[2020] IEHC 289

THE HIGH COURT

[2018 No. 7052P.]

BETWEEN

CARE PRIME HOLDINGS FC LIMITED, FIRSTCARE IRELAND LIMITED

AND

BENEAVIN CONTRACTORS LIMITED

PLAINTIFFS

AND

HOWTH ESTATE COMPANY

AND

JULIAN GAISFORD-ST LAWRENCE

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 12th day of June, 2020

1. This is an application for an order pursuant to O. 28, r. 1 of the Rules of the Superior Courts granting liberty to the plaintiffs to amend the statement of claim delivered on 12th October, 2018 in the terms of a draft exhibited to the affidavit of Mervyn Smith sworn on 11th February, 2020 to ground this application, and which was first provided to the defendants' solicitors under cover of a letter dated 23rd December, 2019 by which consent was sought for the proposed amendment.

2. The plaintiffs are limited liability companies who are said to be part of the First Care Group, which is said to be engaged in the provision of nursing home care and the construction and operation of nursing homes in Ireland. The man behind the plaintiffs and the First Care Group is Mr. Mervyn Smith.

3. The first defendant is an unlimited company with a registered office at Deer Park Hotel, Howth, County Dublin. The second defendant, Mr. Julian Gaisford-St. Lawrence, is described as a businessman with an address at Howth Castle, Howth, County Dublin. The defendants are said to be the legal and beneficial owners of "*certain lands and buildings*" in Howth, including the lands and buildings formerly known as the Deer Park Hotel.

4. The plaintiffs' case, as presently pleaded, is that in January, 2015 Mr. Gaisford-St. Lawrence, by an accountant said to have been his agent, approached Mr. Smith, who is said to have been the plaintiffs' agent, in relation to the proposed redevelopment of the Deer Park Hotel as a nursing home, and that on 7th March, 2016 Mr. Gaisford-St. Lawrence, on behalf of the defendants, and Mr. Smith, on behalf of the plaintiffs, signed a memorandum of understanding ("*MOU*") in relation to the redevelopment of the hotel as a nursing home. The plaintiffs' case is that in reliance on the MOU and on various unspecified requests at unspecified times by Mr. Gaisford-St. Lawrence, on behalf of the defendants, the plaintiffs incurred significant time and expense in relation to the project, specifically, or including, €387,450 paid to a firm of architects and project managers, on which payment the plaintiffs are alleged to have incurred a liability to value added tax. The plaintiffs' engagement and outlay is said to have continued until April, 2018 when, it is said, Mr. Smith was informed by Mr. Gaisford-St. Lawrence that he no longer wished to proceed with the project.

5. The initial focus of the statement of claim is on the MOU which is said to have provided that the plaintiffs would fund all costs associated with an application for planning permission for redevelopment of the hotel as a nursing home, and that in the event that the defendants should decide before the execution of the agreement for lease contemplated by the MOU not to proceed with the execution of the agreement for lease, the defendants would reimburse the plaintiffs in respect of vouched planning costs. The plaintiffs' case is that the planning costs were duly vouched, and the defendants called upon to reimburse them but that the defendants have failed and refused to do so.

6. The statement of claim goes on to make the case that the defendants and their servants and agents, including but not limited to Mr. Gaisford-St. Lawrence, were aware that the plaintiffs were incurring costs and actively encouraged the plaintiffs to do so and to plead that by reason of the assurances given to the plaintiffs it would be unconscionable to permit the defendants to withdraw from and/or to refuse to complete the proposed transaction. Alternatively, the case is made that it would be unconscionable to permit the defendants to resile from the commitment said to have been given by them in the MOU to reimburse the plaintiffs in respect of vouched planning costs. In the further alternative the plaintiffs claim to have provided valuable services which were not intended to have been provided gratuitously and that the value of the lands has been increased and seek a remedy in *quantum meruit* and/or unjust enrichment.

7. On 4th February, 2019 a comprehensive defence was delivered. The MOU is admitted but the defendants object that none of the plaintiffs were party to it, and that the first plaintiff did not even exist until upwards of a year later. Moreover, and perhaps more immediately to the point, it is pleaded tHat the MOU provided – which it did – that it was subject to contract and non-binding and set a deadline of 31st May, 2016 for the execution of a full legal and binding agreement, and that no such agreement was reached or signed. The defence otherwise is largely a traverse, but it is pleaded that the development of a nursing home was contrary to the "*amenity*" zoning of the lands in the Fingal County Development Plan and that the plaintiffs were or ought to have been aware from February, 2017 that there was no prospect of planning permission for a nursing home.

