THE HIGH COURT

2011 No. 4336 P.

BETWEEN

CIARA QUINN

COLETTE QUINN

BRENDA QUINN

AOIFE QUINN

SEAN QUINN JUNIOR

PATRICIA QUINN

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION

KIERAN WALLACE

DEFENDANTS

SEAN QUINN SENIOR

DARA O'REILLY

LIAM MCCAFFREY

THIRD PARTIES

JUDGMENT of Mr Justice Garrett Simons delivered on 27 March 2019

INTRODUCTION

1. This judgment is delivered in respect of the following three applications moved on behalf of the Plaintiffs. The first application seeks a ruling as to the nature of the case which the Plaintiffs are entitled to advance on the basis of the pleadings as currently constituted. The pleadings include a plea of undue influence, but there is a dispute between the parties as to whether the plea permits the Plaintiffs to advance an argument that the undue influence was carried out by a particular individual (Mr Sean Quinn Snr).

2. The second application, which is advanced in the alternative, seeks leave to amend the pleadings so as to include an express plea that the alleged undue influence was carried out by Mr Sean Quinn Snr.

3. The third application is that the Plaintiffs be permitted to address in their oral evidence matters which are not dealt with in their witness statements. More specifically, the Plaintiffs now wish to give oral evidence in respect of what they allege was the undue influence which their father, Sean Quinn Snr, exerted over them. It is sought to adduce this evidence in support of an argument that certain transactions said to have been entered into by the Plaintiffs with Anglo Irish Bank (now the Irish Bank Resolution Corporation) should be set aside.

4. The Defendants resist all three applications. In brief outline, the Defendants object to what they say is an impermissible attempt by the Plaintiffs to change the nature of their case at the thirteenth hour. It is submitted that insofar as an allegation of undue influence has been pleaded, it is confined to an allegation that undue influence was exercised by officials of Anglo Irish Bank. The pleadings do not make an allegation that undue influence was exerted by Sean Quinn Snr. Nor is any such allegation made in the individual witness statements filed on behalf of each of the five Plaintiffs. The application to amend the pleadings is also resisted on the grounds that same would cause real prejudice to the Defendants.

PROCEDURAL HISTORY

5. In order to put the arguments of the parties into context, it is necessary to rehearse the procedural history of these proceedings. This is because one of the central arguments made on behalf of the Defendants is that the Plaintiffs should not be permitted to change their case more than seven years after the proceedings first issued.

6. These proceedings were instituted on 16 May 2011. The proceedings seek to set aside a number of transactions entered into between the Plaintiffs and the bank previously known as Anglo Irish Bank. Anglo Irish Bank was taken into State ownership pursuant to the Anglo Irish Bank Corporation Act 2009, and was subsequently renamed as the Irish Bank Resolution Corporation. I propose to use the shorthand "*the Bank*" to refer to the first named defendant. The Bank is now in special liquidation pursuant to the Irish Bank Resolution Corporation Act 2013. The share receiver (Mr Kieran Wallace) is the second named defendant to the proceedings ("*the Share Receiver*").

7. In brief outline, the impugned transactions consist of a number of share charges and personal guarantees said to have been executed by the individual Plaintiffs in favour of the Bank. The share charges are said by the Bank to have been executed on various dates between January 2003 and March 2009. The personal guarantees are said by the Bank to have been entered in or about October 2008.

8. The Plaintiffs seek to impugn these transactions on a number of grounds including, *inter alia*, undue influence and improvident or unconscionable bargain. In the case of some of the impugned transactions, the Plaintiffs make an additional allegation of "signature switching". More specifically, they allege that they had signed an *earlier* draft of a share charge but that this signature page was then—wrongfully they say—appended to a later revised draft of the share charge by persons within the Quinn Group of companies. In respect of the balance of the impugned transactions, the Plaintiffs appear to accept that they signed the signature pages of the documents, but maintain, for various reasons, that they are not bound by same.

9. For purposes of the three applications the subject of this judgment, the plea of most immediate relevance is that of "undue influence". Before turning to examine the precise nature of the plea made in this regard, it may be useful to provide a very brief outline of the background to the proceedings. The purpose of this exercise is simply to assist the reader in understanding the arguments of the parties on the applications the subject-matter of this judgment. This court has, obviously, not reached any conclusion as to any disputed facts. This court has not yet had the benefit of oral evidence from any of the parties, the hearing of which evidence is scheduled to take several months.

10. The Plaintiffs are the adult children of Mr Sean Quinn Snr. It is common case that Mr Quinn had been an extremely successful businessman. These businesses included quarrying and the manufacturing of concrete; insurance; and hotel and hospitality. The businesses were conducted through a large number of companies.

11. It appears that in or about 2002, Mr Quinn transferred the beneficial ownership of the businesses to his children. (As one of the children, Brenda, was a minor at this time, her shares were held on trust until she reached the age of majority in 2005).

12. The ownership issue is addressed as follows by the Plaintiffs in their Statement of Claim.*

> "10. Whilst Sean Quinn Snr. was the founder of the Quinn Group, the first to fifth named Plaintiffs were, at all times material to these proceedings, the ultimate beneficial owners. Quinn Group (ROI) Limited ('ROI') is a private limited company registered in Ireland under registration number 433246. Since 2002, the shares in ROI have been held by each of the first to fifth named Plaintiffs and Quinn Quarries Limited. Quinn Quarries Limited owns approximately 3% of the ordinary issued share capital in ROI. The fifth named Plaintiff, in turn, holds all of the shares in Quinn Quarries Limited.
>
> 11. ROI is the ultimate holding company of the 95 companies which comprise the Quinn Group, and which carry out a variety of businesses including the following: manufacture of cement and concrete products and of container glass; manufacture of radiators and plastics; provision of general insurance; hospitality; real estate; and financial services. As a consequence of the shareholding of the first to fifth named Plaintiffs in ROI, they collectively hold the beneficial shareholding in the subsidiary companies within the Quinn Group. Schedule 1 to this Statement of Claim contains a chart showing all the companies within the Quinn Group."

*It should be noted that the Statement of Claim has previously been amended pursuant to orders of the Court of Appeal of May 2015 and January 2016 (Trialview 79-52). To avoid any confusion with the *further* set of amendments which the Plaintiffs now seek to make, the extant version of the Statement of Claim will be referred to simply as "*the Statement of Claim*" rather than "*the amended Statement of Claim*").

13. The Plaintiffs were also the shareholders in a company registered in Madeira known as Bazzely V Consultadoria Economica E Participacoes, Sociedade Unipessoal LDA (hereinafter "*Bazzely*"). The precise circumstances in which the Plaintiffs became shareholders in Bazzely, and the extent of their knowledge, if any, of its activities, are very much in dispute in these proceedings. These are all matters which this court will ultimately have to adjudicate upon, having heard all of the witnesses and having heard the legal submissions on behalf of all parties. Other than to reiterate that I have, obviously, not yet formed any view in relation to these matters, I do not propose to say anything further in relation to same.

14. For the purposes of the present judgment, it is sufficient to note that it is common case that Bazzely entered into a series of "contracts for difference" ("*CFDs*") in respect of shares in the Bank during the period October 2005 to January 2009. These investments resulted in enormous losses in circumstances where the Bank's share price fell dramatically in value. This resulted in Bazzely becoming liable under the CFDs to make payments in respect of what are described as "margin calls". (It appears that the payments to the counterparties may actually been made by other companies, namely Quinn Group Family Properties Ltd. and Barlo Financial Services Ltd. Again, this is not a matter which has to be determined for the purposes of this judgment). Ultimately Bazzely's positions in the CFDs were unwound, and this, seemingly, resulted in the transfer of the ownership of a significant number of shares in the Bank which had previously been held by the counterparties. The details of how some of these shares eventually came to be transferred to certain Cypriot companies said to be beneficially owned by the individual Plaintiffs is another issue in dispute in these proceedings.

15. It is the Plaintiffs' case that most of the transactions impugned in these proceedings were entered into as part of the unwinding of Bazzely's position under the CFDs. (Two of the guarantees predate this period, but it is pleaded that they both remained in place to secure borrowings advanced for Bazzely's CFD positions).

