THE HIGH COURT

[2009 No. 4425 P.]

BETWEEN

RICHARD KNOWLES

PLAINTIFF

AND
THE ELECTRICITY SUPPLY BOARD

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 21st day of December, 2018

Background Facts

1. The events giving rise to these proceedings occurred as far back as fourteen years ago. The proceedings were issued on the 18th May, 2009 followed almost immediately by a statement of claim delivered on the 22nd May, 2009. In that document, the plaintiff pleads that by letter dated the 25th May, 2004, he was invited to submit to the defendant a tender for the erection of steel and wooden poles and associated works. These works were to take place within a defined geographic area broadly speaking in North Dublin and Dundalk.

2. The plaintiff submitted a tender on the 14th June, 2004 and was subsequently awarded a contract in or about November, 2004 for the erection of low voltage (LV) wooden poles. During the course of negotiations for the award of the contract, the plaintiff pleads that it was represented to him by the defendant that if he acquired certain equipment, he would be awarded the contract and would be kept working at 80% of his operational capacity thus justifying the investment in the new equipment.

3. The plaintiff pleads that he expected to receive work to the value of €782,000 but contrary to the representations made, he did not receive such a volume of work nor was he kept engaged at 80% of his capacity as promised. In consequence of this, he suffered loss which he quantified initially as being in excess of €500,000. The losses claimed for by the plaintiff appear to extend up to about September 2006 so that it was the best part of three years thereafter before proceedings were instituted.

4. The case thereafter pursued a fairly languid course. A defence and counterclaim were delivered on the 15th March, 2010 and the pleadings closed in May, 2012. Thereafter, little or nothing appears to have happened for three years when a request for discovery was made on the 6th March, 2015. Discovery was not agreed and a motion issued in October, 2015 resulting in an affidavit of discovery from the defendant sworn on the 5th February, 2016. Thereafter a Notice of Intention to Proceed was served in June 2016 followed by a notice of trial in the same month.

5. Another application for discovery was brought in February 2017 which ultimately had to be dealt with by the court resulting in an order of the 27th February, 2017 directing the defendant to make discovery within ten weeks of any contracts and documentation showing payments made by the defendant for wood poling work in the Dublin North and Dundalk regions between 2004 and 2006. The defendant failed to comply with the order and accordingly a further motion to compel compliance was brought on the 17th July, 2017. Shortly thereafter on the 20th July, 2017, the defendants swore an affidavit exhibiting the documents in redacted form and ultimately the court directed on the 13th November, 2017 that the documents in unredacted format should be furnished within four weeks. Those documents were furnished possibly in December 2017 but certainly no later than January 2018.

6. Thereafter, the case was transferred into the case management list of this court with the first case management conference taking place on the 18th February, 2018. From the outset, counsel for the plaintiff made clear that the plaintiff was extremely anxious for an early trial date if at all possible before the long vacation in 2018. For various reasons, that did not prove possible but ultimately on the 11th July, 2018, I fixed a provisional trial date of the 15th January, 2019. The case has to date appeared on at least ten occasions in the case management list. In May of 2018, I recommended that the parties should consider mediation. Various other issues about expert reports and so forth arose but in the interim, the parties agreed to go to mediation and the mediation took place in October this year. It was not successful.

7. At a further case management conference on the 7th November, by which stage there had been some six previous conferences, the plaintiff's counsel indicated for the first time that the plaintiff now proposed to seek to amend his statement of claim. I gave liberty to the plaintiff to issue a motion in that regard in the event that the amendment was not agreed and it is with that motion that I now propose to deal.

8. The amendments proposed on their face appear to be very extensive but in substance, are less so. The plaintiff now for the first time pleads that the contract awarded to him was subject to EU public procurement regulations as transposed into Irish law. The essential new issue arising in this regard is that the plaintiff now claims that the defendants breached the procurement regulations by unlawfully awarding work covered by the plaintiff's contract to parties who had not tendered for same. It is clear that this is an entirely new plea. Nowhere in the plaintiff's original statement of claim or particulars is a complaint made that contract work to which the plaintiff was entitled was given to third parties.

9. Indeed the plaintiff's original statement of claim pleads that the original tender process was abandoned but he now appears to suggest that he was in fact the successful tenderer for the contract.

