outcomes were heavily weighted towards the lower end of the illustrations and that the vast majority of the likely outcomes were a marginal break even or loss;

(k) the defendant sold the Solid World Bond without carrying out any proper analysis of the suitability of the product;

(l) the defendant engaged in pressurised and misleading selling techniques in relation to the bond and

> *(i) the defendant imposed an artificial 'for a limited time only' deadline in relation to the selling of the bonds;*
>
> *(ii) the defendant falsely claimed that the bond was only available to a limited number of people on a first come first served basis;*
>
> *(iii) the defendant falsely claimed that the bond was only available to certain 'select' persons. This was a ploy. The manner in which the bond/loan agreement transaction was structured meant that the defendant was prepared to sell the bond to a wide range of persons once they were able to serve the interest on the loans;*
>
> *(iv) the defendant in every respect presented the Solid World Bond as a 'win-win' investment for the plaintiff. This was untrue in circumstances where the defendant was selling a product that was dependent upon borrowing the principal from the defendant and where, having regard to the cost of the said borrowing and the tax that the plaintiff would have to pay on any gains, the product would have to far out-perform the market's view of the likely performance of the basket of shares in order for the plaintiff to make any or any significant gain.*

(m) in failing to highlight to the plaintiff the possible downside that would have resulted from the combination of the zero investment return on the equity element of the bond and the requirement to service a substantial loan, albeit interest only, if there was a further possibility of a rise in interest rates, the defendant failed to act with due

skill, care, diligence and in the best interest of its customers;

(n) in failing to take care of the client's information needs and to produce all relevant information, the defendant, failed to act with due skill, care, diligence and in the best interest of its customers;

(o) in failing to highlight in the sales literature the possible loss of interest which would not be covered by a capital gain on the Solid World Bond, the defendant was negligent in the promotion of the bundled arrangement;

(p) the defendant, through the sale of the product by its agent, indicated a lack of expertise and knowledge in the making of the sale because of inadequate training and product knowledge:

(a) the defendant failed to take adequate steps to ascertain the suitability of the combined product at the level recommended for the plaintiff's circumstances;

(b) the defendant's sales representatives did not realise, did not know or did not communicate that the combined product was a high risk strategy;

(c) the defendant did not know or chose to ignore the impact of the combined product on the plaintiff.

(q) the use of gearing to fund the bond was an implicit element of the arrangement and was used to identify the situation of geared but related secured investments which the defendant used to recklessly, negligently and deliberately mislead the plaintiff and to the advantage of the product;

(r) in failing to comply with s. 30 of the Investment Intermediaries Act 1995, the defendant failed to issue a receipt where it advised on and received commission in respect of the transaction.

The plaintiff reserves the right to furnish further particulars on receipt of discovery and expert reports."

27. Loss on the part of the plaintiff is pleaded and the prayer seeks a declaration that the terms of the loan agreement between the plaintiff and the defendant are unenforceable and of no effect by reason of the provisions of Regulation 3 of the European Communities (Unfair Terms and Consumer Contracts) Regulations 1995. There is then sought an order compelling the Bank to repay to the plaintiff all sums paid by him to it. An account of profits is sought together with damages for negligence, breach of duty, breach of fiduciary duty, breach of statutory duty, breach of contract, negligent misstatement and misrepresentations.

Defence

28. A full defence was delivered to this statement of claim after which discovery was made.

29. It is as a result of material which was disclosed on discovery that the current application comes to be made.

The Correspondence

30. Prior to the bringing of the motion, a letter was written dated 9th February, 2012, by the plaintiff's solicitors indicating an intention to plead fraud against the defendant. Four particular instances of this fraud were identified. They were:-

(i) the manner in which the Bank advised the plaintiffs and other investors in relation to the bond and the associated back-to-back loans;

(ii) the manner in which the Bank marketed the bond and the associated back-to-back loan to the plaintiffs and other investors;

(iii) the manner in which the Bank promoted the bond to the plaintiffs, other investors and to intermediaries as a suitable product to borrow or invest in; and

(iv) the representations made by the Bank to the plaintiffs, other investors and intermediaries as to the performance of the basket of shares, the subject matter of the bond.

