

THE HIGH COURT

[2014 No. 5675 P.]

BETWEEN

D.D. GROWTH PREMIUM MASTER FUND (IN LIQUIDATION)

PLAINTIFF

AND

P.N.C. GLOBAL INVESTMENT SERVICING (EUROPE) LIMITED NOW KNOWN AS B.N.Y. MELLON INVESTMENT SERVICING
(INTERNATIONAL) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 20th day of December, 2016.

1. By notice of motion dated 21st September, 2016, the defendant seeks two orders. The first order has been made by this Court on 19th December, 2016; namely, an order substituting B.N.Y. Mellon Fund Services (Ireland) D.A.C. as defendant to the proceedings as all the assets and liabilities of the original defendant had been transferred to it by operation of law.

2. The second order sought in the notice of motion is an order pursuant to O. 28, r. 1 of the Rules of the Superior Courts and/or O. 63A, r. 5 and/or 6 of the Rules of the Superior Courts and/or under the inherent jurisdiction of the court granting the defendant leave to amend its defence. The amendments are to be found at paras. 35 and 36 of the draft amended defence which is exhibit "KS2" in the affidavit of Mr. Keith Smith sworn on 21st day of September, 2016. A very minor amendment to para. 35 was not opposed and I will grant that amendment. The main amendment is to be found in para. 36 and the particulars attached to same. The plaintiff opposes the amendment sought.

3. In *Croke v. Waterford Crystal* [2005] 2 I.R. 383, Geoghegan J. stated at 393:-

"...the primary consideration of the court must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation."

4. Where an amendment can be made without prejudice to the other party and will enable the real issues between the parties to be tried, the court's discretion should be exercised in favour of making the amendment sought. In *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21, MacMenamin J. stated at para. 40:-

"As Geoghegan J., speaking for this Court, in *Croke v. Waterford Crystal Limited & Irish Pensions Trust Limited* [2005] 2 I.R. 383 pointed out, the Rules of the Superior Courts, insofar as they concern amendments are intended to be 'liberal', and intended for the purpose of ensuring that the real matters in controversy between the parties are determined by the courts."

5. The plaintiff argues that the proposed amendments radically alter the nature of the defence and introduce new matters; accordingly, it is necessary for the defendant to give to the court good reason for not having originally made that plea and for seeking the amendment at this stage. They rely on the observations of Flood J. in *Palamos Properties Limited v. Brooks* [1996] 3 I.R. 597 at 605 where he said:-

"...there must be such evidence from which an inference can reasonably be drawn as to why the plea which is sought to be introduced by way of amendment was not put in the original defence or express evidence given to explain the failure in a manner which renders the omission broadly excusable if not actually justifiable."

6. In *Porterridge Trading Limited v. First Active plc* [2007] IEHC 313, Clarke J. accepted a submission from counsel that *Croke* is not authority for the proposition that an explanation is never required as to why the pleading sought to be admitted was not made in the first instance or that the adequacy of the explanation is entirely irrelevant; however, he did state in para. 3.4:-

"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."

7. In *Catherine Allen v. Irish Holmasters Limited* [2008] 1 I.L.R.M. 81, Finnegan J. said at 87 that in *Croke v. Waterford Crystal Limited*, Geoghegan J. expressed doubt that the cases relied on by Flood J. in *Palamos Properties Limited v. Brooks* supported the broad proposition that an explanation was required as to why the amendments sought was not in the original pleadings. He went on to state:-

"If delay is not justifiable or excusable then that is a factor to be taken into consideration as part of the matters to be weighed in deciding whether or not the court will allow amendment."

8. In an affidavit sworn on behalf of the plaintiff, Ms. Maura Connelly, a solicitor in Eugene F. Collins stated that the plaintiff has no specific objection to the amendment sought in para. 35 or 36 of the defence save "...that it ought not to have been required to meet the costs of responding to a proposal to amend the defence for such amendment is unnecessary". Counsel for the defendant argued that it was by no means certain that the amendment was necessary but that it was prudent to seek to amend the defence at this stage.

9. The real issue on the motion is whether or not the proposed amendments raise any new issues of fact which would require further procedural steps other than simply dealing with the amendments in the reply to the defence. The defendant makes out a substantial case for the necessity of the proposed amendments. If the amendments are allowed, the defendant argues that the claims of the plaintiff against the identified persons referred to in para. 36 are statute barred and that, as a matter of law, the plaintiff is responsible for the acts of those persons.

10. Paragraph 35(iv) of the defence pleads:-

"...the said alleged loss and damage was caused or occasioned or contributed to by the Plaintiff and/or its directors and/or other persons other than the Defendant and/or events which were unrelated to the performance by the Defendant of its duties pursuant to the Administration Agreement and/or the Middle Office Agreement and/or events which were outside the control of the Defendant."

11. The amendment sought in para. 36 is no more than a reiteration and amplification of that claim and furnishes particulars of the person or persons against whom the claims of the plaintiff could have and should have been made. It also raises the plea of the statute of limitations and the legal assertion that the plaintiff is or must be deemed to be responsible for the acts of such persons by virtue of s. 35(1)(i) of the Civil Liability Act 1961, as amended.

12. It is important to record that no new fact is pleaded in this amendment, such as would require further discovery. It seems to me that this is a real issue between the parties and one which would most conveniently and be appropriately dealt with at the trial of the action. If this amendment was not to be allowed, it would rule out a real and significant issue which arises between the parties out of matters which were already referred to in the original pleadings. I am satisfied that for the following reasons, I should exercise my discretion in favour of allowing the amendments sought:-

(i) they are necessary to ensure that all of the real controversies between the parties can be determined at the trial of the proceedings;

(ii) they can most conveniently and appropriately be determined in these proceedings in a way which is just, expeditious and likely to minimise costs;

(iii) the plaintiff has not shown any prejudice other than costs associated with the motion. In particular, the plaintiff has not established that there will be any unfairness or lack of justice in permitting the amendments. Discovery is not due to be exchanged until 30th March, 2017, and no new facts are pleaded which would require further discovery;

(iv) there has been no delay in bringing this application. In the context of these proceedings and the directions given, the time between the delivery of the defence and the request for consent to delivery of the draft amended defence is within acceptable limits;

(v) insofar as no explanation has been offered to the court as to why the amendments sought were not in the original defence, I do not regard that of particular significance in the context of the facts of this case. No new material facts are being introduced by the amendments and I am satisfied that they are necessary in order to join the real issues in dispute between the parties. In effect the amended defence seeks to raise legal consequences alleged to flow from matters already canvassed in para. 35(iv) of the defence and further amplified in the amendment sought in para. 36.

13. The defendant is entitled to an order amending the defence in the terms of the draft exhibited in the affidavit of Mr. Keith Smith sworn on 21st September, 2016.