Neutral Citation [2016] IEHC 454

THE HIGH COURT

[2012 No. 5362P]

BETWEEN

VIRGINIA O'GORMAN

PLAINTIFF

AND

DAMIEN HALLY

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 29th July, 2016.

Part 1

Facts

1. By way of personal injuries summons issued in May, 2012, Ms O'Gorman alleges that, in June, 2010, she was a front-seat passenger in a motor vehicle that was being driven by Mr Hally, and which he caused to go out of control and roll over. As a result of this incident (the 'Accident'), Ms O'Gorman claims that she has suffered severe personal injuries, loss, damage, inconvenience and expense; she has therefore commenced the within proceedings.

2. In June, 2013, a defence was delivered in which Mr Hally admitted liability and put Ms O'Gorman on proof of her injuries, damage, loss and expense. Thereafter, ongoing investigations by Mr Hally's motor insurer (AXA Insurance Limited) and the discovery process that occurred within the context of these proceedings cast, in a rather different light, the version of relevant events which had been understood to pertain. For starters, although Mr Hally had initially advised AXA that prior to the Accident, he had not consumed any alcohol on the evening in question, he later advised AXA that he did in fact consume alcohol on the evening in question and that he and Ms O'Gorman had been arguing in the car when the Accident occurred. Mr Hally's version of events was not the only version that took an unexpected turn. In replies to particulars furnished in November, 2012, in the course of these proceedings, it is stated that "*The Plaintiff* [*i.e.* Ms O'Gorman] *was wearing a seatbelt*". However, in medical notes of which discovery was made in May, 2014, it emerged that Ms O'Gorman appears to have told the hospital doctor who first treated her after the Accident occurred, that on the evening of the Accident, she (Ms O'Gorman) was out celebrating her birthday, that she left the venue of the celebration with her brother (Mr Hally) in her husband's car, and, critically, that she did not think she had her seat-belt on while the car was driven.

3. In light of the changed understanding of facts which it now understands to pertain, AXA – which in truth is managing the defence to these proceedings – now wishes to amend the defence to plead, *inter alia*, that Ms O'Gorman was guilty of negligence/contributory negligence in the circumstances presenting. Ms O'Gorman objects to the court allowing the amendment to the defence on the basis of the delay that occurred between (a) AXA's discovery, in May, 2014, as to what she had told the hospital doctor on the evening of the Accident, and (b) AXA's solicitors first contacting her solicitors, in January, 2016, with a view to her solicitors consenting to the delivery of an amended defence. So far as this delay is concerned, AXA has indicated that it is due to (i) its having to comply with its obligation under s.19 of the Criminal Justice Act 2011, to report what it suspected to be fraud to An Garda Síochána, and the consequent need to stay its hand until the Gardaí had progressed matters, (ii) the review of matters that followed on the discovery of Ms O'Gorman's medical records in May, 2014, and (iii) Mr Hally's changed version of events.

Part 2

Law

4. Order 28, rule 1 of the Rules of the Superior Courts 1986, as amended, provides as follows:

> "The court may, ***at any stage of the proceedings***, allow either party to alter or amend his indorsement or pleadings in such a 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.***" [Emphasis added].

5. In truth, a plain reading of the O.28, r.1 all but suffices to indicate what order the court should make in the within application, given the background facts outlined above. However, it is useful to consider some applicable case-law. The court has been referred to two key cases in this regard: *Croke v. Waterford Crystal Ltd* [2005] 2 I.R. 383; and *Woori Bank v. KDB Ireland Ltd.* [2006] I.E.H.C. 156.

6. In *Croke*, a case in which the plaintiff sought, *inter alia*, leave to amend a statement of claim so as to plead fraud and deceit, Geoghegan J., giving judgment for the Supreme Court identified, at 393-94, the test in relation to an amendment of pleadings pursuant to O.28, r.1, stating as follows:

> *"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.…The priority which must be given to that issue was clearly restated by the Supreme Court in* O'Leary v. Minister for Transport *[2001] 1 I.L.R.M. 132….The following passage at p.143 of the report clearly indicates the approach of McGuinness J. and of the court:-*
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> *'I accept that there has been an undesirable delay in the prosecution of these proceedings. As Mr Gallagher submitted, the action was instituted very late in the day, and having been instituted late, has been progressed by the applicant at*

an extremely relaxed pace. Indeed the amount of delay, and the repeated delay is the strongest argument against permitting the inclusion of a new and distinct claim of conspiracy. However this is an application under O.28, r.1, and the delays in the instant case are not outside the well established parameters of that rule. The operation of the rule was considered by Kinlen J. in Bell v. Pederson *[1995] 3 I.R. 511. In that case an application to amend the pleadings in a substantial and important way was made on the morning of the trial. Kinlen J. allowed the defendants to amend their defence in the manner sought. In his judgment he approved the principles laid down by Keane J. in* Krops v. The Irish Forestry Board Ltd. *[1995] 2 I.R. 113 and referred also to the dicta of Lynch J. in* Director of Public Prosecutions v. Corbett *[1992] I.L.R.M. 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 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.'*

Kinlen J. adopted this reasoning as part of the ratio of his judgment. It appears to me also to be an application of principle which is in accordance with justice.'