31. The letter went on:-

"The plaintiffs will rely upon the following matters as evidence of the fraudulent conduct of the bank:-

1. at all material times the bank actually knew that the product was not a suitable product to borrow to invest in. This is evidenced, inter alia, by the following matters:-

(a) IFSRA informed the bank it could not 'in any way' advertise/promote the lend to invest arrangement;

(b) the bank received legal advice from its in-house legal function to the effect that it could not promote the product to staff as it could not be seen to encourage staff to borrow to invest in the product;

(c) the bank's compliance officer, Eoin Russell, stated that the product could not be promoted as a borrow to invest product. He said that the bank could provide finance to persons who approached the bank to borrow to invest in the product provided that the bank was satisfied that those persons had the requisite financial sophistication and experience to understand the risks associated with borrowing to invest in the product. For the avoidance of doubt, it is not conceded that the product was suitable even for this class of investor in the absence of proper advice as to the real risks associated with the product.

2. Notwithstanding the state of knowledge of the bank adverted to ante, the bank actively promoted the product as a borrow to invest product. This is evidenced, inter alia, by the following matters:-

(a) each of the plaintiffs and other investors represented by this firm will give evidence that they were

encouraged to borrow to invest in the product;

(b) the overwhelming majority of persons who invested in the bond borrowed to invest in the product;

(c) prior to the commencement of the marketing campaign for the bond, Stephen Murphy of the bank predicted, correctly, that 99% of the bonds would be sold on a borrow to invest basis. Dominic Martin of the defendant, in response to that prediction, postured that this would not occur, presumably in an effort to pretend that the bank was not in breach of the advices referred to ante;

(d) the bank has discovered extensive material demonstrating that there was a 'borrow to invest' campaign carried out by the bank;

(e) the bank knew that the product was being promoted as a borrow to invest product by intermediaries;

(f) the bank deliberately interposed intermediaries for the purpose of facilitating the borrow to invest arrangements without furnishing any or any proper information to the intermediaries concerning the risks associated with the borrow to invest arrangement;

(g) the bank revised the criteria for lending to invest in the bond in order to remove any meaningful restriction on the persons to whom finance would be available. The bank knew that the attitude of the branch managers was, as set out in the submission made to the bank's credit function:

> *'at present we cannot approach these clients as we cannot guarantee loan approval, and you cannot sell a bond to a guy without assuring him that you will give him the money.'*

3. The bank knew that the bond and associated loan were likely to result in a loss for investors and were a high risk product. The statement made by Rabo Bank internal audit report in April 2004 when it said that the 'ultimate performance of the tracker bonds is estimated to be low' evidences this. If the bank had that knowledge one month in (sic) the term of the bond, then it, prima facie, sold the bond knowing that its performance was estimated to be low or reckless as to whether the performance of the bond was low or otherwise.

4. In light of the bank's state of knowledge as to the likely performance of the bond and associated loan the bank made the representations concerning its suitability knowing them to be false or reckless as to their truth or falsity.

5. When IFSRA raised the issue of advisory sales with the bank, the then chief executive of the bank wrote to IFSRA asserting that the Solid World 5 product was a low risk product. He did not disclose that the bank or its intermediaries had promoted and sold the product on a borrow to invest basis. This behaviour is evidence of a course of action by the bank whereby it deliberately misled the regulator as to the manner in which it was conducting its business.

We propose amending the statement of claim in the four test cases to include the claims made ante. If you have any meaningful answer to these matters we will consider same. We are fully cognisant of the serious nature of the conduct disclosed in the discovery made by the bank to date.

We would respectfully request that you do not write to us asserting, without reference to the discovery or what actually occurred, that the product was not promoted or advertised on a borrow to invest basis or that the bank only provided finance to sophisticated investors who approached it on an independent basis. We are well aware that that it the bank's stated position."