10. The within application is grounded upon the affidavit of Sarah J. McGuinness who is the plaintiff's solicitor. In the course of argument during the hearing of this application, counsel for the plaintiff suggested that the necessity to recast the statement of claim arose from the fact that it was not until the plaintiff received the defendant's unredacted discovery documents in December 2017/Jan 2018 that it became evident that work which ought to have gone to the plaintiff had been unlawfully awarded to non-tendering parties. This however is somewhat at variance with the affidavit sworn by Ms. McGuinness where she avers at para. 8:

> "It is acknowledged that this application is being made at an advanced stage of the proceedings herein. The explanation for this is that, in the process of preparing for a mediation and with the prospect of a trial in the near future, the claim was reassessed and the plaintiff's instructions were revisited in the light of the significant amount of documentation discovered by the defendant over the course of number consultations (*sic*) with senior and junior counsel. In this context, the public procurement law issues came to the fore and the plaintiff elaborated upon, clarified and corrected the factual background to the claim."

11. It seems to me that this in reality amounts to little more than an assertion that it was only in the course of preparing for the trial

after an unsuccessful mediation that it became evident to the plaintiff's legal team that the public procurement issue had not previously been considered.

12. In response to Ms. McGuinness's affidavit, a detailed replying affidavit was sworn by Suzann Dundon of the defendant's legal department. In this affidavit, she sets out her objections on behalf of the defendant to the proposed amendments and refers to the various new pleas by the plaintiff that under the relevant EU legislation, the defendant was not entitled to assign work to other parties who were not successful in the tender under which the plaintiff was awarded a contract. Ms. Dundon goes on to aver that in order to meet this claim, the defendant would have to establish the framework under which those other parties were awarded contracts in order to demonstrate that the works which they undertook were works for which they had tendered.

13. It will now accordingly be necessary to examine in greater detail the works carried out by the plaintiff and each of the other parties to whom work was awarded in order to establish whether such work was covered by lawful tenders or not. She says that the nature and scope of the evidence that will now be required to meet a new cause of action would be much more extensive and different from that relevant to the original action.

14. Ms. Dundon goes on to deal with the issue of prejudice in her affidavit which she says falls under five different headings. She says that oral evidence will now be required of the witnesses involved in the tendering processes for all the parties concerned, and not just the plaintiff, as would evidence from the defendant's supervisors of the works assigned to the plaintiff and the other relevant contractors. Although these witnesses are all still alive and available, albeit some retired, she says that they have never before been asked for their recollections of events in 2004 that concerned contractors other than the plaintiff. This applies to two witnesses in the defendant's purchasing department and four supervisors of the contract works in issue. This is the first ground of prejudice relied upon.

15. Secondly, Ms. Dundon avers that the defendant retains documents for a period of seven years and the procurement files for the frameworks other than that involving the plaintiff have long since been destroyed. The framework file relevant to the plaintiff's contract was retained but any others that might now become relevant under the new plea have been destroyed. She says therefore that it would be impossible for the defendant to establish the scope of the works involved in the other frameworks.

16. Thirdly she points to the fact that the defendant has retained a forensic accountant, Mr. Liam Grant of Grant Sugrue Accountants to prepare a report on the claim as it stands but that will have to be entirely revisited in the light of what is now alleged.

17. Fourthly, she says that logistical prejudice arises to the defendant by virtue of the fact that inevitably now, if the plaintiff's application is acceded to, the case will not be in a position to proceed on the 15th of January next and it will obviously be some considerable time before it can be given a new trial date. All the matters which have to date been the subject of extensive case management orders and directions will also have to be revisited on the basis of the new case as pleaded. Much of the time, effort and cost involved to date in these matters will thus have been wasted.

18. Fifthly and finally, Ms. Dundon refers to the fact that the defendant will, if the amendments are allowed, be deprived of the benefit of pleading the Statute of Limitations by way of defence to the new claim. The plaintiff has elected not to reply to the affidavit of Ms. Dundon.

Legal Principles
19. The legal principles to be applied in applications for the amendment of pleadings are well settled and well known. The starting point is obviously the Rules of the Superior Courts themselves and in particular O.28 r.1 which provides:

> "1. 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."

20. As has often been pointed out, the starting point must be that amendments will in general be allowed in the absence of irremediable prejudice so that the court can do justice between the parties in respect of the real questions in controversy. The fact that the application is made late in the day is of course a factor to be considered but by no means conclusive and it is no function of the court to punish a party for a failure to plead its case in a timely manner.

Discussion
21. By any standards, the delay that has occurred in this case is unacceptable.

22. The issue of prejudice to the other party arising by virtue of the amendments must be a central consideration for the court as recent decisions such as *Quinn v. IBRC* [2016] IECA 21 demonstrate.

