THE HIGH COURT

COMMERCIAL

[2014 No. 5450 P]

[2014 No. 148 COM]

BETWEEN

EUROPEAN PROPERTY FUND PLC

PLAINTIFF

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on 28th day of January, 2016.

1. These proceedings commenced on 19th June, 2014, when the plaintiff and a co-plaintiff, Laurelmore Ltd. ("Laurelmore") claimed various reliefs arising out of two transactions referred to as the Belgrave Road Derivative and the Old Jewry Derivative. A statement of claim was delivered dated 7th August, 2014, and there was a notice for particulars and replies to the notice. The defence was delivered on 12th December, 2014, and a reply to the defence was delivered dated 22nd December, 2014.

2. The defendant brought a motion seeking to strike out the proceedings on the basis, *inter alia*, that they were statute barred and alternatively were frivolous and vexatious and bound to fail pursuant either to the provisions of O. 19, r. 5(2) of the Rules of the Superior Courts 1986 or the inherent jurisdiction of the court. The matter was heard over two days on 18th and 19th March, 2015, and I delivered judgment on the matter on 2nd July, 2015. This judgment should be read in conjunction with my earlier judgment of 2nd July, 2015, which sets out the factual background and pleadings in detail.

3. On the basis of the pleadings as they then stood and the affidavits exchanged between the parties, I struck out the entirety of the claim brought by Laurelmore against the defendant. In relation to the plaintiff, I held that its claims against the defendant fell into four parts. The first related to a loan facility referred to as the EPF Facility (though referred to by the plaintiff sometimes as the Belgrave Derivative), the second to the Old Jewry Derivative, the third to the sale of Belgrave Road and Old Jewry properties and the fourth to the delay in closing out the EPF Facility and the Old Jewry Derivative. For the reasons set out in the judgment I dismissed all of the claims of the plaintiff save those that related to the sale of the Belgrave Road and Old Jewry properties which the plaintiff alleged was procured by coercion and intimidation on the part of the defendant and a claim for damages arising out of the alleged delay in closing out of the EPF Facility and the Old Jewry Derivative.

4. In light of the judgment I granted the plaintiff liberty to bring a motion to amend its statement of claim.

5. The plaintiff brought a motion pursuant to O. 28, r. 1 of the Rules of the Superior Courts seeking leave to amend its statement of claim. Order 28, r. 1 provides:-

> *"[t]he 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."*

6. The proposed amendments are extensive. The draft amended statement of claim runs to 40 pages. A notable feature of the plaintiff's application is that all of the information was available to it or in the public domain before the proceedings were commenced, with the exception of certain testimony provided by former officers of the defendant to the Joint Committee of Inquiry into the Banking Crisis between 7th May and 6th August, 2015, and the House of Commons Treasury Committee Conduct and Competition of SME Lending Report published on 10th March, 2015. The plaintiff now wishes to add several new causes of action:-

> i) Claims based upon the relationship between the plaintiff and the defendant which give rise to a duty on the part of the defendant to act fairly and in good faith in relation to the plaintiff.
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> ii) A claim that the defendant mispriced the EPF Facility and therefore sought wrongfully to increase the rate of the interest chargeable on foot of the two facilities granted by the EPF Facility. In the alternative due to the mispricing of the facilities the defendant wished wrongfully to terminate these performing facilities.
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> iii) A claim that the defendant established limits with respect to internal credit lines based, *inter alia*, upon the plaintiff's contingent liabilities (which were not disclosed to the plaintiff) which adversely affected the creditworthiness of the plaintiff which in turn influenced the defendant in calling in or terminating the EPF Facility and the Old Jewry Derivative.
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> iv) A claim that the defendant misrepresented to the plaintiff that the EPF Facility would be restructured if the plaintiff sold the Belgrave Road property and the Old Jewry property. This is advanced as either an aspect of the intimidation and coercion claim or as a claim in its own right.
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> v) A claim that the defendant assured the plaintiff that it would not enforce breaches of the terms of the EPF Facility and therefore wrongfully called in the facilities and coerced and intimidated the plaintiff to force it to sell the two properties the subject of this litigation.

vi) A claim based upon alleged rigging of Libor by the defendant and/or its parent, Royal Bank of Scotland ("RBS"), and misrepresentations as to the interest chargeable pursuant to the EPF Facility as a result of the manipulation of Libor and a wrongful overcharging of interest as a result of the manipulation of Libor.

The legal principles

7. The plaintiff relies upon the judgment of Geoghegan J. in the Supreme Court in *Croke v. Waterford Crystal Ltd.* [2005] 2 I.R. 383 where he noted that O. 28, r. 1 was intended to be a liberal rule based on the proposition that the interests of justice are best served if the real issues and controversy between the parties are before and can be determined by the court. At para. 31 he stated:-

> *"[w]hile I quite agree that other factors have to be taken into account in the exercise of the discretion, the primary purpose of the rule is to give the court wide powers of amendment so that the real issues between the parties can be determined. This is always subject to questions of real prejudice to the defendant…"*

8. The plaintiff also relied upon the decision of Clarke J. in *Woori Bank & Anor v. KDB Ireland Ltd.* [2006] IEHC 156. At para. 3.2 of the judgment he stated:-

> *"…the starting point for a consideration of whether to allow the amendment should be to have regard to the fact that the party could have included the plea in the first place without requiring any leave from the court. Prejudice needs to be seen against that background. The prejudice that needs to be established must be prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered. The prejudice must stem, therefore, from the fact of the belated alteration of the pleadings rather than the presence (if allowed) of the amendment itself."*

At para. 5.2 he held that:-

> *"…the court should lean in favour of allowing an amendment if… it is otherwise appropriate so to do, unless it is manifest that the issue sought to be raised by the amended pleading must necessarily fail."*

Therefore it is necessary to this limited extent to assess the strength of the issue sought to be raised before leave to amend the pleading should be granted.

