

## BETWEEN

**MOORVIEW DEVELOPMENTS LIMITED, SALTHILL PROPERTIES LIMITED, VALEBROOK DEVELOPMENTS LIMITED, SPRINGSIDE PROPERTIES LIMITED, DRAKE S.C. LIMITED, MOLDRO S.C. LIMITED, THE POPPINTREE MAUL LIMITED AND BLONDON PROPERTIES LIMITED**

PLAINTIFFS

**AND  
FIRST ACTIVE PLC AND RAY JACKSON**

DEFENDANT

AND

RELATED CASES

**Judgment of Mr. Justice Clarke delivered the 20th day of October, 2005.**

**1. Introduction:**

1.1 On the 1st May, 2005 Carroll J. ordered that certain related proceedings be linked and heard at the same time.

1.2 The President of the High Court assigned those cases to me for the purposes of managing and ultimately hearing same. The proceedings include the above proceedings ("the principal proceedings") together with certain related proceedings all of which have been before the court on a number of occasions. The claims made in the principal proceedings are complex with the statement of claim running to 40 paragraphs and claiming damages running to well in excess of €150 million. While it is unnecessary, at this stage, to specify in any detail the full nature of the claims made, same arise out of the relationship between the first named defendants ("First Active") as lenders to a variety of companies which were related and of which Brian Cunningham ("Mr. Cunningham") was the principal shareholder and a director. In that context it would appear that First Active lent money to each of the plaintiffs in the principal proceedings with the possible exception of Blondon Properties Limited. In summary the plaintiffs allege that First Active was a shadow director of the plaintiff companies, that it acted in breach of lending terms and conditions, that it acted negligently and in breach of duty and that the second named defendant, as a receiver, ("the receiver") was invalidly appointed to the first second and third named plaintiffs and acted negligently. First Active and the receiver strenuously deny those allegations.

1.3 The first related case (Record 2003 No. 9017 P) is one in which Mr. Cunningham is plaintiff and First Active is defendant. In those proceedings, as presently constituted, Mr. Cunningham seeks declarations concerning the extent of guarantees entered into by him in relation to the indebtedness of certain of the plaintiffs in the principal proceedings and claims damages.

1.4 The second related proceedings (Record 2004 No. 18785 P) were commenced by Porterridge Trading Limited ("Porterridge") against First Active. Porterridge is also a company of which Mr. Cunningham is, apparently, the beneficial owner. Porterridge claims to be entitled to the interest of a lessee in certain properties at Galway which were leased to it by the second named plaintiff in the principal proceedings. First Active claims that it holds a mortgage or charge over the property which pre-dates the lease and accordingly takes priority. The allegations against First Active include slander of title.

1.5 In the context of attempting to deal with each of the interlocutory matters which require to be resolved before determining the precise method and sequence of the trial of the issues which arise in the above proceedings I directed that the parties would attempt to resolve all procedural questions such as particulars and discovery but that in the event that any such questions proved incapable of resolution applications in respect of remaining issues should be brought before me. On foot of those directions a series of procedural applications were heard by me and this judgment is directed towards the issues which arise on those applications.

**2. Additional Cases**

2.1 However before going on to deal with those issues I should note that two of the motions which were before me on the occasion in question concerned applications on the part of, on the one hand First Active, and on the other hand the receiver to have further proceedings joined in this process. The proceedings involving First Active bear Record No. 2005 No. 272 S and seek, as against Mr. Cunningham, judgment on foot of a guarantee arising out of transactions and dealings involving companies who are the plaintiffs in the principal proceedings. In the case of the proceedings maintained by the receiver (bearing Record No. 2005/793 S) same seek repayment of what is contended to be a director's loan outstanding by Mr. Cunningham in favour of Moorview Developments Limited (the first named plaintiffs in the principal proceedings). The applications to have those respective proceedings joined in the case management process were resisted by counsel on behalf of Mr. Cunningham on slightly different bases.

2.2 In relation to the proceedings maintained by First Active it was contended that were I to embark on any hearing in respect of those proceedings prejudice might occur. The proceedings are summary proceedings. First Active's application for liberty to enter final judgment came before the Master of the Court on 15th July, 2005. The Master took the view that the case was contested and transferred same to the court list for hearing where it stands listed for the 7th November next. Thus if these proceedings were to be linked the first matter which would, apparently, come before me, would be the hearing of an application for summary judgment in the circumstances outlined above.

