

**THE HIGH COURT****[2004 No. 16720P]****BETWEEN****JIM FITZHARRIS****PLAINTIFF****AND**

**MICHAEL O'KEEFFE, JIMMY DUNNE, RICHIE McLoughlin, SIMON DEVEREUX, CHRISTOPHER A.G. GAVICAN, TURLOUGH COFFEY, MICHAEL CUNNINGHAM, EDDIE KELLY, SEAN DORRIS, MARGARET NEIL, GERARD BURNS, RAY DEVINE, PADDY MCCARTHY, MICHAEL GILMARTIN AND JIM O'CONNOR**

**DEFENDANTS****Judgment of Miss Justice Laffoy delivered on 21st day of November, 2012.****1. The application and its context**

On this application all of the defendants other than the third, sixth and thirteenth defendants (these defendants) seek an order granting liberty to serve and file an amended defence upon such terms as may be just and necessary for the purposes of determining the real questions in controversy between the parties. Although not specifically invoked, that application is obviously brought pursuant to Order 28, rule 1 of the Rules of the Superior Courts 1986 (the Rules) which provides that the Court may, at any stage of the proceedings, allow a party to amend his pleadings in such manner and on such terms as may be just. Rule 1 goes on to extend the Court's discretion to –

"... all amendments shall be made as may be necessary for the purposes of determining the real questions in controversy between the parties."

1.2 The chronology of the procedural steps in these proceedings is as follows:

21st July, 2004: Plenary summons issued.

30th November, 2004: Statement of claim issued.

5th April, 2005: Defence delivered.

7th November, 2005: Order of the Court (Clarke J.) made on the application of these defendants that a preliminary issue be tried as to whether there could be said to be any contract and/or any collateral contract between the plaintiff and these defendants/the National Association of Regional Game Councils as might arguably give rise to the various contentions as pleaded by the plaintiff.

18th December, 2008: Judgment delivered by the Court (Laffoy J.) on the preliminary issue – Neutral Citation [2008] IEHC 438.

10th February, 2010: Notice of trial was first served on these defendants' solicitors in relation to all of the thirteen defendants referred to herein as "these defendants".

1st March, 2011: Request by the solicitors for these defendants for consent to delivery of an amended defence.

1st March, 2011: Refusal of the plaintiff's solicitors to consent to delivery of an amended defence.

1st June, 2011: Notice of motion issued on this application returnable for 4th July, 2011.

1.3 It is convenient at this stage to reiterate the summary of the plaintiff's case, as pleaded, as set out in the judgment of 18th December, 2008. It was as follows:

"In the statement of claim delivered on 30th November, 2004 the plaintiff is described as a keen game hunter. The following matters are pleaded to illustrate the plaintiff's relationship to the defendants: –

(a) that the plaintiff has been a member of Ballitore Game Club (the Club) since 1971 and its secretary since 1974;

(b) that the club is affiliated to Kildare Regional and Game Wildlife Council (the Council) and the plaintiff was at all material times a serving officer of the Council since the early 1980s;

(c) that at all material times the plaintiff was a member of the National Association of Regional Game Councils of Ireland (the National Association);

(d) that the National Association operates a self insurance scheme entitled "The National Association of Regional Game Councils Game Hunting Compensation Fund" (the Compensation Fund); and

(e) that the defendants are members of the National Executive of the National Association and that they are being sued in these proceedings in their representative capacity.