9. The plaintiff submitted that the pleas set out in the draft amended statement of claim were not statute barred and that the plaintiff would be entitled to institute new proceedings bringing these claims if leave to amend the existing proceedings were not granted; the defendant had not asserted that it would suffer any prejudice if the amendments were permitted and there had not been undue delay on the part of the plaintiff in seeking leave to amend the statement of claim. It was emphasised that it was not seeking to circumvent the earlier judgment of 2nd July, 2015, dismissing many of the existing pleas in the case and confirmed that the judgment was not subject to appeal.

10. The defendant opposed the application. It urged that the amendments went considerably beyond what remained to be determined in the case following the judgment of 2nd July, 2015. It submitted that many of the matters now sought to be raised were in fact *res judicata* or thinly disguised attempts to circumvent the effects of the judgment and order of July, 2015.

11. Insofar as the plaintiff now sought to advance new claims which had not previously been raised in the proceedings, it submitted that to permit the plaintiff to expand its case in this fashion after most of its case had been dismissed on the grounds that it had no prospect of success amounted to an abuse of process and offended the principle described as the rule in *Henderson v. Henderson*.

12. Much of the argument in court related to whether the rule in *Henderson v. Henderson* applied to the application or whether the Court was required to follow the more liberal principles set out in *Croke* and *Woori Bank*. Ultimately, this perceived dichotomy is unhelpful. The court has discretion under O. 28, r. 1 whether or not to allow an amendment and the court has discretion in appropriate circumstances whether or not to apply the rule in *Henderson v. Henderson.* The rule is essentially an example of how the courts police their own processes by preventing an abuse of process where it is perceived that the attempt to plead and litigate a claim that could have been brought earlier amounts to an abuse of process which the courts will not permit. Applications to amend pleadings are ultimately determined by assessing where does the balance of justice lie (as was pointed out by Barron J. in *Shepperton Investment Company Ltd. v. Concast (1975) Ltd*. (Unreported, High Court, Barron J., 21st December, 1992)), with the starting point being the fact that the party could have included the pleas in the first place without requiring any leave of the court.

Issue estoppel

13. The defendant argues that many of the claims raised in the proposed amended statement of claim relate to matters that have already been the subject of determination by this Court. That being so, the amendments should not be permitted. The defendant referred to the judgment of Keane J. in *Belton v. Carlow County Council* [1997] 1 I.R. 172 where it was stated at p. 180:-

> *"[t]he law as to issue estoppel was stated by Sir Owen Dixon in Blair v. Curran (62 C.L.R. 464 at pp.531/2) as follows:-*
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> > *'A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue- estoppel is that in the first the very right or cause of action claimed or put in suit has in the formal proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.'"*

14. In my judgment of 2nd July, 2015, I held that in fact there was no Belgrave Road Derivative and there was no novation of that Derivative to the plaintiff. The facility was replaced by the EPF Facility. Therefore any references to the Belgrave Road Derivative and any claims based upon the so called Belgrave Road Derivative cannot be permitted. I also held that the Old Jewry Derivative and the novation of the Old Jewry Derivative were governed exclusively by the terms of the contracts. The parties had agreed that their rights were to be governed by the terms of the contractual documentation and expressly excluded any other claims. On the basis of those express terms, I dismissed all claims not permitted by the express terms and in particular those founded upon the quality or

type of relationship between the plaintiff and the defendant on the basis of the clear contractual terms governing the rights and obligations of the parties.

15. The claims now brought forward in the proposed amended statement of claim do not relate to the Old Jewry Derivative or the novation of the Old Jewry Derivative. They relate to the loan agreement I referred to as the EPF Facility. In my judgment of 2nd July, 2015, I noted that the EPF Facility was a fixed interest rate demand loan facility and that the terms and conditions were set out in the facility letter and subject to the defendant's standard terms and conditions governing business lending to companies. At paras. 74-76 I summarised the claim advanced in relation to the EPF Facility:-