2.3 Having regard to a contention on the part of counsel for Mr. Cunningham that prejudice might be caused, were I to embark upon such a hearing, it seemed to me that it would, out of prudence, be inappropriate for me to consider whether this case should be linked with the cases already assigned to me and that, as a safer alternative, an application to so link should be made to the judge having carriage of the motion list on the 7th November next or alternatively to the President of the High Court who has assigned me to deal with these cases. I took that course of action without forming any view as to whether there was a stateable basis as to whether prejudice might be caused but by virtue of the fact that, if it should transpire as a result of hearing the application that I was, in fact, prejudiced, I might put myself in a position where, contrary to the assignment by the President, I would no longer be in a position to deal with further issues arising in these proceedings.

2.4 In relation to the proceedings maintained by the receiver no such contention of prejudice was made but it was indicated that the application to link those proceedings might be premature having regard to the fact that no replying affidavit had been filed by Mr. Cunningham, as defendant in those proceedings, so as to indicate the issues that might arise whether of law or fact and consequently, the issues not being established, it was contended that it was not clear as to whether there would be an advantage in the linkage sought. In all the circumstances it appeared to me that it might again be prudent if someone other than myself were to determine whether it was appropriate that this case should also be linked.

2.5 Finally before departing from those two applications I should note that counsel for First Active made clear when seeking to move the application to link the First Active guarantee proceedings that it would be his case that even in the event that judgment were granted against Mr. Cunningham in a summary fashion in those proceedings, he would accept that it would be appropriate (having regard to the connection between the events leading to the guarantee and the events which are the subject of the principal proceedings) that a stay should be placed upon any such judgment pending a resolution of the principal proceedings.

### 3. The Issues for Decision

The remaining motions can be divided into those involving

- (a) discovery;
- (b) particulars; and
- (c) an application by Mr. Cunningham to amend certain pleadings

I deal with each in turn.

### 4. Discovery

4.1 Both First Active and the receiver seek discovery of a variety of documents which are specified in the respective schedules to the two notices of motion issued. While there are certain more detailed questions that arise in respect of some of the categories of documents sought (particularity in the receiver's application) it is fair to say that the principal opposition on the part of Mr. Cunningham to making the discovery sought in both applications is at the level of principle and applies equally to both cases. It is undoubtedly correct that the discovery sought, particularly on the application of First Active, is wide ranging. It is equally true to say that a reading of the pleadings generally but in particular the pleadings in the principal proceedings make it clear that the issues which are likely to arise in those proceedings are themselves wide ranging. The fact, therefore, that quite wide ranging discovery is sought is not necessarily inappropriate having regard both to the number and type of issues which are raised.

4.2 The principal ground of opposition is that very many of the documents which would fall within the categories of discovery sought on behalf of First Active are actually already in the possession of First Active. In those circumstances it is suggested that the making of an order for the discovery of such documents is not "necessary" as required by Order 31 of the Rules of the Superior Courts. Counsel for Mr. Cunningham placed reliance on what he contended were significant alterations in the rules in relation to discovery brought about by the Rules of the Superior Courts (No 2) 1999 which amended the existing rule in relation to discovery. In *Taylor v. Clonmel Healthcare Limited* [2004] 1 I.R. 169 the Supreme Court, in considering the effect of the amending rule, found that although the amending rule had shifted the burden of proving necessity to the party seeking discovery a formal verification of necessity in a grounding affidavit would normally be sufficient to discharge this burden on a *prima facie* basis, as on the ordinary discovery principles, if a party was entitled to a document on grounds of relevance that document would usually be necessary. The judgment also noted that the object of the amending rule was to remedy the mischief of automatic and unnecessary resort to blanket discovery without sufficiently specifying the documents sought and the reasons for which their discovery was sought and that, even if the reasons for which discovery was sought were not sufficiently set out in the grounding affidavit, this object would be achieved if the reasons were set out in the letters which were exhibited in the affidavit.

4.3 There have been a variety of descriptions, over the years, of the principal purpose behind discovery. Obviously one such purpose is to afford either party an opportunity to obtain documents which he may not have and which might damage his opponents case or further his own case. However a further way of looking at the reasoning behind an aspect of discovery is, as stated by Henchy J. in *McCarthy v. O'Flynn* [1979] I.R. 127 where, at p. 129 he said the following:-

"The aim of the relevant rules is to enable a party to learn, in advance of the trial, of the existence of the documents on which his opponent might rely at the trial, to give the party who has obtained an order for discovery an opportunity of seeking production for inspection of any of those documents; and to debar the party who has not made discovery from introducing in evidence at the trial documents which he ought to have, but has not, discovered".

