

**THE HIGH COURT****Record no. 2013/428SP****Between/****Ulster Bank Ireland Limited****Plaintiff****-and-****Sean Sheehan and Maria Howley Practising under the style and title of Aaron Kelly & Company, Solicitors****Defendants****Judgment of Mr. Justice Tony Hunt, delivered on 8 December 2014.****Special Summons**

1. The plaintiff's claim in this case, as set out in the special summons dated 24 July 2013, is for an order directing the defendants to comply with two undertakings given in September and October 2004. There is also a further or alternative claim for compensation of the plaintiff by the defendants, pursuant to the inherent jurisdiction of the Court, for loss suffered as a result of the alleged failure of the defendants to comply with the terms of these undertakings. The defendants entered an Appearance on 21 October 2013 and a Notice of Change of Solicitor on 19 November 2013.

**Initial exchange of affidavits**

2. The first grounding affidavit of Sean Cotter was sworn on 28 October 2013. That deposes to the provision of a loan facility in February 2004 to Dunleer Grove Limited in the sum of €1,250,000, to facilitate the purchase of the Grove Hotel, Dunleer for €1,500,000. This company was represented by the defendants in connection with these transactions. The funds were released in October 2004 on foot of undertakings by the defendants to produce unqualified good marketable title to the property. The defendants furnished a Report and Certificate of title in this respect in October 2009.

3. This affidavit asserts that the title to the property was defective, resulting in a diminution of the market value of €100,000, that the Deed of Mortgage pre-dated the Deed of Transfer and that the borrowers and purchasers of the property were incorrectly specified as Michael and Caitriona McClelland. A liquidator was appointed to Dunleer Grove Limited in April 2009, who sold the property in November 2010, at a price resulting in the loss to the plaintiff alleged above. The alleged liability of the defendants to the plaintiff consequent on the alleged breach of undertaking was specifically cited in paragraph 12 of this affidavit as €100,000.

4. This affidavit was replied to by that of Sean Sheehan of 10 December 2013. This does not deny the existence of the undertakings but denies the breach alleged by the plaintiff. He sets out an extensive account of the conveyancing history of these transactions, and deposes that the plaintiff was aware at all times of relevant developments. These matters may become highly relevant at a future stage of the proceedings, but the details are not germane to the current dispute between the parties.

5. At paragraph 14, Mr Sheehan clearly asserts that the losses claimed by the plaintiff arise not from any breach of undertaking, but from a simple fall in property values over the relevant period. Paragraph 19 also asserts that any reduction in market value could also be attributed to the dilapidated state of the premises at the time of sale at the end of 2010. Paragraph 21 deals with a specific aspect of the alleged defects in title at this time, described as a mapping issue, with a limited consequential requirement of a small amount of additional investigation and expense.

6. A second affidavit was sworn on behalf of the plaintiff on 17 February 2014 by Mr Cotter, in reply to that of Mr Sheehan. This takes issue with various assertions made by Mr Sheehan in his affidavit. Paragraph 10 of this document refers back to the initial grounding affidavit and repeats the claim for consequential loss to the plaintiff in the sum of €100,000.

7. A further replying affidavit was filed on behalf of the defendants, dated 26 March 2014, by Eileen Dowling, one of the purchasers of the property from the liquidator in December 2010. She sets out an account of her recollection of the purchase of the property. At paragraph 7, she states that the reason why the purchasers offered €200,000 to the liquidator had nothing to do with fundamental problems with title, licence or planning permission, but was due to the extremely poor condition of the property, remediation of which required expenditure by the purchasers in the sum of €150,000.

**Procedural steps**

8. By co-incidence or otherwise, the summons was listed before the Master of the High Court on the date of the swearing of Eileen Dowling's affidavit on 26 March 2014. The Master struck out the summons with an order for costs in favour of the defendants. By Notice of Appeal dated 1 April 2014, the plaintiff appealed from the Master's order to the High Court. By order dated 12 May 2014, Mr. Justice Keane discharged the order of the Master and adjourned the motion to 23 June 2014.

9. The special summons came on for hearing before Mr. Justice Gilligan on 14 July 2014, pursuant to the Notice of Appeal. The order recites that having heard counsel for both sides and on reading the Special Summons, the learned judge adjourned the action to plenary hearing as if commenced by Plenary Summons, subject to a timetable set out therein for the exchange of pleadings and particulars. The motion was further adjourned to 15 October 2014, for mention in relation to any discovery issues.