32. Within days, the Bank's solicitors responded. Their letter contained a categoric denial of any wrongdoing in respect of the development, marketing or sale of the bond and in particular denied strongly that any fraud whatsoever was perpetrated in the manner alleged or at all. It acknowledged that the allegations which were now being made were extremely serious but indicated that they did not intend to litigate them in correspondence. The letter contained a number of specific comments. It said:-

"1. While you are already aware of the Bank's position in relation to the issuing of borrowing for investment, we reiterate that while the Bank did not market the Solid World Bond 5 product as a borrow to invest product, it was willing to lend money to customers to invest in the product, provide that they met eligibility criteria. It is also important to reiterate, for the avoidance of any doubt, that the Bank is satisfied that it has acted correctly and that it complied with all regulations regarding the marketing and sale of the product.

2. Our client rejects any allegation that it knew at the time of the sale of the product that the performance of the product would be low, or was in any way reckless as to whether the performance would be low. As you are well aware, the product was for a period of five years eleven months, was capital guaranteed and was linked to a basket of twelve stocks. There is no way that the Bank, or any person, in April 2004, could have known or predicted what way the markets would turn out to be at the end of 2009. Indeed events have shown this to be the case.

3. The Bank never misled the Financial Regulator as alleged, or at all, in relation to this or any other product, or the way in which it conducted its business. The letter to which you refer clearly does not evidence the conduct you allege. The Financial Regulator was aware at all times that the Bank was providing back-to-back lending in relation to the sale of the Solid World Bond 5 product and there was no regulatory prohibition on same.

4. The matters upon which your clients propose to rely on as showing that a fraud was perpetrated do not in our view actually relate to the issue of fraud but rather relate to issues of alleged negligence and alleged breaches of regulation, which issues have already been pleaded by our clients in their pleadings and denied by the Bank in its defence.

5. You have adopted your own interpretation of various comments set out in documents and emails included in the Bank's discovery as evidence of fraudulent conduct on the part of the Bank in the marketing and sale of the Solid World Bond 5 product. The Bank rejects your interpretation which will be dealt with at the appropriate time. The Bank does not accept that the documents which you have referred to evidence the allegations being made, which allegations are

denied. In many instances, it is clear that the comments have been taken completely out of context and that you have chosen to ignore other documents which clarify the true meaning of such comments."

33. The letter goes on to say that if the plaintiff wished to amend his statement of claim, a motion would have to be issued. Following review of it, the amendments proposed and any other material relied upon, the Bank would determine whether and to what extent it was appropriate to contest the application. It was pointed out that if liberty to amend was granted then a full defence to the new allegations would be delivered.

34. Further correspondence was exchanged but there is little point in reciting it here since it does not advance the issue that I have to decide.

The Evidence
35. Two affidavits were sworn in support of the motion and one in response.

36. The principal grounding affidavit is that of David Coleman, the plaintiff's solicitor. In the course of the affidavit, he points out the Bank continues to maintain that it did not sell the bond as a borrow to invest product. He also points out that the Bank, through its solicitors, maintains that that issue is a regulatory one and does not go to the issue of whether the representations made by the Bank to the plaintiff and other investors were made knowing them to be false.

37. Mr. Coleman extracted an amount of documentation from the Bank's discovery. He exhibits it. He says that the exercise carried out in compiling these documents was not an exhaustive one but that a cursory review of the material demonstrates that there is:-

> *"An unarguable factual basis for the contention now being made by the plaintiff, i.e. that the defendant created the demand to borrow to invest in the investment product through a targeted sales campaign and the position adopted by it in these proceedings and in the A&L Goodbody letter of 16th February, 2012 is a fiction."*