Even if I was not bound to do so, I would have no hesitation in following that judgment. I entirely agree with the approach to the interpretation of the rule which it represents."

7. Perhaps the key element of this not un-lengthy but nonetheless helpful extract from Geoghegan J.'s judgment in *Croke*, is his affirmation of Lynch J.'s observations in *Corbett.* Lynch J.'s observations comprise five elements:

(1) justice cannot be defeated by mere technicalities regarding pleadings when no material prejudice arises to the other side from those technicalities;

(2) the discretion of the courts in this regard must be exercised judicially;

(3) where an amendment can be made without prejudice to the other party, thus enabling the real issues to be tried, the amendment should be made;

(4) if there might be prejudice which can be overcome by an adjournment, then the amendment should be made and the adjournment granted;

(5) if the amendment might put the other party to expense, this can be regulated via an order as to costs or a condition as to indemnification.

8. In *Woori*, which concerned a belated application to amend a defence, Clarke J. considered further the issue of prejudice, observing as follows, at paras. 3.2–4.2:

"3.2 A party has a very wide discretion as to the manner in which it may plead its case or its response. Insofar as there are limitations, same stem from the rules of court which permit aspects of pleadings to be struck out in the unusual and limited circumstances where the pleadings may be found to be inappropriate….Subject to those limitations a party is at large as to how it pleads. 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….

4.1 Firstly a party resisting the amendment may be able to satisfy the court that, by virtue of the absence of the amended plea…steps have been taken which now make it impossible or significantly more difficult to deal with the case should the amendment be allowed….

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."

9. Perhaps three key points arise from the foregoing:

(1) Whether or not to allow an amendment falls to be considered in the context that a party starts out at large as to how it pleads (and so generally has no-one but itself to blame as to how it pleads).

(2) The prejudice that an opponent needs to establish is a prejudice which flows from the fact that the proceedings progressed on one basis and are now sought to be altered, *i.e.* it must flow from the fact that the alteration is belated, not from the alteration *per se*.

(3) In principle there are perhaps two types of prejudice: (a) 'we are where we are' prejudice, *i.e.* matters have proceeded to a point where it would be (i) impossible or (ii) significantly more difficult to deal with the case, were the amendment allowed; (b) logistical prejudice, *i.e.* late amendment will significantly disrupt the proceedings. [In truth, (b) seems to be but a reformulation or species of (a)(ii)].

Part 3

Application of Principle

10. The defence in this case was delivered by reference to a certain understanding of the facts presenting, which understanding rested in part on Ms O'Gorman's replies to particulars. In light of the question-mark that now arises as to the true facts, following the process of discovery, it is obvious that the court ought now to permit the defence to be amended if, to borrow from the wording of O.28, r.1, "*the real questions in controversy between the parties*" are to be determined in these proceedings. In this regard, the court is mindful that the position, not least following *Croke*, is that where an amendment can be made without prejudice to the other party, thus enabling the real issues to be tried, the amendment should be made. And the court does not see that any prejudice presents for Ms O'Gorman if an amended defence is now served. Certainly, neither of the types of prejudice identified by Clarke J. in *Woori* arises; nor does any other form of prejudice appear to present. In truth, Ms O'Gorman cannot be prejudiced by the seat-belt matter now being put in issue, unless it is contended that, notwithstanding that whether or not she was wearing the seat-belt clearly presents as an issue, the proceedings ought to proceed as though she were not; if this is contended, then it is a contention that the court does not accept. Such delay as has occurred in seeking leave to amend the defence has been fully and adequately explained, and no true prejudice that might arise from the belated amendment of the defence has been identified. In truth, it seems to the court that the most severe prejudice to Mr Hally would arise were the defence not now amended as there is a real concern that the issues that fall to be resolved between the parties in these proceedings could be decided on a mistaken understanding of the relevant facts.

Part 4

Conclusion

11. Having regard to all of the foregoing, the court will grant Mr Hally the leave that he now seeks to serve an amended defence.