10. The plaintiff delivered Points of Claim pursuant to the order of Gilligan J. on 25 July 2014. The defendants required particulars arising from the Points of Claim by notice dated 27 August 2014. These were replied to by the plaintiff on 19 September 2014. The defendants delivered Points of Defence to the Points of Claim on 26 September 2014.

**Application in the plenary proceedings**

11. The exchange of the Points of Claim and Points of Defence caused the issue by the defendants of the Notice of Motion under consideration. This is dated 10 October 2014, and seeks the following relief at paragraph 1:-

12. "An Order striking out (i) all of Paragraph 9 of the Plaintiff's Points of Claim delivered on 25th day of July 2014 and (ii) so much of Paragraph 10 thereof as should allege particulars of loss or damage herein in excess of €100,000, that is, for abuse of process and all and each of the further and/or special objections pleaded in Paragraph 2 of the Points of Defence delivered on 26th day of September 2014."

13. Paragraphs 9 & 10 of the Points of Claim read as follows:-

9. "Further and without prejudice to the foregoing, the Plaintiff pleads that the title to the property was so defective that had the Defendants complied with their obligations on foot of their undertakings, properly investigated title and appraised and advised the Plaintiff as to the condition of same, the Plaintiff would not have proceeded with the loan transaction and would not have advanced the loan facilities to the Borrower."

10. "By reason of the foregoing, the market value of the property was adversely affected. On or about the 21st of April 2009 a liquidator was appointed to the Borrower company and by reason of the matters hereinbefore pleaded, when the liquidator attempted to dispose of the property, the problems with the title, licence and planning permission arose and, as a result, the only purchaser the liquidator could secure was a cash buyer and the property was ultimately disposed of at a discounted price by reason of the title difficulty. As a consequence, the Plaintiff suffered loss, damage and expense."

14. Particulars of loss are calculated in the Points of Claim as being €1,220,000 plus interest, as opposed to the claim in the previous affidavits for €100,000.

15. The defendants took serious issue with the expansion in the basis and extent of the plaintiff's claim from the initial affidavit to the later pleading stages. Paragraph 2 of the Points of Defence objects to the plaintiff's pleadings in the following terms:-

"The Defendants object and demur to certain of the Plaintiff's pleas, namely (i) all of Paragraph 9 of the Plaintiff's Points of Claim delivered on 25th day of July 2014 and (ii) so much of Paragraph 10 thereof as should allege particulars of loss or damage herein in excess of €100,000. The Defendants specially plead in this regards as follows:

? The said pleas are a departure and impermissibly raise a new ground of claim and/or allegations of fact inconsistent with the Plaintiff's previous pleadings or proceedings had herein.

? By the admissions or averments on oath contained in the Plaintiff's several affidavits and leading the Special Summons had herein, in particular by the express evidence given voluntarily therein that the Defendants were liable to the Plaintiff only in the sum of €100,000 (being described as the alleged loss suffered on the disposal of the Property the subject matter of the within proceedings), the Plaintiff is estopped from advancing the said pleas.

? The said pleas are scandalous and/or unnecessary matter inasmuch as the Plaintiff may not, in the premises, be permitted to adduce evidence to substantiate the said pleas contrary to the admissions and averments on oath contained in the Plaintiff's several affidavits verifying and leading the Special Summons had herein.

? By its said pleas the Plaintiff is attempting unwarrantably to amend its proceedings and to enlarge its claims without the prior leave of the Court.

? The said pleas tend to embarrass and prejudice the Defendants in the Defence of the within proceedings.

? The said pleas constitute an abuse of process on the part of the Plaintiff.

In the circumstances, the said pleas of the Plaintiff ought to be struck out and the Defendants will move the Court for an order to such effect prior to the trial of the within proceedings."

### **Affidavits**

16. Dorothy Ware swore the affidavit grounding this application on 10 October 2014. She is the solicitor dealing with the claim on behalf of the defendant. It relates an account of the history of the proceedings and underlying events.

17. Paragraph 9 states as follows:-

"With a view to the eventual hearing of the case, there was a suggestion from the Plaintiff's side and it was agreed that the parties might exchange informal pleadings in the form of Points of Claim and Points of Defence; which I believe was to help identify and isolate the matters in issue between the parties as disclosed in the Affidavits that had been filed to date and which were then closed. On 14th day of July 2014, the Defendants consented to directions of the Court *inter alia* for exchange of Points of Claim and Points of Defence."