While that passage does speak of enabling the party to learn of the existence of documents (which implies that he may not already know of them) it also seems to me that part of the purpose identified is to enable a party to know with some precision the documents which may be relied upon at trial even where that party may have been aware, in general terms, in advance of making an application for discovery, of the existence of those documents. This will be particularly so in cases where, as here, it is likely that there are a very wide ranging number and type of documents which might, on one view, have a relevance to the case which a party might wish to put forward.

4.4 In essence the plaintiffs case in respect of discovery is that the defendants have the documents, that he will discover any additional documentation which may be relevant and which may not be in the defendants possession, and that this should suffice. He suggests that the appropriate course of action is that the defendants should identify the documents that they have and that he will add to them, by way of discovery, with any relevant documents which he has and they do not. However it seems to me that this way of dealing with the matter begs the question as to how the defendants are to know what documents the plaintiff is likely to regard as relevant from amongst the many documents which they (the defendants) already have access to. I can well see that where discovery is sought of a narrow and clearly defined set of documents which are already in the possession of the applying party it might well be said that it would not be necessary to order discovery, or at least any discovery which went beyond directing disclosure of the existence of any documents not already in the possession of the applying party.

However where, as here, the defendants appear to be in possession of a very large volume of documentation and do not, at this stage, know precisely how it is that the plaintiff intends to make his case (insofar as that case may rely on documentary evidence) it does seem to me that it is appropriate to require the plaintiffs, in the ordinary way, to make discovery of those documents which, in the plaintiffs view, are relevant to the case which the plaintiffs wish to make. To take a simple example, the question of the solvency or otherwise of certain companies at relevant dates is potentially material to certain of the issues which the plaintiff contends for in the principal proceedings. Those proceedings are, of course, the plaintiffs proceedings. In general terms the onus of proof will rest upon the plaintiffs. The plaintiffs must, therefore, be aware, or be capable of becoming aware, of those documents within the books and records of the company upon which they would wish to rely for their contention as to solvency. It does not seem to me to be appropriate to require the defendants to second guess the evidential case involving documents which the plaintiffs intend to make and to select those documents.

4.5 As pointed out by Henchy J. in *McCarthy* part of the consequences of failure to make discovery is that a party may be precluded from relying upon a document not discovered save with leave of the court which leave may be granted depending on whether any prejudice can be shown and, in appropriate circumstances, on terms. Thus the making of a discovery order has the effect of limiting the volume of documents which a plaintiff can rely on to those which the plaintiff itself discovers. By not requiring the plaintiff to make discovery in relation to categories of documents where it would be difficult for a defendant to anticipate which documents the plaintiff might consider would support the plaintiff's case, it seems to me that this desirable end would not be met.

4.6 In the circumstances it seems to me that, at the level of principle, the defendants are correct when they argue that they are entitled to require, from the plaintiff, discovery of documents in respect of categories which are, I am satisfied, in general terms derived directly from the pleadings and the issues which have been joined between the parties on those pleadings.

4.7 In the letter of reply to the defendants request for particulars (dated the 5th September, 2005) a number of general themes emerge in addition to the general point referred to above. The structure of the letter of reply is, quite correctly, directed to each of the specific requests. However under a number of headings the point is made that much, if not all, of the documentation which would be relevant under the heading concerned would be documentation which was produced by First Active or persons associated with First Active. Obviously if such documentation has not come into the possession, power or procurement of any of the plaintiffs then it need not be discovered by them. To the extent that such documentation is within the possession power or procurement of the plaintiffs then it seems to me that First Active is entitled to know which such documents are, in the view of the plaintiffs, material to the aspect of the claim identified in each of the relevant paragraphs. With that in mind I would propose directing that, where possible, the plaintiffs in making discovery should categorise the documents being discovered in the relevant schedules by reference to the specific category as set out in the notice of motion.

4.8 Given the position taken by the plaintiffs there was very little debate at the hearing before me as to the precise terms of the specific categories of documents in respect of which discovery was sought. A reading of the request for discovery makes it clear that each category is specifically referred to issues which arise on the pleadings and seems, *prima facie*, to relate to documents which are likely to be relevant to the resolution of the respective issues so identified. It was, however, conceded by counsel for First Active that to a very limited extent (that is in respect of category 17) the request may be over broad and should be limited in time. I would propose hearing the parties further as to the precise limitation that should be included.