> *"74. The pleas in relation to the transaction are set out in paras. 35, 37, 41, 42 and 43 of the Statement of Claim. It is said that Ulster Bank concealed the true nature and extent of the liabilities associated with the Belgrave Facilities at the time of the assumption by EPF of the liabilities associated with the facility (In fact it did not assume those liabilities but assumed liabilities in respect of a new facility. The Belgrave Facility was repaid in full by Laurelmore). At para. 41 it is clarified that what is alleged to be concealed is that any break costs would be associated with the facility at any time over their term. In argument, it was clarified that the concealment relied upon was an alleged failure to bring to the attention of the plaintiffs, in this case, EPF, the fact that there were break costs associated with the facility. However, in Replies to Particulars the plaintiffs accept that the general terms of a fixed rate loan include an early repayment penalty and the general terms and conditions attaching to the EPF Facility expressly state that break costs can arise if the facility is terminated prematurely. It was further confirmed that all the misrepresentations upon which the plaintiff sought to rely predated the entry into of the relevant transactions. There was no particular misrepresentation pleaded in relation to this plea of concealment in relation to the EPF Facility.*
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> *75. It is pleaded that the EPF Facility was inappropriate and entirely at odds with the financial objectives of EPF. The plaintiffs plead that Ulster Bank represented and warranted that the EPF facility was consistent with the financial objectives of EPF and that this amounted to a misrepresentation of the utility, effect and financial benefit or advantage of the facility. In para. 50, it is pleaded that Ulster Bank advised and recommended that EPF execute the EPF Facility and that such advice and recommendation was inconsistent with the plaintiffs' and in particular, EPF's financial objectives. The financial objectives of EPF as pleaded in para. 32 of the Statement of Claim were to acquire from Laurelmore the investment property at Belgrave Road and Old Jewry and hold them for the ultra long-term using excess income to amortise debt and the long-term strategy was to expand by acquiring new assets, constantly building its income base.*
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> *76. It was also pleaded that the EPF Facility was predicated on certain financing costs which it is said were unsustainable into the future and would more than likely give rise to an event of default. It was, therefore, deceitful behaviour on the part of Ulster Bank to offer the EPF Facility in the circumstances when it knew or ought to have known this to be the case. It was pleaded that Ulster Bank set the financing costs of the EPF Facility at an artificially low rate in order to induce and encourage EPF to enter into the EPF Facility when it knew or ought to have know that the financing costs associated with the EPF Facility were unsustainable into the future, particularly in light of the cash flow impact of the break costs and/or other financing costs associated with the EPF Facility (and the Old Jewry derivative). This argument is made in the context of the interest in respect of the facility being a fixed rate of 5.045% until 31st March, 2012, plus 0.90% per annum."*

It is clear that the plaintiff's original plea in relation to the EPF Facility was relatively net. At para. 88 of my judgment I held as follows:-

> *"[t]he EPF Facility was a demand loan which nonetheless was intended to run till 31st March, 2021, and the terms were clear on the face of the letter as regards the fixed interest rate chargeable. The possibility of incurring break costs was set out in the general terms and conditions and the plaintiffs accept that costs are likely to be incurred when a fixed rate loan is terminated. The EPF Facility was accepted by its Davy directors following a resolution of the board of EPF expressly resolving that the acceptance of the proposed facility was in the interests of EPF. It is not possible in the circumstances for EPF to argue with any credibility that Ulster Bank concealed from it the true nature and extent of the liabilities under the EPF Facility. These are stated to be that break costs could be incurred or the interest payable under the terms of the facility. As the EPF Facility is a loan the MiFID Regulations can have no relevance to the loan.* ***Based upon the pleadings and the evidence before me, I can see no basis upon which EPF might avoid the terms of the EPF Facility. It follows that all claims in EPF proceedings in relation to terms of that facility ought to be dismissed in order to do justice to Ulster Bank as required by the authorities cited above.****" (Emphasis added)*

16. It is thus clear that I dismissed any claims that were based upon allegations by the plaintiff that the terms of the EPF Facility were other than as set out in the facility letter of 27th February, 2008, and the standard terms and conditions governing business lending to companies.

17. The EPF Facility was issued as part of the transaction whereby the plaintiff was to acquire the assets held by Laurelmore (the Belgrave Road and Old Jewry properties). This involved a number of connected transactions. It was to fund the acquisitions by borrowing the money set out in the EPF Facility and it was to take a novation of the Old Jewry Derivative. In the circumstances, it is not possible in my judgment to treat the plaintiff as having contracted with the defendant upon one basis in respect of the EPF Facility and on a separate, different basis in relation to the novation of the Old Jewry Derivative. Each transaction was part of a larger scheme of transactions whereby the assets of Laurelmore and associated liabilities were to be acquired by the plaintiff instead. I previously ruled that there was no basis for asserting that there existed a fiduciary relationship between the parties in relation to the Old Jewry Derivative or the novation of the Old Jewry Derivative (two of the transactions comprised in the overall scheme). That being so, it is not now open to the plaintiff to raise claims predicated upon the alleged relationship between the plaintiff and the defendant which is said to give rise to a duty to act fairly or in good faith in relation to the EPF Facility, another transaction, likewise part of the overall scheme.

18. The parties agreed that the terms of the documents executed by them should govern their respective rights and obligations. The plaintiff may not now advance claims arising out of the EPF Facility on a basis other than the express terms set out in the facility letter and the general terms and conditions and the general implied common law contractual terms governing the relationship of banker and customer, such as an implied term as to confidentiality. Thus, the pleas based upon the alleged implied terms and/or representations and/or duties of the defendant in relation to the EPF Facility set out in the proposed amended statement of claim cannot be permitted. I reject the submission that they can be revived as part of the claim for damages for coercion and intimidation, having previously been struck out.