23. The jurisprudence on delay establishes that where delays of the magnitude that have occurred here arise, there is presumptive prejudice where witnesses are being asked to recall for the first time events of such antiquity. Indeed, there are many cases where delays of far less than have occurred here were concerned where such prejudice was held to implicitly arise. I have no doubt that I am entitled to assume such prejudice to arise in the circumstances of the present case despite the fact that the witnesses are still alive.

24. More particularly however, the fact that all files relating to the frameworks which concerned the other contractors in respect of whom the plaintiff makes complaint have been destroyed works an additional and irremediable actual prejudice to the defendant. It seems to me that the evidential deficit thus arising would put the defendant into the positon that it could not in conscience be expected to defend such a claim at this remove in time.

25. Although that fact alone would in my view be sufficient to dispose of this application, there are additional features emerging from the proposed amendment that would, in my view, render further prejudice to the defendant. The claim now being pleaded by the plaintiff is a new cause of action that rests on new facts. The new cause of action is breach of the public procurement regulations and the new facts are that the plaintiff's work was unlawfully awarded to other contractors. Such a claim were it now to be raised would of course be long since statute barred. If the amendment is allowed, the defendant will be deprived of its right to rely upon the statute. That, without more, is not of course decisive as the cases show.

26. Where the amendment does not arise out of new facts, even if it does amount to a new cause of action, it may still be allowed – see *Krops v. Irish Forestry Board* [1995] 2 I.R. 113 and *Croke v. Waterford Crystal* [2005] 2 I.R. 383. Both of those cases were considered by the Supreme Court in *Smyth v. Tunney* [2009] 3 I.R. 322. The court's judgment was delivered by Finnegan J., who said

(at p. 334):

> "In summary, the law as to amendment now is that an amendment will be allowed if it is necessary for the purposes of determining the real issues in controversy between the parties. The addition of a new cause of action by amendment will be permitted notwithstanding that by the date of amendment the Statute of Limitations had run if the facts pleaded are sufficient to support the new cause of action. Facts may be added by amendment if they serve only to clarify the original claim *but not if they are new facts*. Simple errors such as an error in date or an error as to location which do not prejudice the defendant and enable the real questions in controversy between the parties to be determined will be permitted." (My emphasis).

27. As is clear from the facts as I have set them out, the new facts pleaded here are not simply clarifying the original claim but are new facts supporting a new cause of action. On that ground also, the amendments must in my view be disallowed.

28. The recent jurisprudence further establishes that there is an onus on a party seeking amendment, especially as here very late in the day, to explain why the matter was not pleaded in the first place and why the delay occurred. As Finnegan J., speaking for the Supreme Court, observed in *Allen v. Irish Holemasters Ltd* [2007] IESC 33:

> "There is an obligation on the party seeking to amend pleadings to give good reason for having to do so. …
>
> 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."

29. In the present case, it seems to me that no good reason has been advanced for the failure on the part of the plaintiff to plead the matters which he now seeks to plead in the original statement of claim the best part of a decade ago. I am not convinced about the extent to which discovery had any particular bearing on this. Ms. McGuinness in her affidavit, at the passage I have referred to above, says little more than that the recent discovery may have prompted the plaintiff's legal team to revisit his instructions. No reason is advanced why those instructions could not have been given originally.

30. In particular, it is not suggested by Ms. McGuinness or indeed by the plaintiff himself that he was unaware of the existence of these other contractors or that they were doing work similar to himself. There is no suggestion that the discovery somehow came as a bolt out of the blue. Most significantly however, it is clear that even if one were to accept that discovery was the trigger for the proposed amendment, that discovery was made before the case management of this claim even commenced.

31. The defendant was permitted to participate in a significant number of case management conferences, to comply with a number of directions issued by this court and to incur costs in preparing for a case that it seems to me is very substantially different from the one now sought to be advanced. No explanation of any substance has been advanced by the plaintiff for why this state of affairs was permitted to occur.

32. The defendant now finds itself in the position that having prepared for an imminent trial of the plaintiff's claim and its own counterclaim, such trial would be unlikely to take place for a considerable time if the amendments were permitted. This is logistical prejudice of the kind referred to in Delaney and McGrath on *Civil Procedure* (4th ed.) at para. 5 – 220:

> "Turning to the category of logistical prejudice, examples of such prejudice include where the effect of allowing the amendment will be the loss of a hearing date or the delaying of the trial. In *Woori Bank v. KDB Ireland Ltd* [2006] IEHC 156, Clarke J. (as he then was) indicated that this form of prejudice would be of particular significance in cases that had been admitted to the Commercial List and were being case managed because belated applications to amend can have a significant effect on the ability to conduct a trial in a timely and orderly manner."

33. For all these reasons therefore, I refuse this application.