18. This affidavit also supports the estoppel claim, and at paragraph 13 asserts that the defendants are prejudiced in their defence of the proceedings, as they have defended the claim based on a maximum potential exposure of €100,000. It states that the defendants have been deprived of an opportunity to compromise the proceedings on more advantageous terms prior to the delivery of the Points of Claim.

19. The plaintiff replied by the affidavit of its solicitor Robert Browne. Paragraph 6 states that it was only when the plaintiff received the affidavit of the purchaser Eileen Dowling that it decided to obtain documents and correspondence from the liquidator. He asserts that a perusal of this documentation led to the claim that the title defects were so serious that the plaintiff "would most certainly never have advanced the loan facilities to the Borrower." At paragraph 8, he disputes Ms Ware's characterisation of the events leading to the special summons being remitted to plenary hearing, as well as the characterisation of the pleadings as "informal". Further, he states that the defendant had ample time since the commencement in 2013 to take whatever steps they deemed necessary to compromise the claim.

20. By a further affidavit, Mr. Sheehan contests the certainty expressed by Mr. Browne that the bank would have behaved in a

particular way in 2004. He also canvasses issues concerning delay and the Statute of Limitations.

### Submissions

21. Helpful legal submissions were filed by the parties, and the matter was argued by Mr. John Healy SC for the defendants and Mr. Robert Barron SC for the plaintiffs on 13 & 14 November 2014.

22. Mr. Healy made the following arguments in support of the proposition that the plaintiff was debarred from claiming damages on a new or alternative footing:-

- Special summons proceedings are heard on affidavit
- Affidavits may therefore be regarded as equivalent to a Statement of Claim in such proceedings.
- A position advanced in an affidavit in such proceedings cannot be withdrawn or departed from by succeeding affidavits.
- A plaintiff cannot raise new claims in pleadings except by amendment (citing **Ord.19 R.6 and Re Caines (deceased) [1978] 2 All E.R. 1**).
- A point of claim must be evidenced, or else may be advanced only with the liberty of the Court by way of corrective affidavit (citing **Re Unisoft Group Ltd (No 3) [1994] 1 BCLC 609**).
- The reformulated plea in this case was a departure from the initial evidence, and should be disallowed as contradicting the earlier affidavits and a departure therefrom (citing **Duckworth v. McClelland (1878) 2 L.R. Ir. 527**).
- The Rules required that the Special Summons procedure be grounded on affidavit, and there was a need and a right to adhere to the correct procedure in order that the Court had a proper record of the materials required for the pronouncement of the decision, and that no prejudice was required to be established (citing Kennedy C.J. in **Masterson v. Scallan [1927] I.R. 458**).
- The claim for damages as initially formulated on affidavit was admissible against the plaintiff as to the scope of the damage claim, and could not now be abandoned or altered (citing **Saunders on the Law of Pleading and Evidence** (1828), page 41).
- The plaintiff was now estopped by the representation as to the scope of the claim for damages from advancing any further or other claim (citing **Halsbury's Laws of England** Vol. 15, para. 334, **Cunningham v. HSE and another**, Hedigan J., 29/3/11, **Doran v. Thompson and Sons Limited [1978] I.R.223**).
- The defendants were deprived of an opportunity to provide replying evidence, that liberty to adduce further evidence ought to have been sought, and that the Court ought to strike out the reformulated damages claim on the basis that to adduce such a claim at this stage was unfair, oppressive and unsubstantiated by evidence (citing **Kiely v. Minister for Social Welfare [1977] I.R. 267**, **Ryanair v. Bravofly and Travelfusion Limited**, Clarke J., 29/1/09, **Shepperton Investment Company Limited v. Concast (1975) Limited and others**, Barron J., 21/12/92).

23. Mr. Barron submitted that the claim ought to be permitted to proceed as formulated in the Points of Claim for the following reasons:-