19. The plaintiff is free to advance the case that the defendant wrongfully intimidated and coerced the plaintiff to force it to sell the

Belgrave Road property and the Old Jewry property. If the plaintiff wishes to advance a case that the defendant was not entitled to call in the loan or rely upon its security in the circumstances, it is entitled to advance this claim. However, the manner in which it is presented in the statement of claim does not make it clear that this is the case that it being advanced. The pleading as drafted is open to the interpretation that the wrongdoing alleged against the defendant is based upon duties or obligations other than those set out in the transaction documents and in particular the EPF Facility. I have ruled out a claim based upon duties or obligations of the kind now set out in the draft amended statement of claim. It is not the function of the court to plead a party's case. The proposed version cannot be permitted, but subject to my judgments, the plaintiff may replead this claim within these parameters and therefore I do not allow the amendments set out in paras. 9-24.

Mispricing of the Facility

20. At paras. 25-34 of the draft amended statement of claim under the heading *"The Mispricing of the Facility and the Requirement to Increase Margin"* the plaintiff recasts its plea that the defendant mispriced the EPF Facility and therefore wrongfully sought to increase the rate of interest chargeable on foot of the two facilities granted by the EPF Facility or, in the alternative, wrongfully sought to terminate the two facilities. Mr. Richard (Rick) Larkin, in his affidavit sworn on 2nd September, 2015, in fact concedes on behalf of the plaintiff that paras. 25, 26 and 27 are a restatement of the original allegation which appeared at paras. 42 and 43 of the original version of the statement of claim. They read as follows:-

> *"42. Up until late 2009, there were no issue between the Defendant and EPF in respect of the assets, the subject of the EPF Facility. It appears to be the case that there was an increase in funding costs for the Defendant which triggered the amounts for EPF to restructure its loans at this time. It is asserted and pleaded that the facility agreement was therefore mispriced since it was priced at a level which did not take into account the true nature and the extent of the costs associated with the facilities in question and it is asserted and pleaded that the Defendant deceitfully characterised the EPF Facility as being one which could continually finance and provide stability to EPF in light of the projections and cash flows, which the Defendant knew or ought to have known, discharged the liabilities in question. It is therefore asserted and pleaded that the Defendant set the financing costs of the EPF Facility at an artificially low rate in order to induce and encourage EPF to enter into the EPF Facility when it knew or ought to have known that the financing costs associated with the EPF Facility were unsustainable into the future, particularly in light of the cash flow impact of the break costs and/or other financing costs associated with the Belgrave Derivative and the Old Jewry Derivative.*
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> *43. It is therefore asserted and pleaded that the entry into and the execution of the EPF Facility predicated on certain financing costs was deceitful behaviour on the part of the Defendant when it knew and ought to have known that the financing costs associated with the EPF Facility were unsustainable into the future and would more than likely give rise to an event of default."*

21. This plea was dismissed for the reasons set out in my earlier judgment of 2nd July, 2015. The revised pleas concerning the pricing of the facilities all refer to implied terms and/or representations and/or duties of the defendant. They are therefore based upon the proposition that the defendant owed obligations to the plaintiff over and beyond the obligations set out in the EPF Facility and the associated general terms and conditions and the banker/customer relationship.

22. The defendant points out that at para. 31 of the draft amended statement of claim it is pleaded that the defendant was obliged to disclose to the plaintiff any and all criteria that it might rely upon in deciding whether or not to exercise its rights under the EPF Facility. It says that there was no such term in the EPF Facility. That facility sets out the objective circumstances of which the plaintiff could demand repayment.

23. I accept these submissions. To permit the plea which the plaintiff now proposes to advance has the effect of reversing the finding that the terms of the EPF Facility are as set out in that Facility and the general terms and conditions incorporated in the Facility. For these reasons the pleas set out in paras. 25-34 ought not to be permitted. In reaching this conclusion I rely also upon the plaintiff's written submissions that:-

> *"…the claims for mispricing have been paraphrased from the previous Statement of Claim and now serve only to explain and put in context the constituent elements of the coercion and intimidation which is now at the heart of these proceedings…. Mr. Larkin also avers that the issue of mispricing is also directly relevant to the issue of the calculation of loss."*

New claims

24. The plaintiff now seeks to bring new claims which were not pleaded in the original pleadings. The plaintiff advances a variety of reasons to explain why these claims were not originally pleaded. It says that the focus of the proceedings was elsewhere and that now the case has been refocused. It says that it has the benefit of new advisors it consulted in August, 2015 and new evidence has become available in the public domain as set out in para. 6 above.

25. It relies upon the judgment of Geoghegan J. in *Croke* and submits that the primary consideration for the court must be whether the amendments are necessary for determining the real questions in controversy in the litigation. It submits that unless the defendant can establish irreparable prejudice then the amendments ought to be permitted. It refers to the decision of Laffoy J. *Shell E & P Ireland Ltd. v. McGrath & Ors* [2006] IEHC 99 where she considered amendments that involved *"a completely new and expanded case, involving a multiplicity of new causes of action"* but nonetheless held that such objections to the amendments were *"very much the type of technical argument which a court will subordinate to the primary consideration of ascertaining whether the amendments sought are necessary for the purpose of determining the real issues in controversy."*

26. The plaintiff argued that it had not delayed in seeking the amendments as the motion was brought on 2nd September, 2015, following the judgment of 2nd July, 2015. I do not accept this argument. Most of the amendments do not in fact arise out of the previous judgment. There has been no explanation offered to the Court as to why the experts who were consulted in August, 2015 could not have been consulted earlier. It seems to me that the plaintiff could have advanced all of the pleas which it now seeks to advance when it initiated its proceedings.

