

THE HIGH COURT

[2017 No. 148 CA]

BETWEEN

MAEVE O'DWYER

APPLICANT

AND

IRISH NATIONWIDE BUILDING SOCIETY

DEFENDANT

JUDGMENT of Mr. Justice Robert Eagar delivered on Friday the 24th day of November, 2017.

1. On the 11th May, 2017, at Limerick Circuit Court, Judge O'Callaghan heard an application by the appellant/defendant in these proceedings in the motion on behalf of the appellant/defendant for permission to amend the defence to include a claim that the within proceedings are statute barred pursuant to the provisions of the Statute of Limitations Act 1957, and accordingly that the action as against the defendant should be struck out. Judge O'Callaghan refused to amend the defence and appellant/defendant have appealed against this order and the Court proposes to rule on this matter. The order of Judge O'Callaghan was an order refusing the defendant pursuant to O. 65 and/or O. 18, r. 1(4) of the Circuit Court Rules 2001, to amend the defence delivered on the 23rd September, 2011 to include a plea under the statute of limitations such that the plaintiff's claim (or parts thereof) are statute barred.

2. The proceedings in this case were initiated by ordinary civil bill of the plaintiff, issued on the 22nd of January, 2011, in which the plaintiff states in the indorsement of claim as follows:-

(1) On 23rd of August, 1994 the plaintiff obtained and accepted an offer of a mortgage loan in respect of the dwelling house situated at 1 Davitt Street, off John Street, Limerick in the sum of €16,000.00, on the basis that the said mortgage loan would be in the nature of an endowment mortgage (this is a loan arrangement under which only interest is paid to the lender while the principal repayment instalments are paid into a life insurance policy which matures on the same day the mortgage becomes due). It was a term of the said agreement that the building society would provide the said mortgage to the plaintiff and would further procure and/or insist on an endowment policy being put in place so that the principal sum borrowed would be repayable.

(2) Wrongfully and unlawfully and in breach of contract the plaintiff discovered in 2009 that the mortgage loan on the plaintiff's dwelling house was not secured by means of an endowment policy but that all that had been provided was a lesser form of insurance.

(3) Further and in the alternative the defendant was guilty of negligence and breach of duty in:-

(a) Failing to insist upon or ensure that the said endowment policy was put in place prior to the granting of the mortgage loan.

(b) Failing to advise the plaintiff of the fact that the endowment policy had not been put in place.

(c) Failing to insist upon or take steps to ensure that same was put in place within a reasonable time after the execution of the said mortgage loan.

(d) Failing to advise the plaintiff of the true position until 2009.

In consequence of the foregoing the plaintiff claims that she had suffered loss, damage, inconvenience, mental distress and upset, and she sought damages in the sum of €22,000.00, sought the Irish Nationwide loan in the sum of €22,000.00 and the premium paid on the life policy which was not specified in the ordinary civil bill.

3. A solicitor other than the present solicitors for the defendant, entered an appearance on behalf of the defendant on 29th April, 2011.

4. A defence was lodged on behalf of the defendant on 23rd September, 2011. The defence indicated that Anglo Irish Bank Corporation Ltd. were deemed to be successors in title to Irish Nationwide Building Society. The defence cited that pursuant to s. 34 of the Credit Institutions (Stabilisation) Act 2010, by order of the High Court dated 1st July, 2011, the assets and liabilities of Irish Nationwide Building Society were transferred to Anglo Irish Bank Corporation Ltd. The defence subsequently set out what is in effect a denial of the plaintiff's claim.

5. A notice to produce on behalf of the plaintiff was served on 17th October, 2011 and a notice of trial was served on 17th October, 2011 to the solicitors for the plaintiff, returnable for the 10th January, 2012. By letter dated 13th January, 2012 the solicitors for the defendant required further and better particulars arising out of the plaintiff's ordinary civil bill.

6. An application to the High Court dated 18th January, 2016, was made by the plaintiff in these proceedings for an order pursuant to s. 6(2)(b) of the Irish Bank Resolution Corporation Act 2013 for consent to lift the stay imposed by the enactment of the Irish Bank Resolution Corporation Act 2013 (Special Liquidation) Order of 7th February, 2013.