- The case now made by the Plaintiff is a case that could always have been made, and the claim could still be pursued in new proceedings.
- The damages claim was encapsulated by the claim currently formulated in the Special Indorsement of Claim, particularly paragraph 2 thereof, which claimed compensation for loss suffered as a result of failure to comply with the terms of the said undertakings.
- There was no requirement under Ord. 38 R.9 to seek leave to expand factual allegations, and the defendants were not prejudiced in their defence, as they were entitled to set out any available defences in their pleadings in reply.
- In the absence of a specific rule or principle applicable to the situation, the defendants had engaged in a widespread trawl to construct an argument to prevent the plaintiff reformulating the damages claim.
- There was no rule to prevent the plaintiff pleading the claim at this time, and the Points of Claim were to be treated as equivalent to a Statement of Claim in proceedings that were now plenary proceedings, in which the plaintiff was entitled to bring forward such claims as it saw fit.
- The cases and authorities cited by the defendants were irrelevant or inapplicable.
- There was no clear representation or promise that the damages claim was permanently fixed at €100,000 in the grounding affidavits, and there was no rule applicable to plenary proceedings requiring production of a further affidavit in support of the damages claim as formulated in the Points of Claim.
- The claim as initially formulated was as it was understood at the time that the affidavits were sworn, but that the investigation of an affidavit filed by the defendants caused the plaintiff to change the basis of and expand the damages claim.
- The defendants had not pointed to any specific injustice or prejudice, and retained a full opportunity to defend and call evidence to defeat the claim of the plaintiff.
- In the absence of specific authority on the point, the case should be decided by reference to the modern trends in relation to the amendment of pleadings (citing **Krops v. The Irish Forestry Board Limited and Ryan, [1995] 2 I.R. 113**, **Woori Bank and another v. KDB Ireland Limited [2006] IEHC 156**, **Croke v. Waterford Crystal Limited and another [2005] 2 I.R. 383**, **Aer Rianta International CPT v. Walsh Western International Limited [1997] 2 I.L.R.M.**

### **Discussion and decision**

24. The arguments made by Mr. Healy would have considerable force if these proceedings had continued under the rules applicable to the special summons procedure. In that event, the plaintiff would not have been permitted to change the basis of the damages claim in such a radical manner without serving further affidavit evidence in substantiation of the expanded claim, whether by permission or as of right.

25. Order 38 provides that save as otherwise ordered, such proceedings shall be heard on affidavit, subject to notices to cross-examine, and to the possible trial of questions of fact requiring determination, in which case the Court has discretion to proceed in the manner directed by Ord. 38 R.8. It is also provided that the trial of such issues may be summary or otherwise, and is the nature of trial is determined by the requirement to do justice between the parties.

26. The starting point for determining the procedures applicable to this case is the order of Gilligan J. of 14 July 2014. The significant provision of that order is that the action was thereafter adjourned to plenary hearing as if commenced by Plenary Summons. In consequence, the provisions of Order 38, or other requirements of the special summons procedure cannot be regarded as governing the matter after that date, and there is no longer "unity of proceedings" as contended by Mr. Healy. It follows that the rules and procedures applicable are now those that pertain to actions commenced by plenary summons.

27. Thereafter the question becomes whether there is any rule of procedure or law applicable to plenary proceedings which disallows the pleas made in the Points of Claim, when taken together with the initial formulation of the claim set out in the grounding affidavits. Undoubtedly, the reformulated damages claim is significantly enlarged in size, and changed in the basis upon which liability is calculated, although still grounded in the claim for breach of the undertaking furnished by the defendants in 2004.

28. In these circumstances, the grounding affidavits no longer serve the dual purposes of evidence and pleading. Unless the parties agree to treat them as such when proceedings are converted from special summons to plenary, they have no direct evidential function. In this case Gilligan J. provided a timetable for pleadings, which now serve the function of delineating the issues in the plenary format of the proceedings. The affidavits previously filed have no direct purpose in that format, which will require a full trial on oral evidence in the ordinary way. The affidavits may be used and referred to during the examination of witnesses at the full trial.

29. The order of Gilligan J. has the further consequence that the plaintiff was entitled to deliver the Points of Claim in issue. If the plaintiff was debarred from restating the damages claim at that time, that would imply that this pleading should be limited only to a summary or collation of the claims previously made on affidavit, which is the approach suggested by the deponent Dorothy Ware.

30. The purpose of pleadings is not limited in this way. A party who is entitled to deliver a document of claim is entitled to formulate the claim as it stands at the point of delivery, unless there is some other legal impediment to the assertion of the claim by the document. This conclusion is reinforced by the provisions of Orders 19 and 20 of the Rules, which are applicable to plenary proceedings.

31. Order 19 requires the plaintiff to "deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled." Order 20 provides that there is no statement of claim in proceedings by summary or special summons except by order of court. Ord.20 R.6 provides that "whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without amendment of the indorsement of the summons."

32. I am satisfied that the Points of Claim in this case is the "statement of claim" for the purposes of Orders 19 and/or 20, and that the latter Rule provides clear guidance as to the permissible contents of such a "statement of claim", being the relief or remedy to which the plaintiff claims to be entitled, not the relief or remedy to which he claimed to be entitled at some previous time.

