

HIGH COURT

2017 No. 204 CA

Anthony Purcell

Plaintiff

– and –

Tesco Ireland Ltd

– and –

David McInerney

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 14th February, 2018.

I

Background

1. By way of personal injuries summons dated 14th November, 2016, Mr Purcell *"alleges negligence, breach of duty including breach of statutory duty against...[Tesco], its servants and/or agents as a result of which the Plaintiff suffered, sustained and incurred severe personal injuries, loss, damage and expense, all of which continues"*. Under the heading "PARTICULARS OF THE CIRCUMSTANCES LEADING TO THE COMMISSION OF THE WRONG", the indorsement of claim reads, *inter alia*, as follows:

"On or about the 28 April 2014, during the course of his employment, the Plaintiff was asked by a servant or agent of [Tesco]...to push trollies, when suddenly and without warning he felt a twinge in his back which graduated to severe lower back pain. The said injuries were caused as a result of the negligence, breach of duty and breach of statutory duty on the part of [Tesco]...its servants or agents and as a result thereof, the Plaintiff suffered, sustained and incurred severe personal injury, loss, damage and expense, all of which continue."

2. That personal injuries summons issued subsequent to the issuance by the Personal Injuries Authorisation Board on 16th October, 2016, under s.14 of the Personal Injuries Assessment Board Acts 2003 and 2007, of an authorisation to bring proceedings. That authorisation in turn issued consequent upon an application for assessment of damages made by Mr Purcell under s.11 of the Act of 2003 in which, under the heading "Brief Description of Accident details", the following text appears

"I sustained injuries to my back as a result of having to push trollies during the course of my employment, commencing with twinging on the 28th of April and graduating to severe lower back pain."

3. By notice of motion dated 22nd February, 2017, Mr Purcell sought the following reliefs of the Circuit Court: an order pursuant to O.65 of the Circuit Court Rules giving the plaintiff liberty to amend his personal injuries summons and certain ancillary reliefs. The critical amendments sought involved a re-wording of the text under the heading "PARTICULARS OF THE CIRCUMSTANCES LEADING TO THE COMMISSION OF THE WRONG" so that it would now read as follows:

"On or about the 28 April 2014, during the course of his employment, the Plaintiff was asked by a servant or agent of the Defendant to push trollies stocking shelves with magazines when suddenly and without warning he felt a twinge in his back which graduated to severe lower back pain. The Plaintiff will contend that the injuries sustained were as a result of heavy lifting duties he was required to do over a course of time prior to the 28 April 2014, namely pushing trollies, in spite [of his] being medically advised against completing such duties. The Plaintiff will contend that pushing trollies as required was a pre-cursor to and a reason for the injuries sustained on the 28 April 2014. The said injuries were caused as a result of the negligence, breach of duty and breach of statutory duty on the part of the Defendant, its servants or agents and as a result thereof, the Plaintiff suffered, sustained and incurred severe personal injury, loss, damage and expense, all of which continue."

4. In the affidavit accompanying the said motion, a solicitor acting for Mr Purcell avers, *inter alia*, as follows in respect of the amendment sought:

"3. As can be seen from the pleadings, the Plaintiff's claim relates to an incident which occurred in or around 28 April 2014 during the course of the Plaintiff's employment with the Defendant when he was caused to suffer and sustain personal injuries, loss and damage. The Personal Injuries Summons was issued on 15 November 2016.

4. As can be seen from the said pleadings and in particular paragraph 6 of the Indorsement of Claim [from which the court has extracted the above-quoted text], in relation to the particulars of the circumstances leading to the commission of the wrong, it was pleaded inter alia by Counsel that the Plaintiff suddenly and without warning sustained the injuries while in the course of pushing trollies.

5. An appearance was entered by the Solicitors for the Defendant on 3 January 2017. Thereafter, a Notice for Particulars was raised on 3 January 2017 and in answering same with the Plaintiff, it has transpired that Counsel was mistaken in respect of the circumstances surrounding the accident....

6. In taking instructions from the Plaintiff, it transpired that while his case will be that pushing trollies was a pre-cursor to the injuries of which he now complains, it was actually in the course of stocking shelves that he first felt the twinge which developed into severe lower back pain and the injuries complained of herein.

...

8. I say and believe that the proceedings which were issued contained genuine errors and that the proposed amendments are necessary to determine the real questions of controversy between the parties. I further say that there can be no prejudice to the Defendant..."

5. By order of the Circuit Court on 29th June, 2017, the reliefs sought by Mr Purcell in his motion of 22nd February, 2017, were refused. Thereafter, on 7th July, 2017, an appeal was entered against the judgment of the Circuit Court, which appeal fell to be heard by this Court on a *de novo* basis.

II

Relevant Legal Principle

6. As to the amendment of pleadings, when it comes to the addition of facts and the potential for prejudice, the two matters that were the subject of especial focus at the hearing of the within application, the law, as relevant to the facts of the within application, might briefly be summarised as follows:

Additional Facts

(1) Whereas originally it appeared that "*Facts may be added by amendment if they serve only to clarify the original claim but not if they are new facts*" (*Smyth v. Tunney* [2009] 3 IR 322, 334), it has recently been clarified by Murray J. in *Moorehouse v. The Governor of Wheatfield Prison and ors* [2015] IESC 21, "*In Smyth v. Tunney the amendments sought did not satisfy the requirements because the applicant both sought to add causes of action to the statement of claim and to plead a very substantial range of additional facts.*" (Emphasis in original).