38. Mr. Coleman then takes one example concerning the behaviour of a Mr. Leonard Mills who was a senior executive in the Bank's wealth management division. That gentleman appears to have been responsible for coordinating the activities of the wealth management division and the financial planning consultants. The Bank's policy for selling the combined product required that the customer meet with a financial planning consultant or a member of the staff of the wealth management division in each case. He points out that Mr. Mills, together with a compliance officer of the Bank, was responsible for the formulation of the risk warnings letter for lending to invest in the bond. When it came to selling the bond and the associated loan, Mr. Mills made no attempt to disguise the fact that the defendant was selling a combined product, it is alleged. The following is extracted from a communication of Mr. Mills:-

> *"I enclose a brief approach to drive the lending to invest product and to introduce the wealth management service to existing clients.*
>
> *Are you available next week to discuss this lending to invest opportunity."*

39. It is said that Mr. Mills made these comments in the emails introducing the product to various managers in the Bank. He is alleged to have been equally forthright in his communications with third parties:-

> *"I enclose details on a lending to invest arrangement which you may be interested in and some information on self administered schemes."*

40. Mr. Coleman says this is consistent with the instructions that his firm received in relation to the bond, namely, the bond was promoted and sold as a combined borrow to invest product.

41. A replying affidavit was sworn by Tara Glynn, who is the secretary of the Bank. She categorically rejects the contention that the Bank has behaved in any fraudulent fashion. She points out that the Bank opposes the amendment which is sought to be made principally on the basis that even taking the plaintiff's claim at its height, the matters now asserted do not support any claim in fraud. She takes exception to the manner of presentation of the application which exhibited four folders of documents many of which she alleges have no direct relationship to this application. Ms. Glynn also points out that the application is grounded solely on an affidavit sworn by the plaintiff's solicitor. No affidavit had by then been sworn by the plaintiff or indeed any of the other plaintiffs whose statements of claim are intended to be amended. She points out that the Bank indicated that it would expect that if an allegation of fraud was going to be made an affidavit alleging that would be sworn by the plaintiff. This is not to be seen as a technical objection on the part of the Bank. She points out that these proceedings involve the personal investment of the plaintiff and was a suitable one for him where his net assets at the time of the investment were valued at €1,670,000. The pleas made in the draft amended statement of claim are generic and make no effort, she says, to tie what is alleged to the personal circumstances of any particular plaintiff.

She then points out that nowhere does Mr. Coleman refer to or exhibit the risk warnings document which was signed by the plaintiff at the time he borrowed monies from the Bank to invest in the bond.

She then takes issue with a number of amendments over and above those alleging fraud which are sought to be made.

Ms. Glynn points out that the Bank has always accepted that the vast majority of customers who invested in the bond borrowed from the Bank in order to do so. Both the Financial Regulator and the Bank's compliance function were aware of this. There was, she says, no borrowing within the bond structure and the bond and the loan account were two separate products. Borrowing was not a condition of investment in the bond and not all customers opted to borrow to invest. She also points out that there was no prohibition either legislative or through any code of conduct or guidelines from the Regulator on borrowing to invest in tracker bonds or in advertising or marketing borrowing to invest in such bonds. She says that the high watermark of the plaintiff's claim appears to be that there are instances in which internal bank policy in relation to the promotion or marketing or the ability to borrow to invest was not followed.

Ms. Glynn also points out that the plaintiff appears to have completely disregarded the risk warnings document made available to him. This document expressly stated that a minimum growth level was required over the term of the bond to repay interest on the loan and to pay the relevant tax due on profits on a lending to invest arrangement and that this breakeven point would vary depending on interest rates and exit tax. The document even gave two sample breakeven points. She points out particular statements in the risk warnings document demonstrating that there could be no guaranteed returns on the bond and that a minimum growth level was required over the term of it to repay the interest on the loan and to pay the relevant tax due on profits on a lending to invest

arrangement. She points to various other documents which she says are supportive of the Bank's stance and alleges that the plaintiff has made no attempt to explain how, having regard to these documents, his investment in the bond was procured by a fraudulent misrepresentation. Further material is exhibited from a draft internal report which says that it was only in 2008 that the bond dis-improved with the effect that only capital would be returned to the plaintiff and other investors.