16. It is also alleged that insofar as the Bank engaged in lending to facilitate these transactions, it was acting illegally by reference to the Market Abuse Regulations and/or Section 60 of the Companies Act 1963. The question of whether the alleged illegality—if proven—would affect the validity or enforceability of the impugned transactions was the subject of the trial of a preliminary issue. The matter ultimately came before the Supreme Court on appeal. In its judgment in *Quinn v. Irish Bank Resolution Corporation* [2015] IESC 29, the Supreme Court concluded that the underlying lending contracts are enforceable, notwithstanding their illegality; and that in circumstances where the Plaintiffs had never made a case which suggested that the security arrangements might be unenforceable even if the underlying lending transactions were enforceable, the Plaintiffs are not entitled to rely on any of the alleged breaches of either Section 60 of the Companies Act 1963 or the Market Abuse Regulations.

17. Following on from the Supreme Court judgment, there were cross-applications to amend the statement of claim (brought by the Plaintiffs), and to strike out a portion of the statement of claim (brought by the Bank). These applications ultimately came before the Court of Appeal in *Quinn v. Irish Bank Resolution Corporation* [2016] IECA 21. In brief, the pleas in respect of Section 60 of the Companies Act and the Market Abuse Regulations were struck out.

18. Separately, the Plaintiffs had been permitted in May 2015 to make an amendment to introduce the issue in respect of the alleged "signature switching" (referenced in paragraph 8 above).

19. The consequence of all of this is that the issues in the case have narrowed significantly. The hearing of the case commenced before me on Tuesday 12 March 2019. It appears from the opening speech of leading counsel on behalf of the Plaintiffs, Mr Bernard Dunleavy, SC, that one of the principal issues in this case is now the allegation of undue influence. (See Transcript, Day 1, 12 March 2019, page 6). I will return presently to discuss how the allegation of undue influence is now formulated, but it is first necessary to set out how the allegation has been pleaded in the Statement of Claim.

20. The allegation of undue influence is pleaded as follows in the Statement of Claim (Trialview 79-52).

"91. The Plaintiffs took no active role in any matter relating to Anglo lending, and were effectively dictated to in relation to such lending pursuant to which the personal guarantees and share pledges were required by Anglo, as detailed below:

(a) The first to fifth named Plaintiffs had no input into or involvement in the investment strategy that led to Bazzely building up very substantial CFD positions in Anglo.

(b) None of the investment decisions made from 2005 to 2007 relating to the use of CFD positions and the investment in positions in Anglo, nor the decisions made from late 2007 onwards to continue to maintain and fund the ongoing margins calls on those CFD positions, as the Anglo share price declined, were ever instigated by or discussed with any of the first to fifth named Plaintiffs.

(c) There was a complete lack of autonomy on the part of the Plaintiffs in their actions in signing the personal guarantees. They received no independent legal or financial advice in relation to the wisdom or otherwise of signing the personal guarantees. Anglo never sought a single meeting with any of the Plaintiffs in relation to these matters, nor did Anglo ever discuss these matters with any of them.

(d) In signing the personal guarantees the Plaintiffs had no appreciation of the meaning or effect of the documentation that they were being prevailed upon to sign and when asked to sign personal guarantees they only had the signature page presented to them and did not have the benefit of the entire document.

(e) In executing the share pledges the Plaintiffs had no appreciation of the practical meaning or effect of the complex nature of the documentation that they were being prevailed upon to sign.

(f) While the Plaintiffs had a limited appreciation from general family discussions that certain assets would be put into their own names, they were not informed, nor did they have any, or any proper, realisation or understanding that in executing security required of them by Anglo, they could be exposing themselves to significant personal financial liabilities, or that they were putting their own asset position at risk.

(g) If they had been made aware of the potentially dire personal circumstances in which they could have found (and do find) themselves as a consequence of executing the documentation, they would not have signed it.

(h) The sixth named Plaintiff had no appreciation that some shares were being put in her name and she was never informed, nor did she have any, or any proper, realisation or understanding that she could be exposing herself to significant personal financial liabilities, or that she was putting her own asset position at risk in executing security required of her by Anglo.

(i) Each of the Plaintiffs were prevailed upon to sign the relevant documentation, comprising the personal guarantees and/or the share pledges, without any independent scrutiny, advice or consideration of the meaning, effect or implications of the documentation in question.

(j) In the desire, inter alia, to placate Anglo, and with the systematic but incorrect conflation of the corporate interests with the interests of the first to fifth named Plaintiffs as shareholders in ROI and in the Cypriot Companies, the position of the Plaintiffs as individuals was never given any independent consideration.

(k) The Share Pledges relied upon by IBRC to ground the appointment of Mr Kieran Wallace as share receiver of the Plaintiffs' shares in Quinn Group (ROI) Ltd and/or Quinn Quarries Ltd were not signed by the Plaintiffs or by any of them

[…]

100. In the foregoing premises, the personal guarantees and share pledges were not procured as a result of the exercise of the Plaintiffs' own free and informed consent and were rather procured and obtained in circumstances of undue influence."

21. The Bank delivered a request for further and better particulars on 15 June 2011, and the Plaintiffs responded on 6 July 2011 (Trialview 79-12). The replies in respect of the plea of undue influence are as follows.

72. With regard to paragraph 91(e) of the statement of claim, please identify the person or persons who the plaintiffs will allege prevailed upon them to sign the share pledges referred to.

The Plaintiffs trusted senior executives in the Quinn Group (including Sean Quinn Senior). Anglo insisted to those executives that the Anglo share price had to be supported and the security had to be provided. This insistence was communicated to the Plaintiffs by these senior executives. In this fashion, Anglo exerted undue influence upon the Plaintiffs and exercised control upon the will of the Plaintiffs.

[…]

75. With regard to paragraph 100 of the statement of claim, please provide full and detailed particulars in respect of each plaintiff's claim that they were the subject of undue influence, including but not limited to the identity of the person or persons under whose influence they operated and the material facts relevant to each such assertion.

See Reply 72 above. Further:

- Anglo insisted that all margin calls be met on a timely basis;
- Anglo provided funds, without due diligence and without negotiation as to the terms of the advances;
- Anglo provided those funds not for the good of the Quinn Group or any member of the Quinn family, but for its own good (i.e. to support its own share price);

• Anglo did these things through senior management of the Quinn Group and through SQS, the Plaintiffs' father (in the case of the First to Fifth Named Plaintiffs) and husband (in the case of the Sixth named Plaintiff), whom they trusted.

22. An even more definitive response has been set out in the Replies to the Share Receiver's Request for Particulars (Trialview 79-13). At page 59, in response to a request to state under the influence of what person each Plaintiff is alleged to have been acting, the answer is stated as "Anglo".

23. The Bank's second amended Defence was delivered on 10 December 2018 and states as follows at paragraph 102 (Trialview 79-53).

> "102. If the Plaintiffs or any of them were subjected to any pressure or influence (which is denied) that pressure emanated from the Plaintiffs' own servants or agents or from the management of companies owned (directly or indirectly) by the Plaintiffs themselves, and in those premises a claim to set aside the transactions does not lie at the suit of the Plaintiffs or any of them."

CHANGED POSITION RE: UNDUE INFLUENCE

24. The position adopted by the Plaintiffs in their Statement of Claim and in their Replies to Particulars was that the alleged undue influence had been exerted by officials of the Bank.

25. This position was abandoned in the opening speech of leading counsel for the Plaintiffs. There is now no allegation made against the Bank. Instead, the reformulated position is that the undue influence had been exerted by the Plaintiffs' father, Sean Quinn Snr.

26. This is illustrated by reference to the following extracts from the transcript. See Transcript Day 1, 12 March 2019, page 115 and 116.

> "MR. DUNLEAVY: Yes. And I think in my opening, Judge, I think what I said to you was, that there was absolutely no question at any stage the children were in a position to refuse their father, and that is the case, but that is not because their father was someone who roared at them in a room or in some way physically intimidated them, or anything like that; it is because of the nature of the relationship that existed between child and father. He was someone whom they found impossible to refuse, and, in fact, as we go through the documents, we'll see that the bank was aware, for example, in relation to the boards of directors that Mr. Quinn had in respect of his various companies, that nobody was capable of refusing him. The way in which the business ran was that he effectively directed everything on his own, and he was the sole decision maker. No decisions were challenged and certainly nothing that was asked of the children were refused. They felt incapable of refusing that, any request from their father, and that will be their evidence."