4.9 I should also comment on a consistent theme of the submissions made on behalf of Mr. Cunningham which placed reliance on the disparity of resources between himself on the one hand and defendants on the other hand insofar as it impacted on the ability of the parties to deal with complicated procedural issues of a burdensome variety (such as discovery) that might arise in the course of the proceedings. I have no reason to doubt that what was urged on behalf of Mr. Cunningham is factually correct. It may well be, therefore, that it would be appropriate to give a greater degree of latitude to Mr. Cunningham in terms of the time required to respond to various procedural orders for that very reason. However it seems to me that the disparity in resources cannot alter the basic position, which is that the defendants in these proceedings, like any party to any proceedings, are entitled to seek reasonable pre-trial measures designed to ensure the efficient conduct of the trial and to maximise the likelihood of a fair and just result thereto. While the burden of making discovery may well be onerous (and particularly onerous on Mr. Cunningham in his circumstances) the fact is that Mr. Cunningham has commenced proceedings making very serious accusations against the defendants and claiming a very large sum in damages indeed. He is, of course, perfectly entitled to commence such proceedings and nothing which I say should be taken, in any way, to indicate that there has been anything inappropriate in the commencement of the proceedings and their prosecution so far. However having commenced such proceedings certain consequences flow and it will, therefore, be necessary for Mr. Cunningham to comply with the ordinary requirements which would fall on any party who is involved in significant and complex commercial proceedings of this type. The only latitude which it will, in general terms, be appropriate to give to him may be to afford somewhat longer time periods for compliance than might be the case in respect of a party who had greater resources. Even this latter point must necessarily be limited so as to ensure that these matters come to trial within a reasonable period of time.

4.10 That being said I have also come to the view that by virtue of the broad brush opposition adopted by Mr. Cunningham it may be that there are other categories (in addition to the one referred to above) where some reasonable limitation on the breath of discovery could be imposed without doing any injustice to the defendants. For the reasons I have indicated no such detailed response or suggestions were made. However in fairness to Mr. Cunningham it seems to me that I should afford him, through his advisors, an opportunity to suggest any reasonable way in which any of the categories might be limited. In those circumstances I do not propose making an order for discovery today but will do so in early course at a date to be agreed with the parties when, in the intervening period, Mr. Cunningham will have an opportunity to put forward, if he wishes, any limitations which he may consider appropriate to any of the categories of discovery sought bearing in mind that I have rejected the broad basis argued on his behalf against making of discovery orders and that I do not propose allowing Mr. Cunningham to re-open that question. If any such limitations can be agreed then same can be incorporated into the order for discovery. If there are disputes then I will consider the arguments made and rule on same.

## **5. Receiver's Discovery Application**

5.1 The same broad approach was adopted by Mr. Cunningham in response to the receiver's application for discovery. I see no reason to come to a different view in respect of that argument insofar as it relates to the receiver from the one which I have set out above in relation to the application by First Active for discovery. I would therefore propose, subject to one additional matter to which I will refer, to adopt the same position in relation to this application so that I will indicate that in general terms, the receiver is entitled to the discovery sought but will afford Mr. Cunningham an opportunity to suggest any reasonable limitations which might be made.

The additional matter to which I have referred is that it is quite clear from a reading of the reasons given in respect of categories 2, 3 and 4 of the documents sought on behalf of the receiver that the reason given bears no relation to the category sought. Given the obligation on the party seeking discovery to justify the necessity of discovery being made it would, it seems to me, at this stage be wholly inappropriate for the court to direct discovery in respect of any such categories given the absence of any meaningful reason. However I would propose affording the receiver an opportunity to seek again those categories by specifying the true reason why they were sought. I would propose dealing with those issues at the same time as I deal with any further issues that arise in respect of the possible limitation of any of the categories as referred to above.

## **6. Conclusion on Discovery**

As will be seen from the above I have come to the view that in principle both First Active and the receiver are entitled, in the main, to the discovery sought. I propose allowing Mr. Cunningham an opportunity to see if he can come up with any realistic suggestions whereby the scale of the discovery can be limited without impairing the ability of the defendants to know the documents upon which he wishes to rely in making his case. I also propose allowing the receiver to mend his hand by specifying the reasons whereby it is contended that documents in categories 2, 3 and 4 are necessary.