8. In the plaintiffs' reply, delivered on 1st April, 2019, it is denied that planning permission for a nursing home was "*unobtainable*" and it is pleaded that there were meetings with Fingal County Council in April, 2016, February, 2017, and April, 2017 which were attended by representatives of both the plaintiffs and the defendants at which the planning officials are said to have been positive in relation to the proposal and to have provided guidance as to how the detail of the planning application might best be finalised, but that the progress of the planning application was "*rendered impossible and/or frustrated by the unilateral actions of the defendants … by unlawfully deciding not to proceed with and/or by withdrawing from the project".*

9. In the pleadings and the replies to particulars precise dates are sometimes rather thin on the ground but the vouching documentation provided in respect of the claim for the

architects' fees suggests that those fees were paid in various amounts on 28th October, 2016, 24th March, 2017, 14th September, 2017 and 28th February, 2018.

10. The core issue in the action as the pleadings stand appears to me to be whether by reference to the terms of the MOU and/or the alleged representations, assurances or conduct of the defendants (all of which, I emphasise, are fully denied) the plaintiffs are entitled to be recouped their expenditure, or to some other remedy.

11. By letter dated 2nd August, 2019 the plaintiffs' solicitors sought voluntary discovery of four categories of documents which were said to be relevant and necessary for the fair disposal of the action and for saving costs. The fourth category was "*all documents between the defendants, their servants and agents, and any third party, its servants or agents, regarding the sale of the lands and/or the hotel*". In support of the request for that category, the plaintiff's solicitors summarised the facts pleaded in the statement of claim and went on to suggest that:-

> *"On or about 5 October 2018, it was publicly announced that the investment group Tetrarch had agreed a deal in principle to acquire the Hotel and Lands from the defendant in a 'multi-million euro deal'. The Tetrarch chief executive, Michael McElligott, was quoted as saying that Tetrarch had been working with the second named defendant and his family 'on this very exciting opportunity for several years'".*

12. The documents were said by the plaintiffs to be relevant and necessary to the pleas in relation to assurances and unconscionability and would, it was said, go to show that the defendants never intended to honour the terms of the MOU but rather used the engagement with the plaintiffs' brand as leverage in a sales process with third parties. The defendants' solicitors replied on 22nd October, 2019 contesting the relevance of that category to the pleaded case and asserting that the request was a fishing expedition for commercially sensitive information.

13. The plaintiffs' solicitors' letter of 2nd August, 2019 requesting voluntary discovery called for a reply within seven days – which does not appear to me to have been terribly reasonable – and, as far as I can see, the plaintiffs' motion for discovery was issued before the request had been replied to. The defendants' solicitors replied when they were good and ready on 22nd October, 2019.

14. When, on 22nd October, 2019 the defendants' solicitors replied to the plaintiffs' solicitors' request for voluntary discovery, they made their own request for voluntary discovery by the plaintiffs of ten categories of documents. The defendants' solicitors also demanded a reply within seven days – which if not terribly reasonable was at least less unreasonable in term than the plaintiffs' solicitors' seven days had been in the first week of August – and issued their motion before the plaintiffs' solicitors had replied. The plaintiffs' solicitors replied, when they were good and ready, on 5th December, 2019. In the meantime, the defendants' solicitors had issued their motion for discovery, returnable for 25th November, 2019.

15. Somehow or other, although the exchange of affidavits had not been completed, and possibly even before the reply to the plaintiffs' request had been received, an application was made to the court on 5th December, 2019 to list the discovery motions for hearing together on 31st January, 2020. On 23rd December, 2019 the plaintiffs' solicitors sent to the defendants' solicitors a copy of the proposed amended statement of claim and asked for consent to the amendments. That consent was not forthcoming and the hearing date for the discovery motions was vacated to allow the amendment issue to be resolved. The motion now before the court was issued on 11th February, 2020 and was heard on 18th May, 2020.