In the pleas in the statement of claim which are at the core of the preliminary issue it is contended as follows:-

(i) By contract or collateral contract effective from 1st August, 2003 (and similarly for previous years) made between the plaintiff and the National Association, the plaintiff and the National Association agreed to be bound by the Constitution and Rules of the National Association as adopted on 11th February, 1995, as amended;

(ii) The plaintiff's application for renewal together with the Constitution and Rules of the National Association and the correspondence that had been exchanged between the parties represented the terms of a contract and/or collateral contract between the plaintiff and the National Association;

(iii) Pursuant to the terms of the contract the National Executive of the National Association was under a duty to consider the plaintiff's application for membership in accordance with the Constitution and Rules, in particular, Rule 19, and in accordance with the requirements of natural and constitutional justice, and properly, fairly and reasonably;

(iv) In preventing the renewal of the plaintiff's membership, these defendants acted ultra vires their powers and in breach of the plaintiff's contractual rights; and

(v) The National Association is under a duty to admit the plaintiff to membership when he complies with its rules in all material respects.

The kernel of the plaintiff's complaint against the National Association as pleaded, which is not factually disputed, is that on the 8th September, 2003, a motion was passed by the National Executive of the National Association that the membership of the plaintiff be declined at the next renewal unless certain conditions were met. On 20th May, 2004, the plaintiff duly completed a proposal for renewal of his membership number 6210 of the Compensation Fund, which was declined, thus excluding him from membership of the Compensation Fund and effectively from membership of the National Association or its constituent parts and the benefits therefrom."

That summary highlights the aspects of the plaintiff's claim as pleaded which are pertinent to the issue now before the Court, although the reliefs claimed are also pertinent and will be outlined later.

1.4 In the judgment of 18th December, 2008 the Court answered the question posed for preliminary determination as follows:

"Having regard to the Constitution and Rules of the National Association, there can be said to be a contract between the plaintiff and the National Association such as might arguably give rise to the various contentions as pleaded by the plaintiff."

It is reasonable to infer that the application to amend the defence, which was initiated two and a half years later, was prompted, at least to some extent, by that judgment, as I propose to illustrate.

1.5 In the course of the judgment, I outlined the documentation which had been put in evidence by agreement. I also outlined two further documents which had been put before the Court to which I had no regard, namely, the National Association Constitution and Rules 2005/2007 and the Compensation Fund Contract and Personal Accident Summary 2002/2007. I did so on the basis that the question posed for determination of the Court related to the Constitution and Rules of the National Association in force when these proceedings were instituted in July 2004. The documents which I did not have regard to post-dated the initiation of the proceedings. I held that those documents were not relevant to the issue to be determined, notwithstanding that it was suggested by counsel for the plaintiff that they contained amendments which were introduced to score a personal attack on the plaintiff. I also indicated that, for the same reason, namely, irrelevancy, I had no regard to matters put before the Court by counsel for these defendants as to how the relationship between the National Association, the Council and the Club had changed since the proceedings were instituted. I then stated:

"The contention that the plaintiff's application for renewal of his membership of the Compensation Fund and the National Association has become moot is not before the court on the preliminary issue. Indeed, mootness is not pleaded in these defendants' defence."

## **2. Proposed amendments in the context of the existing pleadings**

2.1 The amendments which these defendants propose in their defence involve the addition of eleven paragraphs at its commencement, in the first of which it is pleaded that the matters of which the plaintiff complains are moot as against these defendants "and by reason thereof these proceedings are frivolous and not properly constituted by reason of the matters set forth hereunder".

2.2 As I understand them, the proposed amendments center on the happening of one event, namely, that the Council ceased to be a member of, and became disaffiliated from, the National Association on 2nd July, 2005. As a result of the happening of that event, it is contended that the plaintiff "has no nexus with the National Association", as a consequence of which it is alleged that the plaintiff's claim is moot and/or "incapable of being answered" against these defendants by an order of the Court. It is further claimed that the plaintiff has no *locus standi* to seek the reliefs claimed against these defendants. Further, it is alleged that that event deprived the plaintiff of "the basic requirements" under the Constitution of the National Association (that is to say, of being a member of a gun club which, in turn, is affiliated to a regional council, which, in turn, is a member of the National Association), so that the nexus between the plaintiff and the National Association and these defendants has been determined. The proposed amendments indicate that these defendants would propose to rely on the doctrine of estoppel and also on the doctrine of *novus actus interveniens*. It is alleged that these defendants are not the parties responsible for the perpetration of the alleged wrongs of which the plaintiff complains, which, in any event, is already reflected in the defence in which every allegation made by the plaintiff is traversed. On the foregoing basis it is submitted that no cause of action rests against these defendants "where the plaintiff has insufficient interest".