42. The final affidavit is that of Mr. Cuttle. This affidavit was much criticised for counsel for the Bank. Relevant parts of this affidavit are as follows:-

> *"5. However, insofar as is it material I can confirm that the product was sold to me on a borrow to invest basis and with a recommendation that it was suitable for me having regard to my appetite for risk. Pat Allen, who was my relationship manager in ACC, contacted me. He told me that the minimum investment was €100,000. I told him that I did not have that kind of money and he told me not to worry about it and that the Bank would lend it to me. I understand from my solicitor that the purported minimum investment was €2,500. This was never mentioned to me during the course of the telephone conversation. Insofar as the defendant has claimed and is claiming that persons who borrowed to invest in the product decided to do so of their own volition, this is completely untrue insofar as my case is concerned.*
>
> *6. I subsequently met with Mr. Allen and Tina Franklin from the defendant's wealth management division. She completed the form exhibited to Ms. Glynn's affidavit at TG1. I am absolutely clear that I told them that my attitude to risk was low and this is reflected in the form. Insofar as it says elsewhere in the form that my attitude to risk was medium, that is incorrect. In any event, my solicitor advises me that the experts retained on my behalf are unanimous in their opinion that the product was a high risk product.*
>
> *7. I am advised that the Bank knew that the product, by which I mean the bond and associated loan, was a high risk product. Had I been advised that the product was a high risk product or that there was any material chance of the return on the product not exceeding the monies paid by me, I would not have invested in the product. While I signed the risk warnings documents Mr. Allen advised me that the lowest expected level of return on the product was in or around €20,000 after the deduction of interest and tax. Based upon what I was told by Mr. Allen I expected to recover €30,000 - €35,000. However, I am not relying upon these representations for the purposes of this application. I was not interested in investing in a high risk product. I believe that the representation made to me that the product was a suitable product for me was false. I am also advised that the defendant has disclosed a substantial amount of material which shows that the defendant knew that the representation was false."*

43. During the course of the hearing, I was taken through other selected items from the discovery of the Bank to demonstrate that there was a statable case to be made in support of the amendments proposed.

The Proposed Amendments

44. There are some amendments which are relatively uncontroversial e.g. the allegation at para. 4 of the statement of claim to the effect that the representatives of the Bank classified the plaintiff's appetite for risk as *"low"* in lieu of *"medium"* as original pleaded. The real objection is taken to what is sought to be pleaded at para. 17. It reads as follows:-

> *"17. Further, the defendant made the representations referred to above (in particular the key representation that the combined product was a suitable product for the plaintiff) fraudulently and knowing them to be false or recklessly as to their truth or falsity and the defendant sold the combined product to the plaintiff in circumstances that make the retention by the defendant of the monies paid by the plaintiff to the defendant unconscionable.*
>
> *Particulars*
>
> *(a) at all material times the defendant knew that it could not sell the investment product to the plaintiff without a recommendation that the investment product was a suitable product for the plaintiff to invest in based upon a full fact find and a proper assessment of suitability;*
>
> *(b) at all material times the defendant knew that borrowing to invest in the investment product increased the risk profile of the transaction for the plaintiff and other investors;*
>
> *(c) in November 2003 the Irish Financial Services Regulatory Authority (IFSRA) issued a warning about 'geared tracker bonds' stating that they were 'risky' products and identifying, inter alia, the risk that the costs involved in such an investment would exceed the return and warning that the consumer should be able to assess whether the costs, risks and benefits involved in the transaction are suitable for their particular circumstances;*
>
> *(d) having regard, inter alia, to the matters identified at paragraphs (a), (b) and (c) ante the defendant was at all material times aware that it should not in any way promote or market the investment product as a borrow to invest product;*
>
> *(e) in order to circumvent this prohibition the defendant adopted the fiction that a demand had independently arisen amongst is customers for finance to invest in the product and that it would market and sell the investment product as a stand alone product but would provide finance to customers who decided on an independent basis that they wished to borrow money from the defendant to invest in the investment product;*
>
> *(f) had the defendant not adopted the fiction referred to at (e) ante, the product would never have been launched, marketed or sold by it. The compliance function of the defendant could not have 'signed off' on the product had the defendant's true intentions in relation to the product been recognised and acknowledged during the course of the product development and sign off process;*
>
> *(g) in fact, the defendant actively (and almost exclusively) promoted the investment product and the loan product as a combined borrow to invest product and conducted a 'borrow to invest' sales campaign both directly and through intermediaries who are appointed by the defendant for this purpose. The demand from the plaintiff and other investors to borrow to invest in the product was created by the actions of the defendant;*
>
> *(h) while the compliance and legal functions of the defendant may not have known that the defendant was deliberately breaching its own policy, senior executives in the defendant were so aware and had the compliance or*