7. Section 6(2) of the Irish Bank Resolution Corporation Act 2013 provides:-

"Subject to subs. (6), with effect from the making of the Special Liquidation Order –

(a) there shall be an immediate stay on all proceedings against IBRC;

(b) no further actions or proceedings can be issued against IBRC without the consent of the court,

(c) no actions or proceedings for the winding up of IBRC, or for the appointment of an examiner (whether interim or otherwise) or a liquidator (whether provisional or otherwise) to IBRC can be taken, issued, continued or commenced.

8. The affidavit of the plaintiff in relation to the application to the High Court on 18th January, 2016, was sworn on the 10th December, 2015. In that affidavit she sets out her claim as above and refers to s. 6(2)(a) of the Irish Bank Resolution Corporation Act 2013 staying all proceedings and being included in the applicant's case.

9. She refers to the Irish Bank Resolution Corporation agreeing to sell her mortgage to Shoreline Residential Ltd on 28th March, 2014. The plaintiff states this was without any consultation with her.

10. She further swears that Shoreline Residential Ltd have transferred the administration of her mortgage to Pepper Finance Corporation (Ireland) Ltd., trading as Pepper Assets Servicing (Pepper) and she says it is clear that the responsibilities of Irish Nationwide Building Society had been taken over by Shoreline Residential Ltd and Pepper Finance Corporation (Ireland) Ltd. She further swears that Pepper Finance Corporation (Ireland) Ltd have threatened to issue Circuit Court proceedings against her, seeking possession of 1 Davitt Street, Limerick, for failure to pay the monies due and owing, pursuant to the mortgage agreement. She said the purpose of this application is to request the consent of the Court to lift the stay on the Circuit Court proceedings in the South-Western Circuit, bearing the record number 139/2011, against Irish Bank Resolution Corporation (in Special Liquidation).

11. No affidavit was sworn on behalf of the defendant, in fact the application was unopposed by the defendant, and on 18th January, 2016, Noonan J. ordered that pursuant to s. 6(2)(b) of the Irish Bank Resolution Corporation Act 2013 that the stay imposed by the enactment of the Irish Bank Resolution Corporation Act 2013 (Special Liquidation) Order 2013 of 7th February, 2013, be lifted in respect of proceedings issued by the applicant.

12. The defendant changed solicitors in these proceedings and Messrs. Ronan Daly Jermyn were appointed.

13. Correspondence from the solicitors for the plaintiff dated 20th of June, 2016, seeking voluntary discovery of relevant documents was addressed to Ronan Daly Jermyn solicitors for the defendant.

14. The replies to notice for particulars was delivered to the defendant by the plaintiff on 22nd of September, 2016. An application was made before the County Registrar of the Circuit Court on 7th of November, 2016 whereby the plaintiff sought a motion for discovery and the Court ordered that the motion be struck out with costs of the motion to the plaintiff.

15. A motion for better and further particulars from the solicitors for the defendant to the solicitors for the plaintiff was dated 10th November, 2016. A notice of motion was issued by the defendant seeking an order pursuant to O. 65 and/or O. 16, r. 1(4) of the Circuit Court Rules 2001 to amend the defence delivered on 23rd September, 2011, to include a plea under the statute of limitations such that the plaintiff's claim or (part thereof) are statute barred. Finian O'Brien, solicitor in the firm of Ronan Daly Jermyn swore an affidavit in which he identified the facts of the case and said that by letters dated 22nd March, 2016, 24th May, 2016 and 6th September, 2016, he wrote to the solicitors for the plaintiff and sought the consent of the plaintiff for the making of an order to amend the defence to include a plea based on statute of limitations.

16. Mr O'Brien says that a plea under the statute of limitations is appropriate in the circumstances given the fact that the original mortgage was taken out by the plaintiff with Irish Nationwide Building Society in 1994, and her claim relates to the fact that at the time the defendant, and its predecessor, acted in breach of contract and negligently failed to insure the plaintiff had an endowment policy in place with the third party insurance so she could avail of the potential benefits of such a policy. He says that it would have been preferable to have included the plea in the defence delivered on 23rd September, 2011, but the delays in bringing the application were largely consequent upon the fact that the proceedings were stayed by reason of the impact of primary legislation, and in reality neither party took any substantive steps with regard to the litigation, until the stay of the proceedings was lifted by order of the High Court on 18th of January, 2016. Due before this Court is whether or not the Court should allow the amendment of the defence to include the statute of limitations.