16. In his affidavit grounding this application Mr. Smith synopsises the statement of claim and avers that on 30th May, 2019 he learned from a newspaper article that Tetrarch Capital had completed a multi-million euro purchase of Howth castle and demesne, including the Deer Park Hotel, from the Gaisford- St. Lawrence family. He then carried out some further research which brought him to a newspaper article published on 5th October, 2018 which reported an agreement in principle by Tetrarch Capital to buy the castle and demesne and a statement by the chief executive officer of Tetrarch that "*We have worked with Julian and his family on this very exciting opportunity for several years*". Mr. Smith deposes that he was unaware of any engagement between the second defendant and Tetrarch, was shocked to learn of it, and that had he known of it he would not have sanctioned the expenditure on the nursing home project.

17. Mr. Smith suggests that the proposed amendments are an elaboration of the plea that the plaintiffs relied to their detriment on the defendants' assurances and that it would be unconscionable to permit the defendants to withdraw from and/or to refuse to complete the proposed transactions. He suggests that the proposed amendments do not alter the substance of the claim but rather clarify and further particularise the claim and would enable the real questions in controversy between the parties to be determined.

18. The plaintiffs would now make the case – or would elaborate or expand upon their case – that during the time in which the defendants were engaging with the plaintiffs and/or First Care Group and/or Mr. Smith, and unknown to the plaintiffs and/or First Care Group and/or Mr. Smith, they were working with Tetrarch Capital with a view to selling the castle and demesne to Tetrarch Capital: which – they would say - is another reason why it would allegedly be unconscionable to permit the defendants to resile from the commitment said to have been given in the MOU.

19. An affidavit in answer to the application was sworn on behalf of the defendants by their solicitor, Ms. Ailbhe Rice. Ms. Rice suggests, firstly, that a party who wishes to amend his pleadings must establish that the amendments are necessary to allow the court to determine "*the real issues in dispute between the parties",* and, secondly, that an explanation must be provided for any delay in making the application. Thirdly, it is suggested that if the amendments were permitted, the defendants would be prejudiced.

20. Order 28, r. 1 of the Rules of the Superior Courts provides that:-

"The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and upon 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."

21. In *Persona Digital Telephony Limited v. Minister for Public Enterprise* [2019] IECA 360, the Court of Appeal cited with approval a decision of the High Court in *Rossmore Properties Limited v. Electricity Supply Board* [2014] IEHC 159 in which Birmingham J. (as he then was) approved a summary prepared by counsel of the principles that emerge from the myriad authorities on the subject of amendment, as follows:-

"1. The parties enjoy complete freedom of pleading. This is a reference to the fact that in the ordinary course of events a plaintiff is at large as to how he or she pleads his or her case. Absent pleas that are scandalous or vexatious or the like, the plaintiff cannot be dictated to as to how to formulate and present his or her claim.

2. Order 28 of the Rules of the Superior Courts which is the rule that deals with amendments is intended to be applied liberally.

3. Amendments shall be made for the purpose of determining the real questions in controversy between the parties.

4. Amendments should not be permitted when doing so could cause real or actual prejudice to other parties.

5. Amendments should be allowed if all that is present is litigation prejudice which is capable of being dealt with by orders for costs or other directions by way of case management.

6. There is no rule that per se precludes radical amendments.

7. There is no rule against introduction of a new cause of action if it falls within the ambit of the original grievance."

22. Ms. Rice, in her affidavit, and Mr. John L. O'Donnell S.C. in argument, sought to make the case that the amendments sought to be made are not necessary, but the focus of the submission is, variously, on the statement of claim as it stands and what it is suggested is the merit of the plaintiffs' claim. That, it seems to me, cannot be the correct approach to an application to amend. On a motion for discovery the relevance and necessity of the documents at issue will be determined by the issues disclosed by the pleadings. The premise of an application to amend, however, is that the pleadings as they stand do not – or perhaps do not with sufficient clarity – disclose the issues which the court ought to determine. The real questions in controversy between the parties – which the focus on an application to amend – cannot logically be the issues on the pleadings as they stand but must arise out of what Birmingham J. referred to as the original grievance.

23. The plaintiffs' grievance in this case is that they have not been reimbursed the monies laid out in connection with the proposed redevelopment of the hotel as a nursing home. While I understand the arguments offered on behalf of the defendants by reference to the terms of the MOU and the facts as they are asserted on behalf of the defendants to be, those arguments are directed to the merits of the claim which are a matter for the trial judge.