27. Some emphasis is placed upon the emergence of new evidence relating to the relationship between the defendant and its parent, RBS, in the context of the claim that the Libor market was rigged and also in the context of the significance of the GRG Group within RBS and the defendant. However the plaintiff had previously pleaded a claim based on the activities of the GRG Group and the plaintiff was at all times aware of the fact that the defendant was a subsidiary of RBS. RBS was the subject of various investigations into Libor rigging prior to the institution of these proceedings. Therefore this does not truly explain the failure to bring forward these claims when the proceedings were originally drafted.

28. Since the decision of the Supreme Court in *Croke* less emphasis is to be placed upon the plaintiff's conduct and the failure to provide an explanation for the delay in pleading the case sought to be advanced in the amendments proposed to the statement of claim. However, *Croke* was not a case entered into the Commercial List of the High Court. Cases entered into the Commercial Court are to be determined justly, expeditiously and in a way which minimises cost. The cases are subject to case management and in particular to court determined time limits. The overriding principle is that the court must do whatever the interests of justice require. While this undoubtedly includes the objective of a fair trial on the merits it also brings in the two new procedural objectives of an expeditious resolution of the proceedings and the minimising of costs. If these objectives are to be giving any meaning, as they must, then in the appropriate circumstances, they may limit the latitude that might otherwise be afforded to litigants to a fair trial on the merits. In *Woori Bank*, Clarke J. considered the disruptive effect which could be caused by the late amendment of a party's case in the Commercial Court. He stated at para 4.2:-

> *"[t]he effectiveness of case management can be significantly reduced if parties who do not comply with the directions of the court can escape the consequences of such failure without significant adverse results. Similarly belated applications to amend (after, for example, the parties have filed witness statements and the like) can have a significant effect on the ability to conduct a trial in a timely and orderly fashion. In that context it should also be noted that the nature of the relief sought can be a material factor in assessing the adverse consequences of a delay in trial. For example, claims for specific performance or other similar proceedings (whose existence can have an effect on the ability of parties to deal in a commercial fashion with their assets) should be disposed of as quickly as possible and amendments which could have the effect of significantly delaying such proceedings can, in an appropriate case, give rise to a significant degree of what I have described as logistical prejudice".*

29. In *Moorview Developments Ltd. & Ors v. First Active Plc* [2008] IEHC 274, Clarke J. stated at para. 3.6:-

> *"I am satisfied that it is appropriate for a court in this jurisdiction to at least place some weight on the need to discourage significant non-compliance in the case management process. Otherwise there is no point in case management in the first place. It is, of course, the case that significant non-compliance (which is the matter to be discouraged) will only be encouraged where the court indulges individual cases of non-compliance which are very significant indeed. It is unnecessary to rigidly enforce time limits to encourage broad compliance with case management directives. However it is equally the case that excessive indulgence can only create a climate where there will be a significant level of non-compliance, thus defeating the very object of case management in the first place."*

30. Of course in this case the plaintiff is seeking leave to amend its statement of claim. It is not in breach of any express limits set down as part of the case management process. However, the effect of permitting the amendments sought would be to significantly expand the case more than eighteen months after the institution of the proceedings, with all of the inevitable resulting delays arising from the need to raise further particulars, to reply to those particulars and to amend the defence. This is to be assessed in the context of the conduct of the proceedings to date and in particular in the light of the motion brought to strike out the proceedings which was largely successful.

31. In *Citywide Leisure Limited (In Receivership) v. Irish Bank Resolution Corporation Ltd*. [2012] IEHC 220 McGovern J. stated at para. 12 that:-

> *"[w]here there is delay, a party may not be entitled to amend pleadings".*

32. Previously, Clarke J. had to consider the issues of delay in seeking to amend proceedings, the absence of any explanation for the delay and the discretion of the court in *Porterridge Trading Limited v. First Active Plc [*2007] IEHC 313. He stated as follows-

> *"3.4 …there will always be an effect on the party itself which will not give rise to formal legal costs and which will not, therefore, be capable of being compensated. The extent of any such effect is part of the balancing exercise that needs to be taken into account. Set against such considerations will also be the extent to which there is any reasonable basis for the failure to plead the case properly in the first place. That is not to suggest that it is an issue upon which any great weight ought to be placed, save where there is a fine balance involved in assessing the competing interests of justice arising. In substance if it is clear that the amendment is necessary to allow the true issues between the parties to be determined and if there is no prejudice which is not capable of being substantially met by appropriate orders or directions in the proceedings, then the amendment should ordinarily be allowed."*