legal functions of the defendant made any inquiries of the defendant's sales function they would have been so aware;

(i) the defendant promoted and sold the combined product to the plaintiff and other investors apparently without any analysis at all as to the likelihood of the return from the combined product exceeding the costs associated with the investment. The first documented occasion upon which any such analysis was carried out was in April 2004 and at that point the internal audit function of the defendant's parent opined that the estimated return from the investment product was 'likely to be low';

(j) given that the defendant was promoting and selling the product to the plaintiff and other investors as a borrow to invest product, the defendant was aware that the statements made in its marketing literature concerning the product referred to ante and in particular the representations that the product was a low risk product and was suitable for the plaintiff were false and made by the defendant knowing them to be false."

45. It is also sought to amend the prayer in the statement of claim so as to claim damages for fraudulent misrepresentation and deceit together with a declaration that having regard to the unconscionable conduct of the Bank in promoting and selling as a borrow to invest product it is liable to make restitution to the plaintiff of all monies paid to it by him. The plaintiff also seeks damages for unjust enrichment.

Opposition

46. The application to amend is opposed on a number of grounds. First, there is an assertion that there is no factual basis put forward to warrant the amendment. Second, it is said that the amendments amount to nothing more than an artificial construct which has been created by the plaintiff's lawyers. Third, it is said that Mr. Cuttle himself attempts to make no case in support of the affidavit sworn by him.

47. The Bank relies heavily on the decision of the Supreme Court in *Croke v. Waterford Crystal Ltd. and Irish Pensions Trust Ltd.* [2005] 2 I.R. 383.

48. Mr. Croke was one of approximately 350 plaintiffs who brought separate actions against the defendants. The High Court refused leave to amend pleadings against both defendants. The Supreme Court allowed the amendments to be made against the first defendant but not against the second. Particular reliance is placed upon the a passage from the judgment of Geoghegan J. at p. 401, dealing with the application to amend as against the second defendant. That judge said:

"Insofar as the plaintiff wants to amend the statement of claim as against the second defendant, I take a different view. In the earlier part of this judgment, I have demonstrated by reference to the pleadings in the existing statement of claim and by reference to the replies to the two notices for particulars sent by that defendant, that the plaintiff has not put forward any factual basis whatsoever to support a fraud or any kind of deliberate misconduct claim against the second defendant. In the replies to particulars, there is a vague allegation that deliberate misrepresentations made by the first defendant were made by that defendant as agent for the second defendant. But there are no particulars even remotely supporting that proposition. There are no allegations against any single named employee of the second named defendant and, of course, having regard to the second defendant company, fraud or conspiracy allegations against it would be particularly serious."

Decision

49. The starting point for my decision has to be the basic purpose of O. 28, rule 1. It is, as Geoghegan J. said, intended to be a liberal rule. It has as its object that real matters in dispute between litigants should be determined by the court.