24. It is said on behalf of the defendants that the matters now sought to be pleaded were known to the plaintiffs before the request for voluntary discovery was made and before the plaintiffs' motion issued. That is so. It is said that no amendment was sought before the discovery application was made. That is so. It is said to be therefore manifest that the proposed amendments are not necessary to determine the real issues in dispute. I do not follow. The premise of the plaintiffs' request for voluntary discovery and motion for discovery was, to be sure, that the documents in relation to the sale to Tetrarch Capital were relevant to the issues on the case as it is presently pleaded but that is contested. I cannot see the link between the relevance of the documents created in the course of the sale to the case as it is presently pleaded, and the desire of the plaintiffs to rely on the fact of the negotiations and eventual sale in support of their claim for reimbursement or such other remedy as might be appropriate.

25. It is submitted that the proposed amendment to the statement of claim should be viewed in the context that it was only made in the course of the discovery process commenced upon by the plaintiffs when they were on notice of the facts they now seek to plead. That is so. This "*context*" in which the proposed amendments arose is said to be "*telling*". I do not follow. On the evidence before the court on this application, the plaintiffs first learned of the sale of the estate, and of the previous ongoing negotiations for the sale of the estate, after the pleadings were closed. The answer to a request for discovery of the documents in relation to the sale and negotiations for sale was that they were not relevant to the case pleaded. Without as far as I can see acknowledging that the documents were not relevant to the case pleaded, the plaintiffs proposed an amendment which, if permitted, might very well make them relevant, but the immediate object of the amendment is to allow the plaintiffs to rely on the additional facts which they would plead in support of their claim rather than to justify the request for discovery which has already been made. The only context that I can see is that the plaintiffs found out about the negotiations and sale after the pleadings had closed, and that the necessity for the amendment is the defendants' insistence that the sale of the estate has nothing to do with the case currently pleaded.

26. The defendants' case is that the nursing home project or proposal or discussions and the MOU were dead in the water in February, 2017 and that they were then and thereafter perfectly entitled to negotiate with and sell to whomever they wished. That may very well be so, but the premise of the plaintiffs' case is that it was not so. The objective fact is that the dates contemplated in the MOU for the doing of what was at that time contemplated would or might be done had long since passed before the estate was sold but the plaintiffs' case is that the work and expenditure continued, with the acquiescence

and encouragement of the defendants, until April, 2018. Whether the nursing home project was or was not dead in the water in February or perhaps April, 2017 will be a matter for the trial judge.

27. Mr. O'Donnell submits that the only purpose of the application is to embarrass the defendants and to gain access to confidential documents. He argues that the sole object of the amendment sought is to allow the plaintiffs to seek discovery directed to the introduction at trial of irrelevant evidence, and that it is an abuse of process. That is a serious allegation against responsible counsel and solicitors and I do not believe that it is justified.

28. In principle a plaintiff is entitled to formulate his case as he wishes. It is clear that if the plaintiffs had known in advance of delivery of the statement of claim that the defendants were at an advanced stage of negotiation for the sale of the estate or had reached an agreement in principle to sell it and had included the pleas which they now wish to add, the defendants could have had no legitimate grievance. In truth, it seems to me, the objection to the proposed amendments is founded on the proposition that the defendants did not in fact engage with Tetrarch Capital while there was any prospect of the nursing home proposal proceeding. The allegation that the defendants were covertly negotiating with other parties during the currency of the MOU is said to be "*vigorously*" rejected. I do not understand the defendants' rejection of the plaintiffs' case that they were otherwise encouraged to continue to do work and incur expenditure to be any less vigorous.

29. Mr. O'Donnell characterises the plaintiffs' claim as "*highly speculative".* It is well established that the court on an amendment application is not to attempt to make any assessment of the merits of the case. The issue is not whether the claim is speculative or highly speculative but whether the proposed amendments are frivolous or vexatious or scandalous. These are legal concepts.

30. It seems to me that the indignation with which the proposed amendment is rejected goes to show that it is not frivolous or vexatious. A plea is frivolous if, although the facts or allegations of fact on which it is based are true, it is nevertheless bound to fail. A plea is vexatious if it can be shown to have been made – or in the case of an application for leave to amend is shown to be proposed – for an improper purpose. The substance of the objection to the proposed amendment is not that it discloses no basis upon which the plaintiffs might be legitimately aggrieved, but that the facts which the plaintiffs would assert are not true. In my view, the defendants have not made out their case that it is obvious that the proposed amended claim cannot succeed. Accordingly, it is not frivolous.