33. I turn now to apply these principles to the balance of the draft amended statement of claim. In paras. 35-46 and 58-67 the plaintiff sets out claims for misrepresentation against the defendant. These are different to those which had previously been pleaded and therefore they are not subject to any issue estoppel. The defendant says that the amendment should not be permitted as it offends the rule in *Henderson v. Henderson*. It refers to *O'Donnell & Anor v. Lehane & Anor* [2015] IEHC 228 and *Morrissey v. Irish Bank Resolution Corporation Limited (In Special Liquidation) and Ors* [2015] IEHC 200. In *O'Donnell,* I applied the rule in an application to annul an adjudication of bankruptcy. Both the petition and an appeal had been fully argued and finally determined. In those circumstances, there had clearly been a full hearing on the merits (and appeal) before the application to annul the adjudication was heard before me. In *Morrissey*, the plaintiff commenced proceedings in circumstances where there were already extant proceedings where he was the defendant. Initially Irish Bank Resolution Corporation Limited (In Special Liquidation) was the plaintiff but the purchaser of Mr. Morrissey's facilities was subsequently substituted as plaintiff in those proceedings. These debt proceedings (in which Mr. Morrissey was a defendant) had involved a modular trial and a number of lengthy hearings which had been case managed over several years by Finlay Geoghegan J. A number of issues had been disposed of during the course of those hearings and the sole issue remaining to be determined in the last module of the debt proceedings was the validity or otherwise of the assignment of the facilities and the litigation to the substituted plaintiff. In those circumstances I held that to institute new proceedings seeking to re-litigate matters which either had been raised and disposed of in the debt proceedings or which could have raised and disposed of in those proceedings offended the rule in *Henderson v. Henderson*.

34. The situation here is different. The proceedings have not been determined. While I have significant reservation about the delay in raising the issues set out in these pleas and there has being no real explanation as to why they were not included in the proceedings from the beginning or at the hearing of the motion to strike out the proceedings, the fact still remains that the plaintiff would have been free to plead any case from the outset if it had wished so to do. It wishes to amend its pleadings to include these new claims. It will be necessary to determine these matters in order to determine the issues between the parties. In seeking to amend the statement of claim at this stage in the proceedings, albeit after the motion to strike out the pleadings on the grounds that they disclosed no reasonable cause of action or were frivolous and vexatious, will not cause such prejudice to the defendant as cannot be dealt with by means of appropriate orders as to costs. The application has been brought before discovery has been sought or made and before a date for trial has being fixed or witness statements have been directed, prepared or exchanged. In the circumstances I

conclude that to permit these amendments would not amount to an abuse of process (as is required if the rule in *Henderson v. Henderson* is to apply) and accordingly I allow the amendments to the statement of claim set out in paras. 35-46 and 58-67 save that the words *"[i]n light of the mispricing of the EPF facility"* at the beginning of para. 35 will not be permitted. The plea in relation to this alleged mispricing of the EPF Facility has not been allowed so it cannot be reintroduced into the proceedings in this indirect fashion in para. 35.

35. Paragraphs 47-51 are headed "*Threats, Coercion and Duress by the Defendant*". These pleas were specifically permitted by me following my judgment of 2nd July, 2015. The plaintiff may amend its statement of claim to include these pleas.

36. Paragraphs 52-55 of the draft amended statement of claim is headed "*The Conduct of the Defendant's GRG*". Paragraph 52 relates to the change in the relationship between the parties alleged to have occurred by virtue of the transfer of the business and lending relationship of the plaintiff to the defendant's global restructuring group. The paragraph is predicated upon the relationship being as previously pleaded in the statement of claim i.e. other than that of lender and borrower and as solely set out in the contractual documentation. However, I have held that the proposed amendment to the pleadings setting out the basis and details of this alleged relationship cannot be permitted. It therefore follows that para. 52 as drafted cannot be permitted either. In any event the plaintiff has already pleaded that the defendant used illegitimate, inappropriate and unlawful means to pressurise it and to force its servants or agents to divest itself of its assets. It was conceded that the plea was included solely to set the context for the alleged subsequent events. In those circumstances I refuse to permit this statement of claim to be amended by including para. 52.

37. Paragraphs 53, 54, 55 sets out the facts of the report of Mr. Lawrence Tomlinson in the United Kingdom concerning the practices of RBS, the parent of the defendant and the conclusions of the report. RBS is not a party to these proceedings. The defendant is a subsidiary of RBS. There is no plea that the findings by Mr. Tomlinson in relation to RBS relate also to the defendant. The pleas therefore as they stand are not relevant to the case advanced by the plaintiff against the defendant and accordingly I refuse leave to amend the statement of claim by including paras. 53-55.

38. Paragraphs 56 and 57 of the draft amended statement of claim are headed "*Breaches by the Defendant of its Duties and Obligations"*. They deal with implied obligations, duties and representations which I have previously rejected (with the exception of the representations pleaded in paras. 35-46 which I have permitted). Therefore these pleas, predicated upon implied terms and conditions, obligations and duties, cannot be permitted and for this reason I refuse leave to amend the statement of claim as set out in paras. 56 and 57 of the draft amended statement of claim.

39. Paragraphs 68-72 set out the plaintiff's case against the defendant to the effect that the defendant wrongfully delayed in closing out the Belgrave Road Derivative (which I have called the EPF Facility) and the Old Jewry Derivative thereby incurring additional, unnecessary costs which were charged to the plaintiff. It is also claimed that these costs were improperly increased by the application of an incorrect interest rate. The paragraphs also set out the plaintiff's case in relation to its allegation that it was coerced and intimidated into selling the Belgrave Road and Old Jewry properties. These are all matters which I declined to strike out in the original motion before me. I therefore permit the amendments set out in paras. 68-72 of the draft amended statement of claim save that it should be clarified that what was pleaded as the Belgrave Road Derivative is in fact the demand loan facility to EPF.

