

BETWEEN

MICHAEL GUNNING AND SILVIA GUNNING

PLAINTIFFS

AND

PERMAGREEN INSULATION (IRELAND) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 17th day of October, 2018

Introduction

1. This application concerns a motion brought by the defendant seeking liberty to amend its defence pursuant to the provisions of O. 28, r. 1 of the Rules of the Superior Courts.

2. To state the issues in a nutshell, the plaintiffs are the owners of a house in Co. Westmeath. They commenced building their house in 2009. In 2011, they retained the defendant to provide insulation in the building, during the course of its construction. They allege that as a result of negligence on the part of the defendant, its servants or agents, extensive damage has been caused to the property, to such an extent that it will be necessary to demolish the structure and rebuild it. The plaintiffs allege that as a result of this state of affairs, they have suffered much loss and damage.

3. In a defence filed on 14th April, 2016, the defendant admitted that due to its breach of contract and negligence, "certain damage" was caused to the plaintiffs' house. By notice of motion dated 3rd July, 2018, which came before the High Court on 15th October, 2018, the defendant seeks liberty to amend its defence, so as to effectively plead that while it was responsible for some damage to the plaintiffs' house, other damage was due to defects in the design and/or construction of the property, for which the defendant is not responsible. In addition, it is alleged that, due to the fact that the plaintiffs have failed to carry out remedial works to the property in the intervening years, further damage has been caused thereto.

4. The plaintiffs oppose this application to amend the defence, primarily on the basis that it would cause extensive prejudice to them, if such amendment were allowed; in particular, as the defendant had initially accepted liability for damage to the plaintiffs' property, it would be unfair to allow the defendant to amend its defence so as to place the blame for such damage on other parties, who are as yet unidentified. The plaintiff would be put in a particularly prejudicial position, because they would be out of time to institute any proceedings as against such third parties.

Background

5. As already noted, the plaintiffs commenced construction of their dwelling house in 2009. It is pleaded that in 2011, they retained the defendant to provide cavity insulation in the property, which was still under construction. It is pleaded that the defendant installed the insulation on 10th October, 2011, and subsequent days. The plaintiffs state that thereafter, significant cracking became apparent. Upon investigation, it transpired that this was due to the negligent manner in which the insulation product had been installed in the premises. It is pleaded that by letter dated 13th September, 2012, the defendant's insurance company, Zurich Insurance plc, confirmed that it was not disputing liability.

6. Proceedings were commenced by issuance of a plenary summons on 19th October, 2015. A statement of claim was delivered on 2nd December, 2015. After an exchange of a notice for particulars and replies thereto, a defence was filed on behalf of the defendant on 14th April, 2016. While certain matters were put in issue between the parties, it was admitted that on 10th October, 2011, the defendant commenced installation of the insulation product in the plaintiffs' house. The defence went on to contain the following significant admission at para. 8:-

"8. Whilst it is not admitted that the defendant did not install the product correctly in a workman like manner, in accordance with best practice or with the manufacturers approved practice, the defendant admits that certain damage was caused to the plaintiffs' house by the installation of the product, and the plaintiffs are not required to prove liability in these proceedings, which was conceded in correspondence to the plaintiffs by the defendant's insurers on 13th September, 2012."

7. At para. 21 of the defence, it was denied that the statement of claim had set out an accurate account of the findings made by an engineering company, which had examined the premises on behalf of the defendant, it went on to state as follows: *"it is admitted that on or about 13th September, 2012, the defendant's insurance company, Zurich Insurance plc, confirmed that it was not disputing liability"*.

8. The defence denied that the plaintiffs had suffered the alleged or any loss or damage, inconvenience or expense. It went on to specifically deny that the only remedial solution was to demolish the property and rebuild it.

9. Subsequently, the defendant changed its solicitor and a further notice for particulars was raised in relation to the plaintiffs' claim. That was responded to on 7th July, 2017. A further notice for particulars was raised by the defendant's solicitor on 7th December, 2017. I have not been furnished with any replies thereto. A notice of trial was served by the plaintiffs' solicitor on 8th December, 2017.