27. The position was elaborated upon as follows on 13 March 2019. See Transcript Day 2, 13 March 2019, page 13 and 14.

> "MR. JUSTICE SIMONS: Can I ask this, what explanation will your clients give in evidence as to the reason for not seeking independent advice?
>
> MR. DUNLEAVY: Their explanation will be that the matter simply didn't arise. It didn't arise in circumstances where their relationship with their father was such that they signed whatever they were asked to sign. That was how their father dealt with them. As I indicated in my opening, refusal of a request from their father in relation to any aspect of the business could not be contemplated and was not contemplated by them.
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> MR. JUSTICE SIMONS: Why?
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> MR. DUNLEAVY: Because their father was in a relationship of absolute influence over them, Judge. I mean that is at the heart of the claim that's made by the Plaintiffs in respect of undue influence. That will be their evidence. And the bank must have concluded that that was so, because it never dealt with them at all. It knew that all that had to be done was to make a request to Sean Quinn either directly or through Mr. O'Reilly, and whatever was asked would be done. The bank appears to have known, on the basis of the documentation that we have seen, that even in respect of those requests that were made, they were carried out highly irregularly, and the bank didn't care. The bank knew that whatever was asked of them would be done. The bank never made any request of them themselves. The bank never met them. The bank never discussed anything with them. Never wrote to them directly. Never called them. Never visited them.
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> MR. JUSTICE SIMONS: But the guarantee that you showed me, I know it's not the one in issue, specifically warns the person to obtain independent legal advice.
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> MR. DUNLEAVY: All of the guarantees are like that, Judge. That's not a single feature of the particular guarantee I showed the Court. That is a feature of every guarantee they signed in relation to this case. But their relationship with their father was such that they were asked to sign something, and they signed it unquestioningly. There was absolutely no room for refusal at all. Now, that's their relationship with their father. That is the degree of influence that he has. That is the evidence that they'll give. Of course they'll be tested in relation to that evidence, but I don't understand that evidence is going to be contradicted by anybody. Nor do I understand that any evidence is going to be led on the Defendants' side that the Defendants had any other understanding of the relationship that their father had. So, that's perhaps a rather long answer to your short question, but that's why they didn't ask for legal advice.
>
> MR. JUSTICE SIMONS: Very good. Thank you.
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> MR. GALLAGHER: I don't want to interrupt him. None of that is in the witness statements. It's a point I'll deal with in my opening, but lest I be seen as letting the objection go, I won't be leaving it go, I'll be addressing it."

28. The opening speeches took five days. When the hearing resumed on Friday 22 March 2019, counsel on behalf of the Plaintiffs, Mr Bernard Dunleavy, SC, moved the three applications described in the opening paragraph of this judgment. These applications were responded to on behalf of the Bank by Mr Brian Murray, SC, and on behalf of the Share Receiver by Mr Paul Gardiner, SC.

(1). APPLICATION FOR RULING AS TO SCOPE OF PLEADINGS

29. Counsel on behalf of the Plaintiffs began his submission by explaining that the application to amend the Statement of Claim was

being made in the alternative only. The Plaintiffs' opening gambit is that an allegation of undue influence against Mr Sean Quinn Snr is already part of the case as currently pleaded, and that this is evident from a consideration of a combination of the Statement of Claim; the Defence; and the Replies to Particulars. (The relevant extracts relied upon by counsel in this regard have been set out earlier under the heading "Procedural History", at paragraphs 20 to 22).

30. In their written legal submissions delivered in April 2015, the Plaintiffs had summarised their case in respect of undue influence as follows. (Trialview 84-1).

> "60. It is the Plaintiffs' case that actual improper pressure was brought upon them by Anglo *via* Sean Quinn Senior, father of the first to fifth named Plaintiffs and husband of the sixth named Plaintiff, to enter into the share pledges and guarantees impugned in the within proceedings. The Plaintiffs did not have direct contact with Anglo Irish Bank or its officials at the time of the signing of share charges and guarantees impugned in these proceedings. The Plaintiffs submit that Anglo was actually aware of — and the instigator of — an improper pressure being brought to bear upon them by Sean Quinn Senior and/or was constructively so aware and/or the relationship as between Sean Quinn senior and his children and wife (the Plaintiffs in the within proceedings) gave rise to the presumption of the presence of an undue influence."

31. At paragraph 62(k) of the written legal submissions, it is stated as follows.

> "(k) Anglo was aware of the actual influence being exerted by Sean Quinn Senior (and by Anglo through Sean Quinn Senior) on the Plaintiffs to execute the share charges and guarantees impugned in the within proceedings."

32. Counsel submits that it is obvious from the written legal submissions filed in reply on behalf of the Bank on 22 May 2015 that the Bank understood and was able to meet a case to the effect that the undue influence was exerted by Sean Quinn Snr. Reference was made in particular to paragraphs 616 of the Bank's written legal submissions (Trialview 84-2).

> "616. Despite the fact that the Plaintiffs have pleaded that undue influence was exerted over them by the Bank itself, in their legal submissions they now make a significantly different case. They now allege that the pressure was brought to bear on them by Sean Quinn Senior. This is not only a totally different case to which the Bank objects as a matter of principle given that it has not been pleaded, it is a case that which is not supported by the facts."

33. Counsel accepts, as he must, that the Bank had raised a "fundamental objection" in the written legal submissions as follows.

> "621. None of this has been pleaded. The Bank fundamentally objects to this attempt to recast the case in this way. The Plaintiffs have never before made the case that they were the subject of undue influence by Sean Quinn Senior, and the proposition flatly contradicts their pleading. Without prejudice to that fundamental objection, the Bank reiterates that the case simply cannot be made out in any event."

Discussion and decision

34. With respect, any argument that the case as currently formulated includes a claim of undue influence against Sean Quinn Snr is untenable. Such a claim would be wholly inconsistent with the pleadings to date. As appears from the extract from the Replies to Particulars set out above, the Plaintiffs were unequivocal in stating that the entity against whom the allegation of undue influence was being made was Anglo. A party making an allegation of undue influence is required under Order 19, rule 5(2) of the Rules of the Superior Courts to provide particulars (including dates where necessary). The particulars of undue influence provided by the Plaintiffs to date are only consistent with a claim that it was the Bank against whom the allegation was being made.

35. Not only is no claim of undue influence made against Sean Quinn Snr in the pleadings (including the particulars), the making of any such claim would, in any event, be entirely inconsistent with the manner in which the litigation has been conducted to date. A number of examples suffice to make this point.

36. First, each of the five Plaintiffs have, as is required under Order 63A, rule 22, filed witness statements. The content of the witness statement filed by the first witness whom it is intended to call, namely Brenda Quinn, is summarised in an Appendix to this judgment. Nowhere in these witness statements is there any suggestion made that the individual Plaintiffs' will was overborne by their father, Sean Quinn. Had it been the position that such a claim was being made from the outset by the Plaintiffs, then it is inconceivable that this would not have been included in their witness statements. Such a claim would go to the very heart of the case supposedly being made. These were all matters within the peculiar knowledge of the individual Plaintiffs, and were matters which were known by them since well before the proceedings were instituted. This is in contrast to other cases relied upon by counsel for the Plaintiffs, such as *Moorview Developments Ltd. v. First Active* [2008] IEHC 211, where new material only came to light during the course of the litigation and, in particular, during the discovery/disclosure of documentation.

37. When asked by the court why this material was not included in the witness statements, counsel for the Plaintiffs, very fairly, conceded that there is no good reason why it is not in the original witness statements. (See Transcript Day 7, 22 March 2019, page 121).

38. Secondly, Sean Quinn Snr was not named in the proceedings as a defendant. Further, following the application of the Bank to institute third party proceedings against Mr Quinn, no application was made on behalf of the Plaintiffs to have him joined as a defendant at that stage. Again, had it been the Plaintiffs' position from the outset that Mr Quinn was the principal wrongdoer who had exercised undue influence over them, resulting in what they allege are catastrophic financial losses, it is inconceivable that they would not have named Mr Quinn as a defendant.