40. At paras. 73-82 the plaintiff pleads that the defendant made certain representations in respect of Libor and that those representations were made carelessly and/or negligently and that the defendant had no reasonable grounds for believing that the Libor representations were true. Insofar as the plea relates to representations made upon the alleged assumption of the novated interest obligations of Laurelmore by the plaintiff, this plea cannot be permitted. I have already held that the EPF Facility amounted to a new loan agreement entered into between the plaintiff and the defendant and the interest rates are fixed interest rates and are not related to Libor. An amendment which effectively overturns this ruling cannot be permitted.

41. The plaintiff says that the calculation of the interest break costs or break penalties by the defendant at the time of the sale of the Belgrave Road and Old Jewry properties was referable to the applicable inter-bank offered rate know as Libor. At para. 74 the plaintiff sets out four representations it alleges were made by the defendant to the plaintiff. At para. 75 it is pleaded that *"[t]he Libor representations were false and can be particularised at the moment as follows".* There follows a number of pleas which in fact do not support the contention that the defendant's alleged representations to the plaintiff in relation to Libor were false. For example, the first plea refers to *"[t]he Defendant's conduct in relation to the fixing of Libor rates was such as to cause the Defendant to report its own conduct to the Financial Services Authority and other Authorities".* This clearly is not a representation by the defendant to the plaintiff and it does not explain how any representation by the defendant to the plaintiff was false. Furthermore the plea in fact refers to the defendant's parent, RBS, and therefore cannot amount to a particular of a false representation by the defendant to the plaintiff. Paragraphs 75 (iii), 76, 77 and 78 all relate to the actions of RBS, the parent company of the defendant and its employees. The pleadings do not link these alleged wrongdoings of RBS to the representations allegedly made by the defendant to the plaintiff, which representations in turn allegedly resulted in unlawfully increased interest break costs or break penalties incurred at the time of the sale of the Belgrave Road property and the Old Jewry property. On that basis, these pleadings are not in fact advancing the case of the plaintiff against the defendant. They neither elucidate nor clarify the case being advanced. For this reason, I refuse to permit the amendments set out in paras. 75-78 of the draft amended statement of claim. (For completeness sake, I should state that the fact that a party is subject to an investigation cannot of itself render a representation false (unless it be to the effect that it was not under investigation) and therefore the pleading in para. 75(ii) to the effect that the defendant is the subject of an investigation by the Financial Services Authority and the European Commission and other authorities in relation to rates does not amount to a misrepresentation.)

42. In paras. 79 and 80 the plaintiff wishes to amend its statement of claim as follows:-

> *"The Defendant was careless and/or negligent in making the Libor representations and had no reasonable grounds for believing that the Libor representations were true. In particular, the Defendant was proposing to customers that they enter into financial transactions containing obligations measured by reference to Libor such that it knew the Libor representations were being made, or might be made, to such customers and therefore ought to have taken care to ensure that such representations were not false.*
>
> *80. Further, if and insofar as necessary, the Plaintiff will contend that individuals within the Defendant could have prevented the false Libor representations from being made had they made the facts which rendered the Libor representations false more widely known and/or had a duty, power or responsibility to see that false Libor representations were not made to persons such as the Plaintiff".*

43. It is clear from these two paragraphs that the plaintiff is conflating permissible and impermissible pleas. Insofar as the plaintiff wishes to say that the defendant was careless or negligent in making Libor representations to it and that the defendant had no

reasonable grounds for believing that the Libor representations made by the defendant to the plaintiff were true, it may do so. However, it may not plead a generalised case relating to the manner in which the defendant may have dealt with other customers. As stated above, it is no function of the court to plead a party's case. I will therefore refuse to permit amendment of the statement of claim in the terms proposed in respect of paras. 79 and 80 of the draft amended statement of claim but I will permit the plaintiff to advance its own case in relation to Libor representations made to it by the defendant.

44. Paragraphs 81 and 82 relate to the duty owed by the defendant to the plaintiff in relation to the Libor representations and the damage or allegedly thereby occasioned to the plaintiff. I accept that the plaintiff may amend its statement of claim as set out in these two paragraphs.

45. Paragraphs 83 to 86 of the draft amended statement of claim is headed "*Libor Implied Terms"*. It is pleaded that *"[i]t was an implied term of the contractual arrangements between the parties that the floating rates payable under the interest instruments would be calculated by reference to Libor…"* I do not understand this plea as it stands. The EPF Facility comprised two fixed rate loans and therefore this plea cannot refer to these facilities. That being so, what are the contractual arrangements or the interest instruments referred to? If an amendment is to be permitted it should elucidate and clarify the true issues between the parties. While I accept that the court is not concerned with assessing the strength or otherwise of the proposed amended plea (save to extend that it may be bound to fail) it nonetheless may have regard to whether or not the proposed amendment actually pleads the plaintiff's case with clarity. As I am satisfied that this is not the case in respect of para. 83 and I refuse leave to amend the statement of claim in the manner pleaded in para. 83.