31. Much of the objection to the proposed amendment is rooted in the controversy as to the relevance of the documentation in relation to the sale of the estate to the case as presently pleaded and the commercial sensitivity of the documents which might be made relevant if the proposed amendments are permitted. It seems to me that this is to put the cart before the horse. I am satisfied that the plaintiffs' purpose in seeking leave to

amend is to allow them to pursue their substantive claim. That is a proper purpose. Accordingly, the additional pleas are not vexatious. What, if any, discovery is relevant and necessary for the fair disposal of the action will depend to a greater or lesser extent on the defendants' defence to the additional pleas and it will in any event be a matter for the judge dealing with the discovery motions.

32. It is submitted that the defendants will inexorably suffer prejudice if the amendments are permitted. There is no suggestion that the defendants will not be in a position to deal with the substance of the allegation. Rather the argument is that the defendants will be required to reconsider the issues, including discovery, with attendant cost and delay. It seems to me that an amendment of pleadings will always require a reconsideration of the issues. That is the whole point of an amendment. It is said that the defendants will need to consider whether further particulars are required arising out of the proposed amendments, but it seems to me that there has been abundant time since the amendments were first proposed for any such consideration. It may very well be that new issues of discovery may arise if the amendments are permitted but the defendants will not be required to make discovery of any document or category of documents that is not relevant and necessary for the fair disposal of the action.

33. It is said that there has been delay in making the application to amend. The defendants point in particular to an alleged delay of five months between the first reference in correspondence to the sale of the estate and the furnishing of the draft amended statement of claim. I do not believe that this argument withstands scrutiny. The five month period of the alleged delay is the five months which elapsed between the request for voluntary discovery on 2nd August, 2019 and the furnishing of the proposed draft amended statement of claim on 23rd December, 2019. The objection that the negotiations for the sale and the sale of the entire estate was no part of the case pleaded was made by the defendants' solicitors' letter of 22nd October, 2019. That objection put the plaintiffs' solicitors in the position of having to decide whether it was or might be well founded and, if it was or might be, what amendment might be necessary to allow the plaintiffs to make the case they wished to make. Having formulated the proposed amendments and invited the defendants' solicitors to consent, it was necessary that the plaintiffs' solicitors should await the response, which came on 17th January, 2020, and the motion was issued on 11th February, 2020.

34. I am not satisfied that the defendants have established that there was any delay on the part of the plaintiffs. In any event, on the modern authorities, the significance to be attached to any omission in the original pleadings or any delay in the making of an application to amend depends to a very large extent upon whether the opposing party would thereby be prejudiced. I do not accept that the defendants have made out that the proposed amendment will give rise to what Clarke J. in *Woori Bank and Hanvit LSP Finance Limited v. KDB Ireland Limited* [2006] IEHC 156 referred to as logistical prejudice. The defendants are adamant that they can defeat the additional claim and so are plainly in a position to meet it. Neither the consequential amendment of the defence

nor any additional issues that may arise on the discovery motions will materially delay or otherwise interfere with the fair trial of the action.

35. The real question in controversy between the parties is whether the defendants ought to recoup to the plaintiffs, or the plaintiffs should have some other remedy in respect of, the work done and expenditure incurred by the plaintiffs in connection with the application for planning permission for the redevelopment of the old Deer Park Hotel as a nursing home. The case as presently pleaded is based on the MOU and alleged representations and assurances which allegedly continued until April, 2018. The plaintiffs wish to add to their case an allegation that the defendants - as the defendants' solicitor puts it - covertly negotiated for the sale of the property to someone else. That is a case that the plaintiffs could properly have made in the statement of claim and I am satisfied that it is a case that can properly be added by way of amendment to the statement of claim.

36. There will be an order in the terms of paragraph 1 of the notice of motion pursuant to O. 28, r. 1 of the Rules of the Superior Courts giving liberty to the plaintiffs to amend the statement of claim delivered on 12th October, 2018 in the terms of the draft amended statement of claim referred to in the affidavit of Mervyn Smith sworn on 11th February, 2020 and marked "*MS3*".

37. I invite the parties to discuss the question of consequential orders, including the costs of this motion.

38. Subject to anything counsel may say, it seems to me that all that is required is to limit a short time for the formal delivery of the amended statement of claim and amended defence, although it may be necessary to provide against the possibility that the plaintiffs may wish to amend the reply.

39. If agreement cannot be reached within fourteen days of the date of this judgment, the parties will have liberty to file written submissions within fourteen days thereafter.