39. Thirdly, in the list of proposed witnesses which was furnished to the court in February 2019, Sean Quinn Snr is named as a witness for the Plaintiffs. Again, it is entirely inconsistent with the claim of wrongdoing now sought to be made against Mr Quinn that he would be called by the Plaintiffs as a witness in support of their case.

40. In conclusion, the proposed reformulation of the case so as to include an allegation of undue influence against Sean Quinn Snr is not merely a matter of detail or a shift in emphasis. Rather, it amounts to the introduction of an entirely new claim and the identification of Mr Quinn as a principal wrongdoer. This radical change is combined with the jettisoning of the previous claim that it was the officials of the Bank who exerted undue influence. This is such a vastly different case that there is no realistic basis for saying that it was implicit or latent in the existing proceedings. It simply is not there.

(2) APPLICATION TO AMEND
41. The application to amend is grounded on a short affidavit sworn by Aoife Quinn. The proposed amendments are identified in a draft statement of claim exhibited to that affidavit.

42. The amendments are proposed in respect of paragraphs 91 and 100 of the Statement of Claim, as follows.

> "91. The Plaintiffs took no active role in any matter relating to Anglo lending, and were effectively dictated to by Sean Quinn Senior in relation to such lending pursuant to which the personal guarantees and share pledges were required by Anglo, as detailed below:
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> […]
>
> 100. In the foregoing premises, the personal guarantees and share pledges were not procured as a result of the exercise of the Plaintiffs' own free and informed consent and were rather procured and obtained in circumstances of *the* undue influence *of Sean Quinn Senior in relation to the transactions. The first to fifth named Plaintiffs executed documentation when told to by Sean Quinn Senior, or personnel of the Quinn Group on his behalf, and were unable to disagree with him in circumstances where he exercised influence over them and was the founder and de facto controller of the QF Group and the Quinn Group which businesses he controlled with unquestioned authority."*

Legal principles governing an application to amend pleadings
43. Order 28, rule 1 of the Rules of the Superior Courts provides as follows.

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

44. The judgment of the Supreme Court in *Croke v. Waterford Crystal Ltd*. [2005] 2 I.R. 383 ("*Croke*") emphasises that the primary consideration for the court in determining an application to amend must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation. This is subject always to consideration of whether the amendment would cause real prejudice to the defendant. The judgment in *Croke* also confirms that the grant of leave to amend is discretionary, and there are other factors which a court can properly attach some weight to in deciding whether or not to allow an amendment.

45. More recently, the High Court (Clarke J.) in *Porterridge Trading Ltd. v. First Active plc* [2007] IEHC 313 confirmed that some weight can be attached to whether there was any reasonable basis for the initial failure to plead the case properly.

> "There will, in almost all cases, be some degree of prejudice resulting from any amendment which occurs at any significant time after the original pleading is delivered. The parties will have conducted preparation for the litigation on the basis of the case as then pleaded and it follows that some additional element of effort and expense will, even in the simplest of cases, inevitably result from an alteration in the course of the proceedings. To the extent that extra legal costs are incurred then the court can deal with same by making an appropriate order as to such costs.
>
> However, 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."
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> *Emphasis (italics) added.

***Whether necessary for determining the real questions of controversy*?**
46. I propose to apply these principles in sequence. The first matter to be considered, therefore, is whether the proposed amendments are necessary for determining the real questions of controversy in the litigation. I am not satisfied that the proposed amendments meet this threshold. Far from assisting in identifying the real issues in controversy between the parties, the proposed amendments instead introduce an entirely new claim which is inconsistent with and contradictory to the existing claims. It is now alleged that Sean Quinn Snr was the person who exercised undue influence over the five Plaintiffs. This involves the identification of a new principal wrongdoer, namely Sean Quinn Snr. This new claim is crudely "bolted-on" to the existing Statement of Claim, with no attempt made to withdraw the previous allegation that undue influence was exerted by officials of the Bank. The amendments would result in parallel allegations being made against different individuals.

47. Notwithstanding that the supposed rationale for the proposed amendments was to reformulate the proceedings so as to coincide with the case as outlined by counsel in his opening speech, the actual form of the amendment fails to do this. The allegations against the Bank would remain in the pleadings, whereas counsel for the Plaintiffs had confirmed in his opening speech that no such allegation is now being pursued. (Day 1, 12 March 2019, page 113).

48. More generally, the making of an allegation of undue influence is a serious matter. It would normally involve the party against whom the allegation is being made being named in the proceedings as a defendant to allow them to respond to the allegation. There is an express obligation on the party making the allegation of undue influence to set out particulars of same (with dates and items if necessary) in the pleadings. See Order 19, rule 5(2) of the Rules of the Superior Courts.

> "(2) In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings."

49. The proposed amendments fail to comply with even this basic requirement. No particulars are provided, and, indeed, no factual basis has been suggested to support the allegation. (See, by analogy, *Croke v. Waterford Crystal Ltd.* at [38] where leave to amend

was refused in respect of amendments of fraud as against the second named defendant in that case).

50. In this regard, it may be useful to recall the nature of the alleged undue influence as described by counsel for the Plaintiffs in his opening speech. Counsel made it clear that the allegation is one of actual influence, as opposed to presumed influence. (Transcript, Day 1, 12 March 2019, pages 114 to 115).

> "In respect of undue influence, there are, as the Court will be aware, two prerequisites for undue influence. There must be a relationship of influence, and that relationship of influence can be actual or it can be presumed. In the context of this particular case, although the Plaintiffs are the children of the person who is exercising the influence upon them, the evidence before the Court will be that there was actual influence as between Seán Quinn and his children. So the Plaintiffs don't — aren't looking to rely upon a presumed undue influence arising out of the father/child relationship.
>
> The second thing is, coupled with that relationship of influence, there must be a transaction that calls for explanation, or, to put it another way, a transaction which requires examination. The combination of influence and the transaction that requires examination make, together, the undue influence. The influence itself doesn't necessarily need to be accompanied by bullying conduct or conduct which is dramatically or aggressively overbearing, once it is conduct that the Court is satisfied has a real and actual influence over the parties that are involved."

51. Counsel relied on the description of the ingredients of undue influence as set out in the leading textbook, Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 3rd ed., 2018). (Trialview 91-11845). In the case of actual—as opposed to presumed—influence, the author provides examples of matters to be considered, such as the state of the knowledge of the person against whom the allegation is made; the existence of improper threats, bullying or importunity; the deliberate concealment of material information; and domination.

52. The author also explains that there is a second requirement, referenced by counsel in the above passage from the transcript, as follows at §8–024 (Trialview 91-11845).

> "A second requirement
>
> The basis of the court's intervention in cases of undue influence is, as already indicated, to protect against victimisation. Since victimization is the 'unconscientious use of […] power', it is clear that the use of the word 'victimization' in connection with relief for undue influence is intended to make it plain that, in addition to the first requirement (impaired autonomy of the complainant), there must also be unconscionable use of influence by the defendant. This is the approach that English Law has adopted, in spite of suggestions that this second requirement is not necessary. For there to be undue influence, there must be, in addition to the impairment of the complainant's free will, improper or unconscionable conduct on the part of the defendant. This means that there will be no undue influence if the court finds that the defendant's conduct is not unconscionable. In determining whether in the particular case the defendant's conduct is unconscionable the court will consider a wide range of issues, including whether the defendant took an unfair advantage of the position of weakness of the complainant or opportunistically exploited his own position of advantage. In many cases where complainant's free will is impaired the defendant's conduct will also be unconscionable. However, in some cases the second requirement, unconscionability, may not be present."
>
> *Footnotes omitted.

53. The proposed amendments come nowhere close to providing proper particulars of the facts relied upon to ground the allegation of undue influence. The plea is entirely circular: it is alleged that the individual Plaintiffs were unable to disagree with Sean Quinn Snr precisely because he exercised influence over them. No particulars are provided of the circumstances said to give rise to the undue influence. The pleading does not indicate, for example, whether it is being alleged that the undue influence involved the making of improper threats; bullying or importunity; the deliberate concealment of material information; or domination. No detail is provided in respect of the documentation which it is alleged the individual Plaintiffs executed against their free will: neither the nature of the documentation nor the dates upon which same is said to have executed are identified. No detail is provided in respect of the circumstances in which it is alleged the Plaintiffs were "told" to execute the documentation. No detail is provided, for example, as to whether the alleged instructions were delivered in writing or orally. Indeed, the identity of the Quinn Group personnel said to have been acting on behalf of Sean Quinn Snr is not disclosed.