2.3 It is necessary to consider the proposed amendments in the context of the essential terms of the statement of claim, which have been outlined above, and, in particular, in the context of the reliefs sought by the plaintiff. The reliefs in question are:

(a) injunctive relief variously formulated, the primary relief sought being an injunction restraining these defendants and the National Association from blocking the plaintiff's application for Compensation Fund Cover for the purposes of game shooting in Ireland or from taking any steps towards denying the plaintiff an opportunity of applying for same, ancillary orders being also sought to protect the plaintiff's continued membership of both the Club and of the National Association;

(b) declaratory relief in various forms, including –

- (i) declarations as to the plaintiff's continued membership of the Club and the National Association,
- (ii) a declaration that the plaintiff is entitled to renewal of his Compensation Fund Cover, and
- (iii) a specific declaration that the motion passed by these defendants on 8th September, 2003 providing that the membership of the plaintiff be declined at the next renewal date was *ultra vires* and contrary to the rules of natural and constitutional justice;

(c) damages for breach of contract and damages for breach of constitutional rights.

### 3. The plaintiff's response to the application

3.1 In the letter dated 1st March, 2001, the solicitors for the plaintiff, in refusing to consent to the proposed amendments, intimated that an application to Court for the amendment would be resisted and it was stated:

"Your clients have set out to delay and frustrate our client in his endeavour to have the issue raised before and determined by the Court and any further effort by your clients to delay and frustrate our client in his right to fair and due process and procedures will be resisted. As far as we can see the main thrust of the proposed amendment is the issue raised by your client by way of preliminary issue and which has been adjudicated upon by the Court and in favour of our client."

3.2 No affidavit in response to the application was filed on behalf of the plaintiff. No criticism of the solicitors for the plaintiff is intended in that observation, because the affidavit filed on behalf of these defendants did not raise any issue of fact which required to be addressed.

3.3 At the hearing of the application counsel for the plaintiff relied primarily on the delay in bringing the proceedings to a conclusion and contended that further delay would prejudice the plaintiff. Counsel for the plaintiff relied on two authorities: an ex tempore ruling of the Supreme Court in *McFadden v. Dundalk & Dowdallshill Coursing Club Ltd. & Ors.* delivered on 22nd April, 1994; and the decision of the Supreme Court in *Allen v. Irish Holemasters Ltd.* [2007] IESC 33.

3.4 In *McFadden v. Dundalk & Dowdallshill Coursing Club Ltd. & Ors.*, the defendants were appealing an order of the High Court refusing leave to amend their defence to the plaintiff's personal injuries action, which application was initiated after the case had not been reached in the personal injuries list in Dundalk and within days of the commencement of the sessions in Dundalk at which the case, as it was put in the judgment of the Supreme Court, had "a secure chance of getting a hearing". The defendants wished to amend the defence to raise by way of preliminary point that the plaintiff was a member of the first named defendant when the accident which gave rise to his action occurred, which the Supreme Court described as "a purely technical point", although it might be "a good legal point". The Supreme Court dismissed the appeal. In delivering judgment, Finlay C.J. stated:

"The learned trial Judge of the High Court decided that it was too late. This Court is of the same view. No explanation was given on any affidavit as to why the matter was not adverted to or why it was not in the original defence or why there was not any application made before the time when it was. An affidavit designed to lead to the application simply states that the defendants have informed the solicitor concerned who is acting for them that at all material times the plaintiff was a member of the Club. No suggestion was made in that affidavit as to when or by what method with or without what difficulty did they discover that fact . . . In those circumstances it would be quite unjust in the view of the Court to permit this defence to be amended and face the plaintiff with a very long delay if he were to be successful in a case in which it is already something like seven years since the time of the accident."