10. On 16th May, 2018, the defendant purported to furnish replies to a notice seeking particulars which had been sent by the plaintiff on 9th June, 2016. In those Replies, the defendant set out its contention that some of the damage to the plaintiffs' property was due to failures in design and/or construction of the property, for which the defendant was not responsible or liable. The defendant set out particulars of the matters which it alleged constituted failures to design and/or construct the property properly.

11. By notice of motion issued on 3rd July, 2018, the defendant seeks to amend its defence and in particular, para. 8 thereof in the following way:-

"8. Whilst it is not admitted that the defendant did not install the product correctly in a workman like manner, in accordance with best practice or with the manufacturers approved practice, the defendant admits that certain damage was caused to the plaintiffs' house by the installation of the product, and the plaintiffs are not required to prove liability in these proceedings, which was conceded in correspondence to the plaintiffs by the defendant's insurers on 13th September, 2012."

September, 2012. Further, damage caused to the plaintiffs' property said to give rise to the need for significant structural repair arises because of the failure on the part of the plaintiffs to design and construct their property correctly in the first instance. While damage was caused by the defendant, the damage caused by the defendant was not such as to necessitate the more significant structural remedial works which have been put forward. In the premises, the plaintiffs or their agents in the construction of the property, were the parties responsible for failing to ensure that the premises when constructed would be in compliance with the building Regulations and code of practice, particularly because of the failure to provide adequate ties and wall restraints for which the defendant was in no part responsible. Further the fact that the plaintiffs had not carried out any works to the property, including those identified by the defendant means that the premises both internally and externally have been exposed to seasonal temperature variations which has caused differential thermal – movement of the fabric of the house as well as damage caused by exposure to the elements. Insofar as these elements of damage are ascertained, they are the responsibility of the plaintiffs."

Submissions of the Parties

12. It was submitted on behalf of the defendant that the jurisdiction given to this Court to amend pleadings pursuant to O. 28, r. 1 of the Rules of the Superior Courts, is a wide jurisdiction, that should be exercised liberally in favour of allowing amendments, so as to ensure that each of the parties is able to put their case as fully as possible before the court at the trial of the action. Mr. Fogarty, B.L., submitted that parties should be allowed to amend their pleadings, so as to ensure that all the issues were properly before the court, when it came to hear the action.

13. In support of that submission, he referred to the decision of the Supreme Court in *Croke v. Waterford Crystal Limited & Ors* [2005] 2 I.R. 383. In particular, he referred to the headnote to that report where it was stated that the Supreme Court held that the primary purpose of O. 28, r. 1, was to ensure that the real issues between the parties could be determined. This was subject to questions of real prejudice to the defendant, although some aspects of prejudice could be dealt with by appropriate costs orders.

14. Counsel referred to the dicta of Geoghegan J. at p. 394, where he cited with approval the following dicta of Lynch J. in *Director of Public Prosecutions v. Corbett* [1992] ILRM 674, at p. 678:-

"The day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party. While courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendment should be made. If there might be prejudice which could be overcome by an adjournment then the amendment should be made and an adjournment also 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 shall indemnify the other party against such expenses."

15. Counsel submitted that in this case, the defendant was doing no more than putting the plaintiffs on proof of the damage which had been caused to their property by the wrongdoing of the defendant, its servants or agents. It was not reneging on the admission of liability which had been made in the earlier defence and indeed, which was still contained in the proposed amended defence, but was putting the plaintiffs on notice that the defendant would make the case that not all of the damage to their property was due to any wrongdoing on the part of the defendant. The defendant was merely making its case fairly and squarely, that due to the specified defects in the design or construction of the property other damage, for which the defendant was not responsible, had been caused to the property. In addition, the defendant was making the case that due to the lapse of time and due to the failure on the part of the plaintiffs to carry out adequate remedial works during that time, further damage had been caused to their property.