54. The single particular provided is to the effect that Sean Quinn Snr was the founder and de facto controller of the Quinn Finance Group and the Quinn Group, and allegedly controlled the businesses with unquestioned authority. No attempt is made to reconcile this new plea with the earlier pleas—at paragraphs 10 and 40 of the Statement of Claim—that the Plaintiffs were, at all times material to the proceedings, the ultimate beneficial owners of the Quinn Group, and that Quinn Finance Holding is owned as to 20% each by the Plaintiffs.

55. (I hasten to add that I have formed no view as to the strength or otherwise of a claim for actual undue influence, assuming same had been properly pleaded and particulars provided. Whereas a court can, in principle, refuse an amendment on the basis that the new claim is bound to fail, this is not the basis on which I am deciding the application. I repeat that I have formed no view in this regard. Rather, this aspect of the judgment is concerned solely with the narrow question of whether the proposed amendment would allow the determination of the real questions in controversy in the litigation.)

56. In summary, therefore, the proposed amendments, far from clarifying the real questions in controversy in the proceedings, would serve only to confuse matters further. The proposed amendments also fail to comply with the requirements of Order 19, rule 5, and are inadmissible for that reason alone.

Prejudice to the Defendants

57. For the reasons set out above, therefore, I have concluded that the Plaintiffs have failed to meet the first requirement to justify an application to amend. Lest I am incorrect in this, I propose to go on, in any event, to consider the other factors which are relevant to an application to amend.

58. The proposed amendment would cause real prejudice to the Defendants, especially the Bank. The effect of the proposed amendment is to entirely reformulate the claim for undue influence. Under this reformulation, Sean Quinn Snr is now identified as the principal wrongdoer. The focus of the proceedings would, of necessity, have to shift from a consideration of the dealings and relationship between the Bank officials and the Plaintiffs, to a consideration instead of the relationship and dealings between the individual Plaintiffs and their father, Mr Quinn Snr. This shift has consequences for the running of the trial and, crucially, for the type

of pre-trial procedural steps which the Bank would otherwise have pursued. These proceedings have been case managed since their admission, on the application of the Plaintiffs, to the Commercial List of the High Court in May 2011. A series of pre-trial procedural steps have been completed since then. More specifically, there has been extensive discovery/disclosure of documentation and requests for and replies to particulars. It is self-evident that had the Bank and the Receiver known that the claim they were facing was one of alleged undue influence exerted by Sean Quinn Snr, then the nature of the information sought by each of these procedural steps would have been different. For example, the focus would have been on the relationship between the individual Plaintiffs and their father, rather than on dealings between officials of the Bank and the Plaintiffs.

59. Were the proposed amendments to be allowed, it would then be necessary to adjourn the hearing for a considerable period of time in order to allow fresh applications for discovery, particulars, and interrogatories to be heard and determined. It would also be necessary for the Plaintiffs to deliver supplemental witness statements setting out, for the first time, the nature of the alleged undue influence said to have been exercised by Sean Quinn Snr. In consequence, it would be necessary for the Bank and the Receiver to file supplemental witness statements in response. It would also be necessary for the Defendants to deliver amended pleadings.

60. In summary, to allow the proposed amendments would cause real prejudice to the Defendants, for the following reasons. First, the proposed amendments fail to provide proper particulars of the alleged undue influence exerted by Sean Quinn Snr. This is in breach of the requirements of Order 19, rule 5(2) of the Rules of the Superior Courts. The proposed amendments would result in the Statement of Claim being inconsistent and contradictory insofar as the original allegation of undue influence as against the Bank remains pleaded. This has been set out in more detail under the previous heading above. All of this puts the Bank at a distinct disadvantage. It is impossible for the Bank to know the case that it is now expected to meet.

61. Secondly, the Defendants would suffer prejudice in terms of (further) delay. This is unacceptable given the history of these proceedings. These proceedings were first instituted in 16 May 2011. The matter has been provisionally listed for hearing on a number of dates in 2013 and 2014, but these dates had to be vacated in circumstances where there were a number of criminal proceedings then pending against non-parties who might be called as witnesses in these proceedings. The case was rescheduled for hearing on 3 June 2015, but was adjourned on the first day upon the application of the Director of Public Prosecutions. The case was ultimately listed for hearing commencing on 12 March 2019, with an estimated hearing time of four to six months.

62. It is unacceptable that proceedings which have been case managed in the Commercial List of the High Court should be further delayed. In this regard, it is to be borne in mind that the proceedings involve not just the claim by the Plaintiffs against the Bank and Receiver, but also a significant counterclaim by the Bank to recover sums in the order of circa eighty-two million euros (€82,000,000) against each of the individual Plaintiffs. The Bank is entitled to bring its counterclaim on for hearing and to allow the court to adjudicate—one way or the other—on the merits of same.

63. Thirdly, Defendants will also suffer real prejudice in terms of the incurring of additional legal costs in respect of the various pre-trial procedural steps discussed above which would have to be carried out in the event that the proposed amendments were permitted.

64. Finally, the Bank's position may also be adversely affected by the fact the allegation now sought to be made against Sean Quinn Snr has only been raised now subsequent to his bankruptcy process.

Discretionary factors

65. I turn next to consider the discretionary factors. I am, of course, mindful of the fact that the Supreme Court in *Croke v. Waterford Crystal Ltd.* cautioned that there had been an overemphasis in some of the earlier case law on the requirement for an explanation on the part of the party seeking to amend. It is, nevertheless, a factor which can be given some weight in the exercise of the court's discretion. This is clear from the judgment of the Court of Appeal in these very proceedings, *Quinn v. Irish Bank Resolution Corporation* [2016] IECA 21, [71] to [73].

> "It has been the plaintiffs' case from the outset that they were unaware of the particular illegalities which they have pleaded concerning the loans underlying the banks security. However, if the amendment were to be permitted it would place as a central issue within the proceedings the question as to whether they were not just unaware of those illegalities but rather whether they were completely innocent of knowledge of the nature of those transactions and the arrangements to which they were connected.
>
> Thus, I accept the defendants' submission that if the amendment were to be permitted further factual enquiries would have to be carried out in relation to all the parties involved as to their precise state of knowledge at the relevant time and whether it was ever intended that the plaintiffs would ultimately benefit from the transactions and arrangements which were then put in place.
>
> In conclusion, I am satisfied that the High Court judge was correct in his decision to dismiss the plaintiffs' application to amend the statement of claim in reliance both on the provisions of Order 28 itself and also on the basis of the *Henderson v. Henderson* principles. The amendment sought was not necessary to permit a matter that was in issue between the parties to be tried and in any event the plaintiffs' conduct and delay in making the application was such that the court was entitled in its discretion to refuse the relief sought. Further, based on the *Henderson* principles, the plaintiffs' conduct in relation to the proposed amendment may comfortably, for the reasons earlier stated, be classified as culpable and abusive both insofar as their obligations to the court and the defendants are concerned. It behoves the court and the parties to litigation of the magnitude and complexity concerned in this type of action to ensure that the proceedings are conducted in as fair and efficient a manner as is possible. While the court must of course ensure that the need for efficiency does not trump doing justice between the parties, what was being asked of it on this appeal was to allow a plaintiff, who either had or ought to have considered the possibility of advancing a particular type of claim at the outset of the proceedings parachute that claim into the proceedings as an opportunistic response to the loss of its legal argument on a related claim and to do so in circumstances where the defendants had been led to believe by the plaintiffs' conduct that such an issue would not be pursued. The conduct of the plaintiffs in seeking to recast their claim is in my view conduct which is not only abusive of the defendants but is also such that if permitted would have the effect of circumventing or at least substantially undermining the outcome of the preliminary issue."

66. As appears from the above, the Court of Appeal concluded—separately from the *Henderson v. Henderson* point—that the delay in making the application was such that the High Court (Haughton J.) was entitled in its discretion to refuse the amendment.

67. The High Court (Haughton J.) had addressed the issue of delay as follows in his judgment of first-instance, *Quinn v. Irish Bank Resolution Corporation* [2015] IEHC 313, [36] and [37].