50. There is no plea of fraud contained in the statement of claim as delivered. Some of the allegations of wrongdoing do, however, go very far. For example, allegations of recklessness, negligence and deliberate misleading of the plaintiff. The plea of fraud is sought to be introduced after inspection of discovered material. My attention was drawn to specific documents in that material which, on one view, could be regarded as supportive of a plea of fraud. There may, of course, be another side to that story and indeed a view of the documents as a whole rather than on a selective basis may neutralise the construction which is sought to be put upon them. Without going into detail, I would have to say that if fraud had been pleaded in the statement of claim as originally delivered then, in the light of the documents disclosed in the Bank's discovery, it would not be possible to strike out the fraud claim as one doomed to failure. That is not, by any means, a warranty as to the likelihood of success in such a claim. It is merely an acknowledgement that the very low threshold of proof that has to be achieved to survive an application to strike out *in limine* has been met by the plaintiff. Such a determination might be considered sufficient to dispose of this motion having regard to the agreed test which I was asked to apply. There is, however, another aspect of the matter which is more troublesome. That relates to the evidence which has been utilised in support of this application. Initially, there was simply the affidavit from the plaintiff's solicitor. The Bank, correctly in my view, pointed out in the course of Ms. Glynn's affidavit that it could not see how the plaintiff could justify the amendment so sought without evidence from the plaintiff himself. It is his case and not his solicitors. The response was to file the short affidavit sworn by Mr. Cuttle. I have already repeated the relevant paragraphs from it. At para. 7 he says he has now been advised that the Bank knew that the product, namely the bond and associated loan, was a high risk product. If he had been advised of that at the time, he would not have invested in it. He goes on to say that while he signed the risk warning documents, he got specific advice from Mr. Allen that the lowest expected level of return on the product was in or around €20,000 after the deduction of interest and tax. He expected to recover between €30,000 and €35,000. He then goes on to expressly disavow any reliance upon those representations for the purpose of this application. The sole case which he seems to wish to make then arises from the representation made to him that the product was a suitable one, he having indicated that he was not interested in investing in a high risk product. He states his belief that the representation made to him that the product was suitable for him was false. He then adverts to the discovered material which he says shows that the defendant knew that representation was false.

51. Whilst I think it would have been desirable to have filed a somewhat more detailed affidavit, I am of the view that this affidavit is sufficient to demonstrate that one of the issues now between the parties is this allegation of fraud. I think that, unlike Mr. Croke, there is a factual basis laid to support an allegation of fraudulent misconduct. Specific information has been given and named persons identified. This application requires a low threshold of proof to be achieved. It has been achieved. Permission to amend the statement of claim is not in any way a warranty of success on it's contents.

52. Indeed, I think it might said that if the plaintiff is correct, the claim already made, if supported by evidence and accepted by the trial judge, would be sufficient for him to obtain redress for the wrong allegedly done to him without entering into the arena of fraud

at all. If, however, he wishes to include a claim in fraud then, having regard to the jurisprudence on the topic of amendment, in my view he should be entitled to make that case.

53. In coming to this conclusion, I bear in mind the strenuous denials of the Bank and the other submissions which I have outlined.

54. In permitting the amendment, I believe I ought to do so on terms. That is permitted to me under the rule. If the plaintiff wishes to avail himself of the leave which I am now giving to amend his statement of claim so as to include the plea of fraud, it will be on the following terms. In the event of him not succeeding at trial on the fraud claim then he will be responsible for the costs of that element of the case regardless of the overall outcome of the action.

55. The inclusion of this plea will add a new dimension to the case. It is likely to lead to a longer trial with perhaps a greater number of witnesses. If, therefore, the plaintiff opts to make this case in fraud he will have to pay for it if unsuccessful.

56. The plaintiff must now, therefore, opt to avail himself of the leave to amend or not. If he opts not to amend he must pay the costs of this motion. If he amends but fails at trial on the fraud claim he will be liable for the costs of this motion and any additional costs arising on foot of the amendment.

Approved: Kelly J.