## **7. Particulars**

7.1 First Active seek better particulars of the plaintiffs claim in certain of the proceedings. While, as might be expected, a relatively extensive process of seeking and delivering further particulars has already been engaged in by the parties there are a number of outstanding issues which arise in some of the related proceedings.

7.2 Both counsel accept that the test by reference to which particulars should be delivered is as was stated by Fitzgerald J. in *Mahon v. Celbridge Spinning Company Limited* [1967] I.R. 1 where at p. 3 he said:-

"The whole purpose of pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without any party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at trial."

It should be noted that the facts that a party is required to be told, as part of the pleading process, are not the facts as they may objectively be, but the facts as his opponent alleges them to be. Therefore an assertion that the other party well knows the relevant fact will rarely be a sufficient answer to what would otherwise be a proper request for particulars. A requesting party may well have its own view about what the truth in respect of a relevant factual issue is but that does not absolve his opponent, where it is part of his case, from setting out in reasonable detail the relevant facts which he alleges. Applying that principle I would propose dealing with the particulars requested in turn by reference to the proceedings in which those particulars are sought.

## **7.3 Principal Proceedings**

### **(a) Paragraph 24**

The first dispute concerns the replies to a request for particulars in relation to certain agreements specified at paragraph 13 of the statement of claim and in particular whether such agreements were constituted by certain specified correspondence. In the reply mention is made of other oral agreements "particularly at a meeting in the offices of the first named defendant on 16th August, 2002". In the light of the fact that the plaintiffs have raised the possibility of there being further oral assurances not, apparently, necessarily confined to the meeting of 16th August, the defendants sought full and detailed particulars of the relevant other oral agreements. It seems to me that this request was reasonable and that the failure to reply to it in any meaningful way was inappropriate. I therefore propose directing that the plaintiffs reply to request 24 in the notice for further and better particulars.

### **(b) Paragraph 25(i) and (ii)**

Under these paragraphs First Active sought certain particulars of alleged breaches specified in paragraph 14 of the statement of claim and in particular an account of sums which, it was alleged, were not advanced in a timely fashion and the identity of the particular plaintiff company to whom such sums should allegedly have been advanced. These specific requests have not been answered at all and, in my view, must now be answered. Insofar as the reply relies on "this is a matter for evidence" it certainly does not appear to me to be correct. If it is part of the plaintiffs case that First Active failed to make advances in a timely fashion then First Active is entitled to know exactly to whom and when and in what circumstances it will be contended it should have made advances. I will therefore direct compliance with this particular.

### **(c) Paragraphs 26 and 28**

In both of these queries First Active requested the plaintiffs to confirm that certain agreements referred to at paragraphs 15 and 17 of the statement of claim are constituted by the fourth to seventh named plaintiff's acceptance of the letter of offer referred to in the relevant paragraph. The answer given was that the issue was one of construction and legal argument. That may well, in part, be true, but it seems to me that First Active is entitled to know whether any additional case is being made on behalf of the plaintiffs beyond a contention that the relevant agreements were constituted by the acceptance of the letters of offer. If a wider case is being made relying on other agreements whether written or oral, then same needs to be particularised. If not then that fact should be specified.

### **(d) Paragraph 29**

First Active has complained that sub-paragraphs (v) to (xi) of this request have not been replied to. It seems to me that same should have been replied to and I will direct compliance with that request.

### **(e) Paragraph 38**

Part of the plaintiffs case is that First Active failed to employ appropriate resources, personnel and procedures necessary for the proper performances of its obligations. To the extent that this may be material to the plaintiffs claim (and one must presume at this stage that it is) it is reasonable for First Active to require to know the level of such resources which, it will be contended, ought to have been applied. I will also direct compliance with this particular.

### **(f) Paragraph 75**

As is pointed out by First Active, paragraph 39 of the statement of claim alleges negligence against the receiver. However certain of the sub-paragraphs (that is (k), (l), (o) and (p)) appear to make allegations against First Active as well. First Active sought, by way of particulars, clarification as to whether those items were intended to contain an independent allegation against First Active (as opposed to the receiver). When the matter was pursued the plaintiffs replied in the following terms:-

"which of these the first named defendant is vicariously liable for is a matter of law".

While the answer is undoubtedly correct in that the extent of the vicarious liability of First Active for any alleged acts or omissions on the part of the receiver is a matter of law it does seem to me that First Active is entitled to know which of the alleged acts or omissions of the receiver the plaintiffs allege First Active is vicariously responsible for. Again it seems to me that it is appropriate to require a reply to those items.