> "Thirdly, the plaintiffs in their grounding affidavit for this motion and in their submissions failed to give any explanation or reason why the pleas they now wish to make were not pleaded at the outset, or why no application to amend was brought at an earlier point in time. It is true that in *Croke* Geoghegan J (at p. 394) stated that in a number of High Court decisions cited to him there had been 'an overemphasis on an obligation to give good reason for having to amend the pleadings.' However, in a case such as this where the application is made late in the day, after the trial and final determination of a preliminary issue — which in truth was more in the nature of a 'module' of the trial — and shortly before the date fixed for hearing of the remainder of the action, it is of some relevance.
>
> One reason for the absence of any explanation may be that there have been changes in the plaintiffs' legal representation and therefore it may be more difficult to ascertain or present any explanation. However, the court cannot discount the possibility that the lawyers who prepared and delivered the Statement of Claim in its present form did not consider that there was a factual basis for making the claim that the plaintiffs now wish to make. For instance, it might have been considered unlikely that the plaintiffs could prove that they were entirely innocent guarantors, or it might have been considered that they would face difficulties if it were demonstrated that they stood, potentially, to gain a benefit from the underlying illegal lending — two possibilities tentatively canvassed by Clarke J at paras. 8.50-8.51 of his judgment. While the court is careful not to prejudge any aspect of the plaintiffs' case (notwithstanding an invitation to do so in the Bank's submissions), the absence of any explanation as to why these pleas were not made earlier does put the court at a disadvantage and is a factor that the court takes into account."

68. There are a number of features of the application before me which are so exceptional that they justify being weighed in the exercise of the court's discretion. The first, and most obvious, feature is the unexplained delay in bringing this application. These proceedings were instituted in May 2011. The application to amend had been made at the thirteenth hour, following on the opening of the case (which had taken five days). This is so notwithstanding that the case had been case managed at all times, and the fact that the case came on for full hearing in June 2015 only to be adjourned on the first day.

69. The delay is all the more culpable when one has regard to the following additional matters. The Plaintiffs have been aware—since at the very latest May 2015—that the Bank was maintaining a "fundamental objection" to any attempt to introduce an allegation of undue influence on the part of Sean Quinn Snr into the proceedings. This objection was stated in terms in the written legal submissions filed on behalf of the Bank on 22 May 2015.

70. Notwithstanding that the Plaintiffs were on actual notice of this objection in 2015, no attempt was made to remedy the position, i.e. by applying to amend, until after the opening of the case in March 2019.

71. The delay in this regard has to be seen against the background where the Plaintiffs, in 2015, were actually pursuing a *separate* application to amend the proceedings. It will be recalled that, following on from the ruling of the Supreme Court on the trial of the preliminary issue in March 2015, the Plaintiffs made an application to amend the pleadings so as to include a new claim to the effect that the security was invalid notwithstanding that the underlying loan agreements were valid and enforceable. This application was pursued on appeal to the Court of Appeal and resulted in the judgment of January 2016 set out at paragraph 65 above. There is no explanation offered as to why, when these procedural applications were being pursued in 2015, leave to make the additional amendment in relation to the undue influence was not included.

72. It also bears repeating that the allegation which the Plaintiffs now wish to advance is one which is based on facts within their own peculiar knowledge, and of which they have been aware since prior to the institution of the proceedings. In effect, the Plaintiffs wish to argue that their free will was overborne by the alleged undue influence of Sean Quinn Snr. This is not an allegation which only came to light during the course of the litigation, for example, through the examination of documentation provided on discovery by the defendants. It is quintessentially a matter which, if true, the Plaintiffs would have been aware of at all times. This is crucial in that it distinguishes the facts of the present case from those of the authorities relied upon by counsel for the Plaintiffs. Mr Dunleavy, SC, has placed some emphasis on the judgment in *Moorview Developments Ltd. v. First Active plc.* [2008] IEHC 211. However, as is clear from the judgment of Clarke J. in that case, the application to amend and to plead the (reformulated) allegation of fraud arose from documentation which only became available during the course of the discovery process in the proceedings. No such consideration arises on the facts of the present case.

73. No explanation whatsoever has been offered by the Plaintiffs in this regard. By choosing to remain silent, the Plaintiffs have left themselves open to the accusation on the part of the Bank that the application to amend is not only defeated by delay, but that the Plaintiffs' conduct is tantamount to an abuse or manipulation of the court process. This accusation echoes the finding made by the Court of Appeal in relation to the earlier application to amend. See the passages set out at paragraph 65 above.

74. In circumstances where I have concluded that the application to amend must be refused for other reasons, I do not propose to make any finding in respect of this accusation of an abuse of the court process. It is unnecessary for me to do so. It is sufficient for the purpose of the application before me to confine my findings to one that the application to amend should be refused by reference to the inordinate and unexplained delay in bringing same. This finding is not intended as some sort of sanction or punishment for the Plaintiffs. The finding is not reached in isolation: the fact of the matter is that the delay has caused real prejudice to the other parties.

75. The final discretionary matter which is relevant to these proceedings is in respect of case management, and the importance of preserving the integrity of the case management system. As explained by Clarke J. in his judgment in M*oorview Developments Ltd. v. First Active plc* [2008] IEHC 274; [2009] 2 I.R. 788, one of the considerations to be taken into account is the effect on litigation in general if the court is seen to be lax and lenient in relation to compliance with procedural requirements. I discuss this issue in more detail under the next heading below.

76. In conclusion, I emphasise that these findings in relation to the discretionary factors are, in a sense, *obiter* in that the principal reasons for which I am refusing the application to amend are those stated above: (i) the amendment is not necessary to the real questions in the proceedings, and (ii) would cause real prejudice to the Defendants.

(3). APPLICATION TO EXPAND UPON WITNESS STATEMENTS

The application as made

77. Counsel on behalf of the Plaintiffs advanced the application to expand upon the witness statements on a contingent basis, as follows. First, if leave to amend the Statement of Claim were to be allowed, then the application is to file short supplemental witness statements. Secondly, if leave to amend the Statement of Claim were to be refused, then the application is to permit the individual plaintiffs to expand upon the content of their witness statement in their oral evidence. In particular, permission is sought to allow the

individual Plaintiffs to explain—under cross-examination—that the reason that they signed documentation was that their free will was overborne, and that they could not contemplate the possibility of saying "no" to their father.

Legal principles governing witness statements

78. Order 63A, rule 22 of the Rules of the Superior Courts provides as follows.

> *"III. Evidence*
>
> *Oral evidence*
>
> 22.(1) Unless a Judge shall otherwise order, a party intending to rely upon the oral evidence of a witness as to fact or of an expert at trial shall, not later than one month prior to the date of such trial in the case of the plaintiff, applicant or other party prosecuting the proceedings and not later than seven days prior to that date in the case of the defendant, respondent or other party defending the proceedings, serve upon the other party or parties a written statement outlining the essential elements of that evidence signed and dated by the witness or expert, as the case may be.
>
> (2) A Judge may, in exceptional circumstances to be recited in the order and after hearing all of the parties, make an order directing that the written statement referred to in sub rule 1 of this rule or any part thereof shall be treated as the evidence in chief of the witness or expert concerned but only after it has been verified on oath by such witness or expert."

79. It is common case that Haughton J. had indicated at a directions hearing on 21 May 2015 that the witness statements, as is the normal way in a Commercial List case, would be taken as read, subject to correction and adoption at the outset (Trialview 91-1282). There was no order made pursuant to Order 63A, rule 22(2) directing that the witness statements shall be treated as the evidence in chief of the witness concerned.

80. The nature of the obligation imposed under Order 63A, rule 22 has been considered in detail by the High Court (Clarke J.) in *Moorview Developments Ltd. v. First Active plc* [2008] IEHC 274; [2009] 2 I.R. 788. Those proceedings had commenced, and had advanced to a certain degree, prior to the establishment of the Commercial List of the High Court. However, by agreement between the parties, the proceedings were being conducted *as if* the case had been admitted to the Commercial List. Clarke J. (as he then was) commenced his judgment with a very useful discussion of the objectives of case management. It is stated as follows at paragraph [13].