3.5 In the passage from the judgment in *Allen v. Irish Holemasters Ltd.* relied on by counsel for the plaintiff, Finnegan J. was addressing a submission made on behalf of the defendant, which was resisting an application by the plaintiff for leave to amend his statement of claim. Finnegan J. commenced by stating that the defendant had contended that no good reason had been advanced as to why the pleas sought to be made were not made in the first instance. He then commented that there is an obligation on the parties seeking to amend pleadings to give good reason for having to do so, citing *Shepperton Investment Company Limited v. Concast (1975) Ltd.* (Unreported, High Court, Barron J., 21st December, 1992) and the decision in the *McFadden* case relied on by the plaintiff on this application.

3.6 In the *Allen* case, Finnegan J. also cited the decision of the High Court (Flood J.) in *Palamos Properties Ltd. v. Brooks* [1996] 3 I.R. 597 and he quoted the following passage (at p. 506), in which Flood J. stated:

"That within the facts underlying the claim before the court there must be such evidence from which an inference can reasonably be drawn as to why the plea which is sought to be introduced by way of amendment was not put in the original defence or express evidence given to explain the failure in a manner which renders the omission broadly excusable if not actually justifiable."

Referring to the decision of the Supreme Court delivered by Geoghegan J. in *Croke v. Waterford Crystal Ltd.* [2005] 2 I.R. 383, Finnegan J. went on to state:

"Geoghegan J. expressed doubt that the cases relied upon by Flood J. support such a broad proposition but rather that those cases turned on their own peculiar facts. If delay is not justifiable or excusable then that is a factor to be taken into consideration as part of the matters to be weighed in deciding whether or not the court will allow amendment."

Finnegan J. recorded that in the case before him the plaintiff on affidavit had justified and excused the delay.

3.7 In Delany and McGrath on *Civil Procedure in the Superior Courts* (2nd Ed.), which was the edition available when this application was heard, the following comment on the authorities referred to above appeared (at para. 5 – 144):

"However, these authorities must be viewed with a degree of circumspection having regard to the decision of the Supreme Court in *Croke v. Waterford Crystal Ltd.* [2005] 2 I.R. 383. Geoghegan J. confined these cases to their own facts and stated that in a number of High Court decisions cited to the Court there had been 'an overemphasis on the obligation to give good reason for having to amend the pleadings'."

Delany and McGrath (*op. cit.*) also pointed out (at para. 5 – 146) that Geoghegan J. in *Croke v. Waterford Crystal Ltd.* also commented that in the appeal before the Supreme Court the trial Judge did not adequately address the question of whether the amendments were necessary for the purpose of determining the real questions of controversy in the litigation, because he had concentrated unduly on the procedural misconduct of the appellant.

## Conclusions

4.1 Unlike the position which prevailed in *Allen v. Irish Holmasters Ltd.*, in this case, no excuse or justification whatsoever has been advanced for the delay on the part of these defendants in seeking the amendment. While it is true that the event which is at the core of the proposed amendments occurred after the defence was delivered, almost six years had elapsed from that event when this application was initiated. Moreover, even if it were true, as counsel for these defendants submitted, that the new defence arose out of the ruling on the preliminary issue and originally was not clear, which is a proposition which I do not accept, it is difficult to understand why it took two and a half years from the date of that ruling to apply to amend the defence. The response of these defendants that there is no prejudice to the plaintiff is not a satisfactory answer.

4.2 Notwithstanding the utter inadequacy of these defendants' attempt to explain, and to seek to excuse or justify, the delay in seeking to have the defence amended, I consider that it is appropriate to address the principal criterion for determining whether the amendment of a pleading should be allowed. Geoghegan J., having quoted Order 28, rule 1 of the Rules, identified that criterion in *Croke v. Waterford Crystal Ltd.* as follows (at p.393):

"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."

