THE HIGH COURT

[2021] IEHC 338

[Record No. 2015/9196 P]

BETWEEN

DENIS ENGLISH

PLAINTIFF

AND

PROMONTORIA (ARAN) LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Siobhán Stack delivered on the 17th day of May, 2021.

Introduction

1. This is an application brought by the plaintiff by notice of motion dated 17 December, 2020, in which he seeks an order extending the time to deliver an amended reply to defence and counterclaim, an order granting him liberty to rely upon an amended reply to defence dated 24 November, 2020, and, if necessary, an Order pursuant to O.28 r.1 of the Rules of the Superior Courts, 1986, as amended, granting him liberty to amend his reply to defence and counterclaim in terms of the amended reply to defence and counterclaim dated 24 November, 2020.

2. These proceedings were issued by plenary summons dated 10 November, 2015, and have had a protracted history. They arise out of a number of loan agreements with Ulster Bank, which the plaintiff accepts he entered into between years 2008 and 2011 ("the Loans"). In particular, he accepts that he entered into certain agreements on foot of facility letters dated 7 November, 2008, 13 May, 2010, 11 August, 2008, and 21 March, 2011 ("the Facilities"). He also admits that he entered into a mortgage with Ulster Bank dated 8 November, 2007, as security for the facilities ("the Mortgage"), which relates to Knocklofty House, Clonmel, Co. Tipperary ("the Property").

3. The central complaint of the plaintiff is that Ulster Bank purported to sell and/or assign, by way of the suite of documents (as defined at para. 10 of the defence) the Loans, Facilities and the Mortgage to the defendant, but the plaintiff does not accept the validity or effectiveness of those transactions and therefore does not accept that the defendant has acquired any rights, interests or powers pursuant to the suite of documents.

4. He also questions the appointment by the defendant of Mr. Ken Fennell, as Receiver, and alleges that Mr. Fennell either caused or permitted significant damage to the property by way of fires, flooding and criminal damage. The plaintiff has sued the Receiver in separate proceedings bearing High Court Record No. 2019/1826P ("the Receiver proceedings") and these are referred to further below.

5. There are two previous judgments of this Court, both given by Murphy J., which are significant for the purpose of this application. First, Murphy J. delivered judgment in these proceedings in *English v. Promontoria (Aran) Ltd. (No. 1)* on 16 November, 2016, [2016] IEHC 662 ("the No. 1 judgment") finding that the defendant had failed to provide sufficient evidence to the plaintiff that it had acquired Ulster Bank's rights, titles and interest in the plaintiff's Loans, Facilities and Mortgage, and stayed the appointment of the Receiver. On foot of this judgment, the defendant furnished additional documents to

the plaintiff and, in a second judgment, *English v. Promontoria (Aran) Ltd. (No. 2)* [2017] IEHC 322 ("the No. 2 judgment"), Murphy J. found that the additional documents were sufficient to demonstrate the power of the defendant to appoint the Receiver, and accordingly she lifted the stay on his appointment.

6. However, the immediate background to the within application is that the plaintiff got liberty on 24 October, 2019, to amend his statement of claim. It appears that the amendments permitted were less than what was sought, but nevertheless that liberty was given. This resulted in the inclusion of two further paragraphs in the statement of claim, giving liberty to the plaintiff to litigate the issue of the role of a third party, Capita Trust Company Limited ("Capita"), and no other issue is raised by virtue of those amendments. Other proposed amendments were refused, apparently, but I am not aware of the nature of those proposed amendments.

7. An amended defence and counterclaim was served on 22 November, 2019. Subsequently, on 6 March, 2020, on the hearing of a motion for inspection, this Court (O'Connor J.) directed the plaintiff to deliver his notice for particulars on the amended defence by 13 March, 2020, with the defendant to deliver replies for 27 March, 2020, and the plaintiff to deliver an amended reply to defence by 3 April, 2020. The deadlines for both delivery and reply to notice for particulars were complied with by the parties. As can be seen from the relief sought by the plaintiff in this application, however, the deadline of 3 April, 2020, was not complied with by the plaintiff, and he did not deliver an amended reply and defence to counterclaim until 24 November, 2020. It then appears that, as the defendant objected to the amendments, this motion was brought.