33. In addition, when the claim is delivered pursuant to these rules in the context of plenary proceedings, it is no longer required to be evidenced in advance by affidavit, as any claim made in such circumstances is thereafter subject to proof at the plenary hearing.

34. If Mr. Healy is correct in his submissions on these issues, the plaintiff would be obliged to deliver a statement of the claim, not as it stood at the date of the pleading, but as it had been formulated previously. The plaintiff would then be obliged to apply to court for leave to amend that pleading, even though the basis of such amendment was known to it at the time of delivery of the pleading to be amended.

35. Alternatively, the plaintiff could start again by issuing a new set of proceedings setting out the alternative claims. Mr. Healy did not suggest that such proceedings would be statute barred, but he did observe that the doctrine of laches might arise.

36. Neither result is logical or efficient, and both will involve unnecessary delay and expense in the resolution of the real issues between the parties. It would be highly artificial to compel the plaintiff to take either course of action unless there are good and sufficient legal reasons so to do, when the new damages claim is still firmly associated with the claims in the special summons that the plaintiff suffered losses as a result of breach of the undertaking given by the defendants.

37. Mr. Browne, solicitor for the plaintiff, set forth in his affidavit a reason for the alteration in the basis of the claim for damages arising from alleged breach of undertaking. In so far as an explanation or justification may be required for present purposes, I see no reason not to accept his explanation that further investigation revealed additional information, which caused the plaintiff to alter the approach previously taken in the matter. This evidence was not contradicted, and the change in circumstances outlined by Mr. Browne cannot be regarded as particularly unusual or controversial. The reason offered by Mr. Browne for the failure to advance the new claim at an earlier stage can be regarded as sufficient by way of both excuse and justification.

38. The formulation of claim employed in the earlier affidavits cannot be construed as constituting an admission on the record by the plaintiff. The contents of the initial affidavits amount only to assertions of fact known to the deponent at the time when the affidavits were made. The language of the affidavits does not express or imply an admission to the effect that the plaintiff was thereby confining itself to one claim for damages, to the permanent exclusion of any other potential formulation. The words used in the affidavits do not prevent the plaintiff reformulating the claim based on new information, at a time when it was entitled by court order to deliver a document of claim on the defendants.

39. The defendants also claim that the affidavits of Mr. Cotter create an estoppel against the plaintiff. Mr. Healy referred to

Halsbury's definition of estoppel, which is said to occur "where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not." The estoppel in this case is said to arise by reason of a representation as to fact as to the scope of the claim in those affidavits, which precludes the plaintiff from advancing any further or other claim.

40. The plaintiff has not asserted that any representations of fact in the affidavits grounding the Special Summons claim are now untrue. On the contrary, it pleads the existence of further and other facts relating to extent of the alleged defects in title, and claims that these justify an alternative and increased formulation of loss arising from the alleged breach of undertaking.

41. This state of affairs is not capable of giving rise to an estoppel of the type asserted, as the plaintiff is not resiling from facts already alleged, but wishes to pursue a further and alternative claim for damages, while reserving the right to rely on the original claim if the expanded claim is unsuccessful. The claim at paragraphs 9 and 10 of the Points of Claim is expressly pleaded to be further to the original claim as set out in the preceding paragraphs.

42. In addition, the establishment of an estoppel by representation requires proof of reliance and detriment by the party in whose favour the estoppel is said to arise. In this respect, the defendants allege only that they have been deprived of an opportunity to settle the plaintiff's claim on the basis that it was originally made, i.e. for an alleged loss of €100,000.

43. This does not amount to evidence of the type of positive or concrete step which would be required to constitute detriment to the defendants sufficient to raise an estoppel in their favour. There is no evidence that the defendants contemplated making an offer of this kind (or any other) during the time between the initial affidavits and the delivery of the expanded claim. Proof of detriment in these circumstances requires evidence that the defendants had actually ordered their affairs or taken some preparatory steps with a view to dealing with the claim on the basis of a payment of €100,000. The bare loss of an opportunity to settle does not constitute detriment without more.

44. In the absence of authority on the specific point arising on this motion, the approach suggested by Mr. Barron is preferable. Although this is not a situation where the plaintiff's Points of Claim amends or contradicts a previous pleading, the cases on amendment of pleadings provide the closest analogy for the correct resolution of the point. The recent trend of the law in that area is exemplified by some extracts from these cases.