(2) Because in *Moorehouse* there was (i) "*purely the addition of facts, by amendment, to 'clarify the original claim'*" [the quoted wording being taken from *Smyth*, 334], (ii) "[n]o effort [was]...made to plead a large range of new facts" and (iii) the application for amendment "[did] not concern an endeavour to plead a new cause of action", the Supreme Court was satisfied to allow the amendment sought (the quoted text in points (i)-(iii) is extracted from the judgment of Murray J. in *Moorehouse*, para.46).

Prejudice

(3) There is "*no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without prejudice to the other party.*" (*Smith v. Cropper* (1884) 26 Ch.D. 700, 710).

(4) "*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 presence must stem, therefore, from the fact of the belated alteration of the pleadings rather than the presence (if allowed) of the amendment itself.*" (*Woori Bank v. KDB Ireland Ltd* [2006] IEHC 156, para.3.2).

(5) "*If there might be prejudice which could be overcome by an adjournment then the amendments 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 expense.*" (*DPP v. Corbett* [1992] ILRM 674, 678).

III

Application of Principle

(i) New Facts.

7. When it comes to the addition of the new facts concerning the shelf-stocking, it seems to the court that Mr Purcell is within what might be described as a classic example of the situation that presented in *Moorehouse*. Thus to borrow from the above-quoted phraseology of Murray J:

(i) what presents in the within application appears to the court to be what presented in *Moorehouse*, viz. "*purely the addition of facts, by amendment, to 'clarify the original claim'*", i.e. all that it is sought to do is to make clear that on the date and at the moment when Mr Purcell allegedly felt the first twinge of pain, he was allegedly stocking a bookshelf, not pushing one or more trolleys; however, he continues to consider and allege that it was pushing trolleys that was the pre-cursor to, and reason for, his alleged injuries.

(ii) as in *Moorehouse*, there has been "[n]o effort made to plead a large range of new facts"; in truth the only new fact (which will of course fall to be established) is that rather than pushing trolleys when he felt the first twinge of pain, Mr Purcell was at that moment allegedly stocking a bookshelf.

(iii) as in *Moorehouse*, the application for amendment "[does] not concern an endeavour to plead a new cause of action"; there was suggestion in submission that some repetitive strain injury (RSI) dimension being claimed that was not previously claimed; respectfully, the court does not see that this is so. Mr Purcell has always claimed that he sustained injuries to his back as a result of having occasionally or continuously to push trolleys during the course of his employment, he continues to claim this, the only new fact is that that rather than pushing trolleys when he felt the first alleged twinge of pain, Mr Purcell was at that moment allegedly stocking a bookshelf, but his cause of action remains the same, he continues to maintain that it was pushing trolleys that was the pre-cursor to, and reason for, his alleged injuries.

8. In passing the court notes that it does not consider that the case which it is now sought to make is inconsistent with what was presented in the application form submitted by Mr Purcell to the Personal Injuries Assessment Board. It will be recalled that in that form, under the heading "*Brief Description of Accident details*" (not '*Exhaustively Comprehensive Account of Accident*'), it is stated by Mr Purcell that "*I sustained injuries to my back as a result of having to push trollies during the course of my employment, commencing with twinging on the 28th of April and graduating to severe lower back pain.*" That is what he continues to maintain, save for the nuance that rather than pushing trolleys at the precise moment when he felt the first alleged twinge of pain on 28th April, Mr Purcell was at that moment allegedly stocking a bookshelf.

(ii) Prejudice.

9. The court does not see anything in the facts of the within application which could conceivably amount to the visiting of prejudice on the defendants. No steps have been taken by the defendants that would make it impossible or significantly more difficult to deal with the case should the amendment be allowed (and it will be allowed). Nor does any logistical prejudice present, in the sense that the proposed and to-be-allowed amendment has been sought at a late stage and could have the effect of significantly disrupting the intended proceedings. There is nothing to stop Mr Purcell being cross-examined at trial as to the facts that led to the need for the amendment application. Given that he has now made clear that he was allegedly stocking a bookshelf at the time that he claims to have felt the first twinge of pain, Mr Purcell may conceivably have made it harder for himself, through his honest amendment of his pleadings, to establish that it was the trolley-pushing and not, e.g., some odd movement on his part when stocking the bookshelf that allegedly caused the injury from which he claims to be suffering.

10. There was some suggestion that there has been delay on the part of Mr Purcell in terms of prosecuting the within proceedings. However, the within application comes, if not early, certainly not at so late a stage of proceedings as to be in effect an attempt to gain an unfair advantage or to surprise Mr Purcell's opponents. Thus it does not involve delay of a type that might count against Mr Purcell in terms of getting the relief now sought. (And the type of conduct that would count against an applicant in this regard would in any event tend to be fairly extreme, as in the eve-of-trial application made in *McCarron v. Toye* (Supreme Court, 17th April, 2002)). The sort of prejudice which is in contemplation when it comes to the issue of prejudice in the context of O.28, r.1 is something which places the non-moving party (here the defendants) in a worse position from the point of view of the presentation of its side of matters than it would have been if the substance of the proposed amendment had initially been pleaded; no such prejudice, in truth no prejudice at all, appears to the court to present on the facts of the within application.

IV

Conclusion

11. For all of the reasons aforesaid, Mr Purcell's appeal must succeed and the court will allow the amendment sought of his personal injuries summons.