> "Modern case management and modern trial techniques (such as the availability of video evidence) have been introduced precisely because it is felt that such measures have the potential to increase the justice of litigation as a whole. The absence of case management has been perceived, at least in complex litigation, to have increased the cumbersome nature of the pre-trial process leading to additional costs and, frequently, significant delay in cases coming to trial. In addition, the absence of such techniques, again at least in complex litigation, can lead to the trial itself being more prolonged and costly. The impact of such factors on access to justice should not be ignored. If cases take much longer to come to court and are much longer at trial than is reasonably necessary then that of itself creates an injustice for all concerned. A losing party who may justly have to pay the costs of litigation should not be burdened with having to pay significantly more costs than was reasonably necessary simply because the pre-trial and trial process was more cumbersome than it needed to be. To impose such a burden is itself an injustice and one which has the potential to arise in many cases."

81. Clarke J. then goes on to consider what approach a court should take to breaches of case management directives, and identifies different levels of breach, i.e. material, significant or prejudicial. Insofar as a "significant failure" is concerned, the suggested approach is as follows.

> "[25] However, where there is significant failure to comply with case management directives, the court needs to put in the balance, along with whatever excuse may be given for that non-compliance and the extent to which there may either be general or specific prejudice, the need to insure that there is at least broad compliance with case management procedures if the undoubted advantages for the administration of justice (and indeed justice in individual cases), that come with case management are to be retained.
>
> [26] *At all times the court should, of course, consider whether any measures short of excluding the relevant evidence might meet the requirements of the case*.* However, a point will, necessarily, be reached where to afford any further indulgence to a party would create a likely expectation among parties generally of a level of indulgence which could only undermine case management."
>
> *Emphasis (italics) added.

82. The judgment then identifies a number of considerations which may be relevant to an application to amend witness statements, as follows.

> (i). The first consideration is prejudice to the opposing party. Where additional evidence is proposed *after* the commencement of the case, then same has the potential to affect the running of the case from the perspective of the opposing party. The court should, however, take into account the fact that, generally speaking, a belated change in witness statements whether by the addition of new witness statements or the alteration of existing witness statements has the potential to cause prejudice which will largely be incapable of being remedied and to which potential prejudice all due weight should be given.
>
> (ii). The second consideration is whether there is any justification for the late service of an amended or new witness statement. Two examples are cited as follows: (a) where evidence only comes to light at a late stage, or (b) where a case has developed, to a material extent, in an unexpected direction.
>
> (iii). The third consideration is the importance of encouraging broad compliance with case management directives across the range of cases. The giving of excessive indulgence to parties might create a climate in which significant non-compliance was encouraged. It is appropriate to have regard to the overall level of compliance by the party concerned. A broadly compliant party should not be unduly penalised for a single failure in the absence of prejudice.

83. In applying those principles to the facts of the case before him, Clarke J. made the following observations in respect of Order 63A, rule 22.

> "[33]. In fairness to First Active (and to the extent to which it was relevant to him, Mr. Jackson), it was not suggested that any specific prejudice would arise from the proposed additional evidence of Mr. O'Brien. This is particularly so because the evidence seems to be more in the form of an elaboration of the original witness statement rather than an attempt to touch on wholly new areas. In that context it is appropriate to note what the Commercial Court rules say about witness statements. The Rules of the Superior Courts 1986, O. 63A, r. 22(1) require the service on the other party of 'a written statement outlining the essential elements of' the evidence (whether factual or expert) intended to be led. It does not seem to me to be the case that a witness statement, therefore, requires to be equivalent, in all respects, to the evidence in chief of the witness concerned. However, it is equally clear that the intent of the rule is that the receiving party should not, to any significant extent, be capable of being taken by surprise by the contents of any evidence in chief to be led. The fact that a party may elaborate on evidence actually included in the witness statement is unobjectionable provided that the additional evidence can properly be regarded as an elaboration rather than a departure or movement into a new area."
>
> [34]. It seems to me that much of the additional material contained within the proposed new statement of Mr. O'Brien can properly be described as an elaboration on his previous statement. To that extent it does not seem to me to be necessary to permit an additional witness statement to be filed as such elaboration is permissible in any event. To the extent that the proposed additional evidence of Mr. O'Brien goes beyond an elaboration, then a difficulty seems to me to arise."

84. Clarke J. then indicates examples of circumstances in which it will be appropriate for a witness to elaborate on their written statement. First, at the time when a witness files their witness statement, the witness concerned may not have had sight of witness statements coming from the other side relating to the same events. Clarke J. states that it is entirely appropriate that such a witness be given an opportunity, during evidence in chief, to comment on the evidence of other witnesses, most particularly those likely to be called by the opposing party. Secondly, Clarke J. states that it would be unreal—and in his view a recipe for injustice—if subsequent witnesses could not have evidence led from them in chief so as to give their account of issues whose controversy has come into particular focus in the course of the cross-examination of earlier witnesses.

85. The following conclusion is then stated.

> "[39] However, witness statements should not be taken as an end in themselves resulting in an excessive or disproportionate restriction on the evidence to be given by the witness concerned. Where, therefore, whether for the sort of reasons outlined above or for other reasons that may arise on the facts of a particular case, it is reasonable to take the view that the case has evolved since the time that the witness statement concerned was filed, it would be wrong to place any barrier in the way of a witness giving evidence in chief relating to issues whose existence or importance could not reasonably have been ascertained at the time when the witness statement concerned was filed. Permission to give evidence of that type should be readily given, even though the evidence may not be adequately specified in the witness statement. Where, however, on the other hand, it ought to have been clear that evidence sought to be led was material as of the date of the filing of the witness statement concerned, somewhat different considerations apply. It is in that context that the reason advanced for seeking to add to the witnesses evidence (whether by filing a more detailed witness statement or otherwise) needs to be considered."

86. The requirement to file a witness statement has more recently been considered by the Supreme Court in *Ryanair Ltd. v. Bravofly Ltd*. [2016] IESC 53 ("*Bravofly*.") Having set out Order 63A, rule 22, McKechnie J. then stated as follows at [33].

> "As is apparent from its terms, what the witness statement must contain is the 'essential elements' of the evidence intended to be given: once all of the salient features are outlined, that will be a sufficient compliance with the rule. A verbatim account, strictly so called, is not necessary, very much for the reasons identified at para. 15 above. Accordingly, when in place, that written outline will satisfy the underlying purpose of the rules, which is to avoid surprise, to enable the opposing party to properly prepare for trial, to facilitate the possibility of settlement and to further the efficiency of the judicial process."

87. On the facts of *Bravofly*, the impugned witness statement had been filed more than three months prior to the scheduled hearing date, and the evidence was not new or novel, and did not expand or alter any issue in the case. See paragraph [44] as follows.

> "It is true that the order of the court was breached, but in my view the resulting default could not be considered as a significant non-compliance with the order, given the fact that the additional statement was still submitted almost three months prior to the hearing (*cf*: time requirement of O. 63A, r. 22(1) itself: para. 33 *supra*). Whilst the reasons advanced by both parties for their respective stance on this issue ranged from nil to unsatisfactory, nonetheless it is important to recognise that, at least at a *prima facie* level, the additional evidence appears relevant and probative to a key issue in the case. That evidence could not be described as new in any novel sense, nor does it expand or alter the nature of that issue or indeed any other issue in the case. In addition, it could not have taken the respondent by surprise, particularly if, as asserted by Ryanair, much of the information comes from one of its own websites. Accordingly, it is not surprising, in these circumstances, to find the absence of any prejudice which could weigh heavily in the Court's overall consideration of this appeal."

Discussion and decision

88. The Plaintiffs' application to expand on the content of the witness statements has, to a significant extent, been overtaken by my decision to refuse leave to amend the Statement of Claim. The effect of this decision is that a claim that Sean Quinn Snr exercised undue influence over the individual plaintiffs does not form part of the case. Any attempt to adduce evidence in this regard will be open to the objection that such evidence is not relevant to an issue in the case.

89. For the sake of completeness, however, I propose to apply the legal principles identified under the previous heading to the facts of the present case. The starting point must be the nature of the "new" or "additional" evidence which it is sought to adduce. It is clear from the opening speech delivered by leading counsel for the Plaintiffs that it is proposed to adduce evidence to the effect that Sean Quinn Snr exerted undue influence over all of the plaintiffs. The Plaintiffs, seemingly, felt incapable of refusing any request from their father.