16. In response to that submission Mr. O'Sullivan B.L., counsel for the plaintiffs submitted that, while it was true to say that the court enjoyed a wide jurisdiction when considering an application to amend pleadings under O. 28, r. 1, the question of prejudice had to be taken into account by the court when considering how it would exercise its discretion on such an application. Counsel submitted that in this case, the plaintiffs would suffer significant prejudice, if the defendant was allowed to amend its defence in the manner proposed. He pointed out that as far back as April 2016, having carried out whatever inquiries it deemed appropriate, including having the property examined by its own engineer, the defendant and its insurers had formally conceded liability by letter dated 13th September, 2012. The defendant had gone on to file a defence conceding liability. Against that background, they should not be allowed amend their defence to now plead that some of the damage to the plaintiffs' property was caused (a) by other parties in the design and/or construction of the structure, or (b) by the plaintiffs, due to their failure to carry out appropriate remedial works in the intervening years. Counsel submitted that if the defendant was allowed to make such a case, the plaintiffs would suffer significant prejudice, in that they would now probably be statute barred in relation to any claim they may wish to make in relation to the design and/or construction of their house. In such circumstances, the plaintiffs would suffer irremediable prejudice and on that basis, the application should be refused.

17. In support of that submission, counsel referred to the decision of Clarke J. (as he then was) in *Woori Bank v. KDB Ireland Limited* [2006] IEHC 156, where he stated as follows at p. 4 of the judgment:-

"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."

18. Counsel also referred to the opinions expressed by the learned authors of "*Delaney & McGrath on Civil Procedure*", (4th Ed.) at paras. 5-214 *et seq* as follows:-

"5-213 Leave to amend will not be granted where to do so would prejudice the other party to the proceedings. Prejudice in this context does not refer to the effect of the amendment sought on the party's chances of success in the proceedings. For example, in Croke v. Waterford Crystal Limited, it was held that no prejudice arose in circumstances where the plaintiff sought to amend his statement of claim to plead his date of knowledge of the accrual of a cause of action in order to defeat a plea that the proceedings were statute barred. Geoghegan J. stated that: 'if by reason of the appellant's date of knowledge the action which might otherwise have been statute barred is not in fact statute barred it cannot be said that prejudice has arisen.

5-214 In Aer Rianta v. Walsh Western International Limited, Murphy J. explained that it is 'inescapable that every amendment to a defence is intended to raise, and presumably will raise, further obstacles for a plaintiff'. He approved of a passage from the judgment of Lord Keith in Kettman v. Hansel Properties Limited, where his Lordship explained that:

The sort of inquiry which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case than he would have been in if his opponent had pleaded the subject matter of the proposed amendment at the proper time...it is not a relevant type of prejudice that allowance of the amendment will or may deprive him of a success which he would achieve if the amendment were not to be allowed."

19. Counsel submitted that in this case, the plaintiffs would suffer significant prejudice if the amendment were allowed. They had been lulled into a position of complacency due to the fact that the defendant's insurers had conceded liability in its correspondence and the defence initially filed on behalf of the defendant in April 2016, also conceded liability. It was submitted that it would be most unjust to allow the defendant to change its stance at this late stage, some two years after the original defence had been filed on its behalf and some seven years after the events complained of by the plaintiffs against the defendant and some nine years after the commencement of construction of the house.

20. Finally, in response to those submissions, Mr. Fogarty, B.L., on behalf of the defendant, submitted that even if the amendment were not allowed, the plaintiffs would still have to prove what actual damage was caused by the wrongdoing of the defendant. Just because the defendant had admitted that it had installed the insulation in a negligent or incorrect manner, did not *ipso facto* mean that they were therefore responsible for all the damage to the plaintiffs' property. The onus always rested on the plaintiff to prove what damage flowed from the admitted wrongdoing of the defendant. In these circumstances, he submitted that the amended pleadings did no more than put the plaintiffs on notice that the defendant would argue at the trial of the action, that while it had caused certain damage to the plaintiffs' house, other damage had been caused thereto by the parties who were responsible for the design and/or construction of the structure itself. Furthermore, the defendant would argue that the plaintiffs had contributed to the loss by failing to take any adequate remedial steps after 2011.