45. In **Croke** at page 393 of the report, Geoghegan J. cited Ord.28 R.1 and observed as follows:-

"While undoubtedly there is discretion in the court as to whether to make the order (amending the pleadings) or not, 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. I am in agreement with the submissions of counsel for the plaintiff that the trial judge did not adequately address that question but was much more concerned with the procedural conduct of the plaintiff."

46. Geoghegan J. then referred to the decision of the Supreme Court in **O'Leary v. Minister for Transport [2001] 1 I.L.R.M. 132**, which approved the principles laid down by Keane J. in **Krops**, and 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 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."

47. Geoghegan J. entirely agreed with this approach to the interpretation of Order 28. The learned judge went on to cite extracts from Bowen L.J. in **Cropper v. Smyth (1884) 26 Ch. D. 700** and Woolf L.J. in **Bower v. Maxwell** (Unreported English Court of Appeal, 8/5/89) in support of the general propositions that the courts do not exist for the sake of discipline, but for the purpose of deciding matters in controversy, and that the conduct of the party seeking the amendment must be excusable or justifiable.

48. An application of these principles demonstrating that a substantial amendment may arise at a very late stage in proceedings may be seen in the Supreme Court decision in **Walsh Western**. In that case, the Court (by a majority) allowed a very substantial amendment to the defence, first intimated one year after the initial defence was delivered and three months before the date fixed for trial. The amendment pleaded that the proper contracting party was other than the existing defendant. The failure to raise this defence earlier was due to a mistake on the part of an adviser. The matter was sufficiently justified by this explanation to permit the amendment sought, subject to an appropriate order as to costs and expenses incurred by the delay in bringing forward the new plea.

49. If these cases apply by analogy to the present situation, and there is discretion as to how the matter should proceed, the sentiments expressed suggest that the policy and approach ought to be that the matters in issue between the parties should be joined by the pleadings at whatever stage the real issues between the parties become apparent, unless there is very specific prejudice to prevent a claim from being advanced. The defendants are in no worse position in relation to the presentation of their case than they were if the new damages formulation had emerged earlier in the proceedings, and are in a very much better position than, for example, the plaintiff in **Walsh Western**.

50. The plaintiff is entitled to deliver the Points of Claim in the existing form without permission of the court, as that claim was formulated and delivered at a proper time pursuant to court order. The affidavits initially sworn by Mr. Cotter do not operate as a form of admission or estoppel. There is no rule or procedure preventing the plaintiff from delivering this pleading, or pursuing the claims made therein.

51. On the contrary, the plaintiff is entitled at this relatively early stage in plenary proceedings to put forward all reasonable formulations of the claim based on the breach of undertaking initially alleged in the special summons, in order to ensure that the court will be in a position ultimately determine the real question in controversy between the parties.

52. The defendants are understandably vexed that their financial exposure in the claim has multiplied. That is not equivalent to prejudice which prevents the claim being made by the plaintiff at the time and in the circumstances outlined above. Any order in their favour at this stage will only have the effect only of postponing a final resolution of the controversy, at the cost of additional delay and expense.

53. This is not to be taken as an endorsement of the new formulation of the damages claim. The possible infirmities in the claim, as alluded to by Mr. Healy in the course of argument, will be fully explored at trial, including the fact that it was not incorporated in the original grounding affidavits.

54. The defendants are in substantially the same position to challenge the plaintiff on all issues as they were previous to the delivery of the Points of Claim. If the plaintiff fails to make out the alternative claim, this may well be reflected in the final costs order. The defendants have all options open in terms of pleadings, lodgements, *Calderbank* type letters or any other step that may be appropriate to meet the claim as presented, and to ensure that the plaintiff does not have a free run at the trial of the action.

55. In addition, there are no grounds upon which the pleadings should be struck out based on any circumstances of unfairness, or of oppression of the defendants by the plaintiff. Unfairness would reside in denying the plaintiff the opportunity to ventilate the alternative claim, in circumstances where the uncontradicted evidence at this stage is that the basis of the enlarged claim came to light only when the plaintiff conducted investigations into the content of a replying affidavit delivered by the defendants.

56. For the reasons set out above, the decision on the application is to refuse the relief sought on the defendant's Notice of Motion.

57. The plaintiff's costs are reserved to the trial judge. The defendants have 8 weeks to lodge any amended defence and/or lodgement, with two weeks for the plaintiff to reply.