Therefore, it seems to me that in each of the cases where a dispute arises First Active is entitled to the particulars sought and I will therefore direct the delivery of such particulars in accordance with the relief sought by First Active. I will hear the parties further as to the precise mechanics for the delivery of such particulars.

## **7.4 Porterridge Proceedings**

There are a small number of outstanding particulars in this matter. I will deal with them in turn.

### **(a) Paragraph 2**

The plaintiff in those proceedings alleges slander of title. Ultimately the response to a request for particulars of that slander is that the request is "a matter for evidence" and is "a matter within the knowledge of First Active". However it seems to me that First Active is entitled to know what the allegation is. The fact that it may be possible, upon obtaining discovery, for a party to be able to give more detailed particulars does not absolve it from the obligation to particularise the claim as best it can when it makes that claim. One must presume that a claim would not have been included unless the plaintiff had some basis for believing that the claim was well founded. In those circumstances it seems to me that it is appropriate to require the plaintiff to deliver such particulars as it now can. It would, of course, be appropriate for it to reserve to itself the right to deliver such reasonable additional particulars as might become apparent when discovery has been obtained and considered.

#### **(b) Paragraphs 3 and 4**

Under these headings the First Active sought further details of the breaches of duty and statutory duty alleged against it. Certain duties are specified in the reply of 16th March, 2005. However that reply commences with the words "these include, inter alia". Again it seems to me that it is appropriate that, in advance of any hearing, the defendant knows the legal basis upon which the plaintiff makes his case. In saying that I would wish to emphasise that I am not suggesting that a defendant is entitled to know, (in the absence of special directions by the court) the legal argument that will be put forward in support of any such legal basis. However it does seem to me that where, for example, a breach of statutory duty or a breach of a constitutional obligation is alleged, a defendant is entitled to know with some precision precisely what breach the plaintiff will argue for (as opposed to the legal arguments in favour of that contention). It therefore seems to me that the defendants are entitled to have the plaintiffs either make clear that the various duties specified in the reply of 16th March, 2005 are comprehensive or to specify such additional breaches as it may be the intention of the plaintiff to rely on. I would direct compliance with that particular.

7.5 Therefore so far as the particulars sought in these proceedings are concerned I will direct compliance but invite both parties to note the comments made in the preceding paragraphs as to the manner in which it may be permissible to reply to those particulars.

#### **8. The Amendment Motion**

8.1 In proceedings (Record No. 9071 P/2003) Mr. Cunningham (as plaintiff) seeks an order granting him liberty to deliver an amended statement of claim. The amendment, if allowed, would delete any relief which sought a declaration in relation to certain contracts of guarantee entered into between the parties.

8.2 Both counsel are agreed that the appropriate test to be applied, in general terms, to the consideration by the court of an application for an amendment of pleadings is to the effect that the primary consideration of the court must be whether the amendments sought are necessary for the purpose of determining the real questions of controversy in the litigation. See for example *Croke v. Waterford Crystal Limited and Another* (Unreported, Supreme Court, Geoghegan J., 26th November, 2004). That is not to say that there may not be, in certain special circumstances, other factors that may properly be taken into account, particularly where prejudice can be established.

8.3 It is clear, therefore, that the nature of the amendment sought is one which would reduce rather than increase the issues in the case and in those circumstances it was properly conceded by counsel on behalf of First Active that, in the ordinary way, no prejudice arising, the court would make such an order. However reliance is placed upon the fact that a previous application to introduce such an amendment failed. However, as explained by counsel for Mr. Cunningham, the earlier amendment sought would, it would appear, have removed the claim for relief without altering certain other consequential provisions in the statement of claim and, on that basis, I am told that Carroll J. took the view that it would be an inappropriate amendment. I have to say that the explanation given seems to me to be reasonable. I am also satisfied that the new amendment proposed deals with the problem which was identified by Carroll J.

8.4 Secondly it is suggested that no adequate reason has been put forward for the amendment. The explanation given in the grounding affidavit is that the claim was included in error. It does not seem to me to be appropriate for the court, certainly in a case where no prejudice may be caused, to go behind such a statement. It is, of course, a matter of record that the claim was included and subsequently deleted. If anything turns on that question, (particularly if it potentially affects the credibility of any claims subsequently pursued), then it will, of course, be open to First Active to draw attention to the history of the pleadings and invite the court to draw whatever inferences may be appropriate from that history.

In the circumstances it seems to me that the balance of justice requires allowing the amendment and I would propose so doing.