21. He further submitted that if the court should find that some of the damage to the plaintiffs' property was caused by third parties who had not been sued, the fact that the plaintiffs may now be statute barred from proceeding against such parties, would not be sufficient to prevent the defendant from making the case that such damage was indeed caused by third parties, who had not been sued by the plaintiffs.

Conclusions

22. I have considered carefully the detailed submissions made by counsel for each of the parties. Order 28, rule 1 is in very clear terms:-

"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."

23. There is considerable strength in the submission put forward by counsel on behalf of the plaintiffs, that a defendant should not be allowed to concede liability in its defence and then some years later, try to amend its defence so as to retract from the position that it had initially taken. This would be all the more so, where the plaintiff would suffer significant prejudice by allowing the defendant to alter its stance on liability. I can readily appreciate how such irremediable prejudice could arise. If one were to take a simple example of a man walking down a street who trips due to some defect in the pavement. If the local authority were to put in a defence conceding liability, the plaintiff would take no further steps in relation to the liability aspects of the case. It would be most unjust if some years later, the defendant were to be allowed to alter its plea in relation to liability, so as to put same back in issue between the parties. By that time, the locus may well have changed and the plaintiff would be at a serious prejudice in trying to establish that the pavement had been in an unsafe and dangerous condition at the time of his accident. In such circumstances, the prejudice would be so severe, that the court would probably not allow the defendant to amend its defence. A similar prejudice could arise where liability was initially conceded and in the interim between the time when the defence was first filed and the time when the amendment was sought, an important liability witness had died. The plaintiff may well be in a position to oppose such an amendment on the basis that had they known that liability was in issue between the parties, they would have applied to have the witness's evidence taken on commission, when it became clear that he was terminally ill. In both these circumstances, the plaintiffs could forcefully argue that the amendment should not be allowed due to prejudice.

24. However, based on the authorities cited above, it would appear that the general approach nowadays is that amendments to pleadings should be allowed, so as to enable each of the parties to put their case fully and properly before the court, unless by so doing, one would subject the other party to prejudice, which cannot be remedied either by an adjournment, or an appropriate order as to costs.

25. The argument put forward by Mr. O'Sullivan, B.L., on behalf of the plaintiffs in resisting the application for the amendment, to the effect that the defendant should not be allowed to amend its defence, because to do so would enable it to place the blame for the damage to the plaintiffs' property on the shoulders of third parties, against whom the plaintiffs may now be statute barred; while undoubtedly a forceful argument, it seems to me that the submission made by Mr. Fogarty, B.L., in response is, in fact, correct. Even where a defendant concedes liability for certain damage as a result of its wrongdoing in the installation of a particular insulation product, that admission does not imply that it is accepting liability for all damage to the property. The onus always rests on the

plaintiff to prove what actual damage flowed from the wrongdoing of the defendant. I accept his submission that even if no amendment were made, the defendant could still argue that some of the damage alleged by the plaintiffs was not due to its default, but was due to the negligence and/or breach of contract on the part of other parties, who are not before the court.

26. In these circumstances, the amendment to the defence does not, in reality, alter the position which the defendant had taken in relation to liability, but merely puts the plaintiffs on notice that it will argue at the trial of the action that some of the damage to their property was caused by other people and some of the damage was due to their own negligence in failing to carry out remedial works in the intervening years.

27. If I thought that the initial defence filed on behalf of the defendant conceded that it was liable for all the damage in the plaintiffs' property, then I would not allow the amendment. However, that defence was carefully drafted and merely conceded that "certain damage" had been caused by its wrongdoing. In these circumstances, the onus of proving what actual damage was caused by the wrongdoing of the defendant remained on the plaintiffs. I am satisfied that the amendment to the pleadings, merely puts the plaintiffs on formal notice of the case which the defendant will make in relation to the extent of damage which it alleges was due by other parties, who are not parties to the proceedings. In the circumstances, I am satisfied that the amendment will not unfairly prejudice the plaintiffs. The amendment sought will clarify the issues which will have to be determined at the trial of the action. Accordingly, I will permit the defendant to amend its defence in the manner sought in its notice of motion.