17. Counsel for the applicant/defendant opened Dowling and McDonnell, *Civil Procedure in the Circuit Court, 2nd Ed.*, (Dublin, 2013) and referred to O. 65, r. 1 of the Circuit Court Rules:-

"The Judge or the County Registrar as appropriate may, on such terms as he considers just, at any stage of the proceedings, allow any party to amend or alter the pleading or other document or may disallow any amendment already made or may amend any defect or error in any proceedings and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties".

18. In *Walter Croke v. Waterford Crystal Limited and Irish Pensions Trust Limited* [2005] 2 I.R. 383, Geoghegan J. at p. 393 stated:-

"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."

and Dowling and McDonnell state:-

"Whilst it is clear that the amendment must relate to an issue or issues between the parties arising from the subject matter of the proceedings, it is not a bar to granting leave to amend if the proposed amendment will fundamentally alter the nature of the proceedings by introducing a new ground for relief or cause of action."

In *Cornhill and Others v. Minister for Agriculture and Food* (Unreported, O'Sullivan J., 13th March, 1999) the learned judge stated that it was the function of the court to consider the merits of the proposed amendment or its likelihood of success. Dowling and McDonnell also state, that if the respondent to the motion to amend the proceedings demonstrates to the court that such an amendment would cause prejudice then the application will be refused. It is not acceptable merely to make general allegations and accordingly specific prejudice must be shown and "some examples of prejudice including the delay of the trial, the loss of an early hearing date and the death of a witness". Even if prejudice is shown to exist the court may permit the amendment if the prejudicial effect of the amendment can be less and/or neutralised in some way. He then quotes from Lynch J. in the *DPP v. Corbett* (No 2) [1992] I.L.R.M. 674:-

"If there might be prejudice which could be overcome by an adjournment, then the amendment should be made and an

adjournment granted to overcome the possible prejudice and if the amendment might put the other party to extra expense, that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party should indemnify the other party against such expense.”

19. In relation to delay Dowling and McDonnell state that where there has been excessive delay on the part of the party bringing the application to amend, the court may refuse to grant the relief sought and quoted from *Shepperton Investment Co. Ltd. v. Concast (1975) Ltd* (Unreported, High Court, Barron J., 21st December 1992):-

“Clearly if the plaintiff has a good case in respect of its amended claim, it is facing serious injustice if it is not allowed to make it. Nevertheless, before such an amendment should be allowed full disclosure should be made to the circumstance in which the claim comes to be made and why it is not been made sooner. No such effort has been made here in the circumstances where the technical evidence apparently available to the plaintiff appears not to support the amendment. Such considerations weaken the case for the plaintiff.”

20. Dowling and McDonnell in dealing with the issue of delay, said delay will not be leading factor in a court refusing to grant leave to amend pleadings. The court must look at any additional factors, such as prejudice or the absence of an explanation for such delay. Case law indicates that leave to amend will be refused in circumstances where the applicant has failed to provide an explanation for the delay. This Court notes that a defence was lodged on behalf of the defendant on the 23rd September, 2011.

21. The Irish Nationwide Building Society was taken over by Anglo Irish Bank Corporation having regard to the s. 34 of the Credit Institutions (Stabilisation) Act 2010. Subsequently, the Irish Bank Resolution Corporation on the 28th March, 2014, agreed to sell the plaintiff's mortgage to Shoreline Residential Ltd. and subsequently to Pepper Finance Corporation (Ireland) Ltd.

22. The Court is satisfied that the delay caused by the collapse of the original defendant and such delay has prejudiced the plaintiff in such a way that the plaintiff will be in worse position from the point of view of presentation of her case than she would have been if the defendant had pleaded the subject matter of the proposed amendment at the proper time. The Court follows the decision of Clarke J. in *Woori Bank v. KDB Ireland Ltd.* [2006] IEHC 156:-

“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.”

The Decision of the Court

23. The Court for the above reasons will refuse an order pursuant to O. 65 of the Circuit Court Rules to amend the defence of the defendant which was delivered on the 23rd September, 2011. The Court refuses to allow the defendant to amend the defence by the insertion of the statute of limitation.