90. This evidence is markedly different from that set out in the individual witness statements. As the summary of the witness statement of Brenda Quinn set out as an Appendix to this judgment confirms, the explanation offered for her willingness to sign various documentation was a supposed assumption on her part that the documentation did not relate to her personally but rather formed part of normal commercial activity of a large conglomerate. There is no suggestion in her witness statement that Brenda Quinn was not acting autonomously or that her free will was overborne. Moreover, the proposed evidence is not presaged by anything in the pleadings, and is inconsistent with the case made in the pleadings which, it will be recalled, is to the effect that it was the officials of the Bank who had exerted the undue influence.

91. Adopting the categorisation suggested by Clarke J. in *Moorview Developments Ltd. v. First Active plc* [2008] IEHC 274; [2009] 2 I.R. 788, the "new" or "additional" evidence goes beyond mere elaboration, and consists, instead, of the introduction of new evidence.

92. The judgment in *Moorview Developments Ltd*. identifies a number of considerations which may be relevant to an application to amend a witness statement. These have been summarised at paragraph 82 above. The first consideration is prejudice to the opposing party. As part of this consideration, regard must be had to the timing of the attempt to introduce new evidence. In the present case, the application has been made during the course of the trial, following the conclusion of opening speeches. This is done in circumstances where the parties have prepared for a case which is scheduled to run for between four and six months. Self-evidently, the legal teams will have made significant preparations in relation to the cross-examination of witnesses in these complex proceedings. The change in tack, whereby the perpetrator of the alleged undue influence is now said to be the father, Sean Quinn Snr, will necessitate and prejudice the parties in the work that has been carried out to date. Not only will it affect the cross-examination, it may also affect the nature of the witnesses and the enquiries which would otherwise have been called and carried out.

93. The second consideration is whether there is any justification for the late service of an amended witness statement. None has been offered on behalf of the Plaintiffs. As noted earlier, when asked by the court why this material was not included in the witness statements, counsel for the Plaintiffs, very fairly, conceded that there is no good reason why it is not in the original witness statements. (See Transcript Day 7, 22 March 2019, page 121).

94. The history of the proceedings and, in particular, the fact that the case was originally to have been heard in June 2015 is relevant in this regard. Moreover, this is not a scenario whereby the requirement to introduce an amended witness statement has arisen as a result of evidence only coming to light for the first time as a result of events in the proceedings. The need is not said to arise from anything in witness statement filed by the *other side*, and only seen for the first time after the individual plaintiffs had filed their own witness statements. Nor does it arise out of cross-examination or the discovery of documentation.

95. Rather, the evidence is something which, by definition, was always within the peculiar knowledge of the individual plaintiffs. It is something that they could have brought to light at any stage.

96. The third factor, then, is the importance of encouraging broad compliance with case management directives across the range of cases. It is acutely important in litigation of this scale and magnitude that all parties are conscious of the consequences of a failure to comply with case management procedures. This case has been listed for hearing for a period between four and six months. This has entailed a significant commitment on the part of all parties to the litigation. Moreover, it has made demands on scarce judicial resources, both in respect of the substantive hearing for the next number of months and also in respect of the case management of the litigation over the last number of years. A number of these procedural ruling were pursued on appeal, and thus required the input not only of the High Court, but also of the Court of Appeal and the Supreme Court. This has been of significant benefit to all of the parties in that it has allowed the precise issues in the proceedings to be pinpointed. Much of this time and effort will have been set at naught if any party to the litigation were to be permitted to reformulate their entire case in their opening speeches.

97. The message which it would send to other litigants if case management directions in a case of this scale and magnitude—which has benefited from input from all levels of the court hierarchy—could be overridden with impunity, would be damaging. Other litigants would be less likely to comply with case management directions themselves if they could assume that there is no sanction for failing to comply.

CONCLUSION AND PROPOSED ORDERS

98. For the reasons set out herein, I propose to make orders along the following lines. I will, however, hear from counsel before settling on the precise form of order.

99. First, an order refusing the Plaintiffs' application, brought by way of Notice of Motion filed in court on 22 March 2019, for leave to amend the Statement of Claim pursuant to Order 28, rule 1 of the Rules of the Superior Courts.

100. Secondly, a declaration that the pleadings to date, including the Statement of Claim (as amended on 14 May 2015 and 2 November 2018) and the Replies to Particulars, do not include a claim for undue influence against Sean Quinn Snr.

101. Thirdly, an order refusing the Plaintiffs leave to file supplemental written statements pursuant to Order 63A, rule 22 of the Rules of the Superior Courts.

102. Insofar as the oral evidence which the individual plaintiffs will be permitted to give is concerned, I do not propose to make an order at this time delimiting the matters which can be dealt with in evidence. I do not yet know what precise evidence the individual plaintiffs will be giving, and it would be artificial to make an *a priori* ruling excluding certain evidence. To do so might hamper both sides by disrupting the flow of examination in chief and cross-examination. Instead, I propose to deal with the matter by allowing counsel for the Defendants to raise objections, if appropriate, during the course of the hearing of the evidence. For present purposes, it is sufficient to reiterate that the pleadings to date, including the Statement of Claim (as amended on 14 May 2015 and 2 November 2018) and the Replies to Particulars, do not include a claim for undue influence against Sean Quinn Snr. This will obviously have implications for the relevance—and hence the admissibility—of any evidence which seeks to imply the existence of undue influence on his part. The fact that such evidence might be received *de bene esse* does not make it relevant or admissible.

APPENDIX:

EXTRACTS FROM WITNESS STATEMENT OF BRENDA QUINN

103. The witness statement of Brenda Quinn is dated 22 December 2014. The witness statement is 12 pages in length (Trialview 49-1733). The witness statement sets out the personal details of Brenda Quinn; and her education and work experience. It then sets out her knowledge of investments by the Quinn Group. Thereafter the statement turns to address the practice of signing documents as

follows.

"7. My father transferred ownership of the Quinn Group to my siblings and I in 2002. As I was 15 years old at the time, I believe the shares in the company were initially held in trust for me by my parents. I do not recall any discussions in relation to this at the relevant time or how the decision was made. In 2005, I turned 18 years of age and at this point the shares in Quinn Group were legally transferred to me. I was legally advised in 2005 by Mr John Coman of A & L Goodbody Solicitors in relation to this transaction. From this time onwards, I was frequently asked to sign documents relating to the company.

8. My understanding at the time was that when the Group requested me to sign documents, it was in my capacity as an ultimate shareholder of the Quinn Group and in respect of normal commercial activity of a large conglomerate. I relied on and trusted the documentation coming from the Quinn Group and never considered that signatures requested from me were for anything other than operational activities in the Group.

9. I trusted that had any of the documentation related to me personally, as opposed to the Quinn Group businesses that I would be advised of same and would be informed of the risks associated with this by the Group or by someone like Mr John Coman who had previously advised me.

10. As such, where signature pages of documentation were forwarded to me by the Quinn Group, I signed same without hesitation as requested. I never queried the import of the documentation I was asked to sign. The turnaround time on the documentation that I was asked to sign was usually immediate. If I was in College at the relevant time, it was frequent to have to slip away from lectures to sign and fax signature pages of documents backed to Derrylin. If I was unable to immediately return documentation to the Group, I would have been concerned that I was hindering the businesses and as such, this rarely if ever happened.

11. I specifically recall in March 2008, I was on a private bus coming from a college football game when I received a telephone call to my mobile from Teresa Higgins (Quinn Group Secretary) to inform me that a document needed to be urgently signed and returned to Derrylin. When I advised Teresa that I was not in college and would not be able to return the document until later that night, Teresa reiterated that her understanding was that the document required urgent execution.

12. I therefore had to ask the bus driver to allow me to disembark the bus at a Hotel in Ennis (the West County Hotel) where the documents were faxed to by the Group. I recall that the Hotel receptionist gave me the signature page to the document which I signed and the receptionist then faxed same back to the Group.

13. Following my time in college, I began work in Quinn Insurance in Blanchardstown in August 2008 where the practice of signing documentation remained the same, save for the fact it was done from that Blanchardstown office which made it easier to return the documentation without delay."