As Delany and McGrath (*op. cit.*) pointed out (at para 5 – 124), later in his judgment, in the context of an application by a plaintiff to amend his statement of claim, Geoghegan J. elaborated on the correct approach to be adopted, stating (at p. 399):

"It does seem to me that there was a certain element of disingenuousness on the part of the plaintiff. There is a danger, however, that in overly concentrating on these discrepancies in the procedural behaviour of the plaintiff the real purpose of the rule may become forgotten. While I quite agree that other factors have to be taken into account in the exercise of the discretion, the primary purpose of the rule is to give the court wide powers of amendment so that the real issues between the parties can be determined. This is always subject to questions of real prejudice to the defendant but some aspects of prejudice can be dealt with by appropriate costs orders or conditions."

4.3 Applying the foregoing to this application, the issues which it is necessary to address are:

(a) whether the proposed amendments are necessary for the purpose of clarifying the real questions of controversy in these proceedings; and

(b) if the answer is in the affirmative, whether to allow the amendments would give rise to real prejudice to the plaintiff which cannot be ameliorated by an appropriate order for costs or other conditions.

4.4 On the first issue, the alleged wrongs which form the basis of the plaintiff's claim, as one would expect, occurred before the proceedings were instituted. The alleged wrong at the core of the plaintiff's case is the decision made by the National Association on 8th September, 2003 that the membership of the plaintiff be declined at the next renewal, unless certain conditions were met. Despite the fact that the plaintiff sought renewal on 20th May, 2004, his proposal was declined and he was prospectively excluded from membership of the National Association and he was also excluded from membership of the Compensation Fund when his existing membership expired on 1st August, 2004. On the basis of the plaintiff's case the liability of the National Association, and of these defendants as its representatives, falls to be determined on the basis of those facts. The event on which these defendants would propose to rely to argue that the plaintiff has no cause of action against them happened –

(a) almost two years after the decision of 8th September, 2003 was made,

(b) approximately a year after these proceedings were instituted, and

(c) approximately three months after these defendants delivered their defence.

4.5 I find it impossible to discern any basis on which these defendants could rely on an event which occurred almost two years after the alleged core wrong as being an answer to the plaintiff's claim on liability, if the plaintiff were to establish wrongdoing on the part of these defendants. The proposition advanced on behalf of these defendants seems to me to be akin to a situation in which an employer defendant attempts to avoid liability for an accident at work, which resulted in injury to the plaintiff employee who alleges negligence on the part of the employer, on the basis that the employee retired from his employment two years after the accident. Such defence would be unstateable.

4.6 However, it is conceivable that in this case the subsequent event could impact on the type of relief to which the plaintiff would be entitled to redress these defendants' wrongdoing, if he were to establish liability, particularly, as elements of the relief sought by the plaintiff are equitable relief. However, that would be a matter for legal submission at the hearing of the action. In any event, it is noteworthy that the amendments which these defendants seek leave to make relate exclusively to the issue of liability, not to the form of relief to which the plaintiff may be entitled, if he establishes wrongdoing. Therefore, I must surmise that they continue to rely on the plea in their defence that the plaintiff is not entitled to the relief claimed or any relief against them.

4.7 Accordingly, in my view, the proposed amendments are not necessary for the purpose of clarifying the real questions of controversy in the proceedings. On the contrary, they are irrelevant to the issue of liability and, in my view, would be confusing and obfuscating.

4.8 While, having regard to that conclusion, the second issue strictly speaking does not arise, it has to be observed that the position adopted by the plaintiff in his solicitors' letter of 1st March, 2001, which I have quoted above, is well-founded. The basis of my decision, however, is as set out in para. 4.7 above.

## 5. Order

5.1 There will be an order dismissing the application.