46. If the pleas advanced in paras. 84 to 86 are to set out the plaintiff's case that it was obliged to incur unlawfully increased or inflated break costs and penalties upon the sales of the Belgrave Road and Old Jewry properties by reason of the wrongful acts of the defendant or that certain demands were unlawful, this is permissible and the plaintiff should be permitted to amend its pleadings to set out its case in this regard. However, the case as in fact pleaded in this respect cannot be permitted as it remains extremely unclear and confusing. The plaintiff may recast this plea but it must make clear the precise contracts referred to, the terms upon which interest was chargeable, the demands for payment made by the defendant and precisely how the plaintiff alleges that the calculation of interest was unjustified and the demands unlawful. Furthermore insofar as the contracts referred to include those contracts the subject of my earlier judgment, the plaintiff is bound by the terms of that earlier judgment.

47. Furthermore, I will not permit an amendment which raises pleas that there were implied contractual terms (which contracts are not identified) between the plaintiff and the defendant regarding the conduct of RBS when no case has been pleaded that the defendant had any control of or involvement in the actions of RBS and where I have ruled that the plaintiff may not raise pleas of implied terms in respect of the only relevant contracts identified to date in the proceedings, the EPF Facility, the Old Jewry Derivative and the novation of the Old Jewry Derivative. Therefore those parts of draft para. 84 relating to RBS will not be permitted.

48. At para. 84 the plaintiff seeks to plead that the defendant made false or misleading representations to the BBA and/ or that it engaged in the practice of attempting to manipulate Libor and that it was an implied term of the "*contractual relationship*" that it would not engage in this behaviour. I have already ruled that the plaintiff may not advance a case that there were implied terms applicable to the three contracts. It would appear that these are the contracts referred to in paras. 84-86. I refuse to allow any amendment to the statement of claim based upon any alleged implied terms of these contracts.

The reliefs sought

49. The proposed amended prayer for relief seeks a number of declarations. Two of them are as follows:-

> *"2. A Declaration, that in interpreting the written instruments evidencing the financial arrangements between the parties, that the Defendant owed the Plaintiff a duty to act honestly and fairly…*
>
> *5. A Declaration that the Defendant, in terminating or demanding the financing arrangements between the parties, would only rely on clear, transparent and express terms of the written documents evidencing those arrangements".*

It appears to me that these reliefs ought not to be permitted. The first is based upon an issue which I ruled out of the proceedings (a duty allegedly owed by the plaintiff to the defendant other than as previously set out). The second is predicated upon a plea which I have not permitted in this judgment.

50. At relief number three the plaintiff seeks restitution of the penalty or break costs associated with and charged to the plaintiff on the sale of the Belgrave Road and Old Jewry assets. In fact it has not pleaded a case in restitution as such. It advanced a case for damages. This prayer for relief should be recast. This is particularly. so, in the light of prayer number four which reads:-

> *"[r]estitution of the amount lost by the Plaintiff on the delay in closing out the interest rate arrangement associated with and/or related to the sale of the Belgrave Road asset".*

51. Prayer number six reads:-

> *"[d]amages for fraudulent misrepresentation with respect to the deliberate and conceded behaviour of the Defendant in fixing LIBOR".*

The plaintiff has not pleaded that the defendant conceded behaviour which amounted to the fixing of Libor by it. (Mr. Richard (Rick) Larkin's affidavit of 2nd September, 2015, erroneously refers to the defendant in this regard though all the material exhibited to support his averments relates to RBS and none of it relates to the defendant). The pleas in the draft amended statement of claim all relate to the actions of RBS and its employees. No basis for the attribution of liability to the plaintiff for these alleged actions has been advanced, other than the fact that the defendant is the subsidiary of RBS. This is clearly contrary to the fundamental principles of company law. In the course of the hearing of this motion to amend the statement of claim, the plaintiff referred to certain evidence which was led before the Joint Committee of Inquiry into the Banking Crisis in order to demonstrate that the RBS Group operated as an integrated group and RBS exercised a high level of control over the Group including the defendant. There is nothing remarkable about this and certainly nothing to say why the defaults of the parent should be attributed without further allegations to be proved at trial to the subsidiary.

52. In any event, this evidence is not admissible in other proceedings by virtue of the provisions of s. 29 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 which provides:-

> *"[n]one of the following is admissible as evidence against a person in any other proceedings (including disciplinary*

proceedings) except proceedings in relation to an offence under this Act or the offence of perjury:

(a) a statement or admission made by the person to the committee during the course of the Part 2 inquiry".

Furthermore, in its terms the prayer at relief number six asserts a fraudulent claim. The previously advanced case in fraud has been dismissed. The draft amended statement of claim does not in fact seek to allege fraud. For these reasons I refuse to permit the statement of claim to be amended to include prayer number six.

Conclusions

53. In redrafting the statement of claim the plaintiff sought to present its case in a more readily understood and coherent fashion than if it had simply deleted those portions of the statement of claim which had been struck out and inserted the proposed amendments into that statement of claim as appropriate. Unfortunately, in the light of this judgment this laudable end cannot be achieved. I therefore direct that a further draft amended statement of claim be prepared by the plaintiff which goes no further than was sought in the draft amended statement of claim the subject of this judgment but which complies with the rulings in this judgment. The redrafted amended statement of claim should be furnished to the defendant and to the Court to ensure that a useable statement of claim which conforms with the scope of my two judgments in this case may be permitted by order of the Court and the proceedings continue on the basis of that new statement of claim. The new statement of claim is to be delivered within three weeks of this judgment.