8. The most striking aspect of the amended reply and defence to counterclaim upon which I am now asked to adjudicate is its length. In sharp contrast to the limited amendments permitted to the statement of claim by O'Connor J., the amended reply and defence to counterclaim contains 25 new, or substantially altered, paragraphs, along with less significant changes to other paragraphs. Certainly, the impression is that the plaintiff has been given an inch but has taken a mile. However, impressions are not what counts and what matters is the substance of the proposed amendments and whether, in light of the relevant legal principles, the plaintiff should be permitted to introduce these amendments into the proceedings at this stage.

9. It should be added that the substance of the initial statement of claim could be, very broadly, divided into two strands. First, the plaintiff takes issue with the status of the defendant as the purported assignee of Ulster Bank and puts the defendant on full proof of its entitlement to appoint a receiver over his property and to recover monies said to be due and owing on foot of certain loan facilities which were originally granted to him by Ulster Bank. In addition, he makes some very serious allegations against the Receiver appointed by the defendant, to the effect that the Receiver caused or permitted significant damage to be done to the property.

Relevant legal principles

10. The application is brought pursuant to O. 28, r. 1 of the Rules of the Superior Courts, which provides:

> "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."

11. It is common case that the principal legal authority is the Supreme Court decision in *Croke v. Waterford Crystal Ltd*. [2005] 2 I.R. 383, a unanimous decision of the Supreme Court. This establishes that the primary purpose of O. 28, r. 1 is to give the court wide powers of amendment so that the real issues between the parties can be determined, subject to questions of real prejudice to the defendant (but noting that some aspects of prejudice can be dealt with by appropriate costs orders or conditions). The principles relating to the amendment of proceedings are, therefore, liberal ones, designed to achieve justice between the parties and not to defeat parties on the basis of technicalities.

12. It is instructive, however, to look in some detail at the application of those principles by the Supreme Court in that case. The applications consisted of amendments to the statement of claim as against both defendants, and an amendment to the reply. The amendments to the statement of claim sought to plead fraud and misconduct as against both parties.

13. However, the outcome was quite different as against the first and second defendants. In the case of the proposed amendments as they affected the first defendant, the Supreme Court was satisfied that the original statement of claim contained allegations of deceit and fraud and fraudulent concealment which "might not of itself be a cause of action but presumably would be directed towards a potential plea of the statute of limitations." The proposed amendment against the first defendant was, therefore, allowed on the basis that consisted of "clarification and… perhaps a strengthening of the claim that was made from the start."

14. The outcome against the second defendant was entirely different. The Supreme Court found that this was an entirely new claim, not previously pleaded against the second defendant in the statement of claim (notwithstanding some reference to it in the prayer and in the plenary summons). The introduction of a fraud claim was therefore found by the Supreme Court to radically alter the case against the second defendant, and these amendments were not permitted.

15. That outcome is, I think, instructive to the approach to the amendments in this case, given that the Supreme Court stated (at para. 25) "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." The starting point therefore must be to consider whether the proposed amendments are necessary for the purpose of determining the real questions of controversy in the litigation, and the approach of the Supreme Court in *Croke* itself would suggest that this Court should look at the pleadings as they stand at

present so as to consider whether the proposed amendments consist of clarification and perhaps expansion of the existing issues, or whether they consist of a radically different case and, if so, whether they are pleaded on an identifiable factual basis.

16. In refusing the amendments to the statement of claim as it was directed to the second defendant, for example, the Supreme Court, when considering the application to amend insofar as it concerned the second defendant, said it was highly relevant that, insofar as an allegation of deliberate misconduct was being made against the second defendant, it was "nothing more than a piece of legalistic pleading" (see para. 25) and was influenced by the fact that in the original statement of claim and replies to particulars, the plaintiff had not "put forward any factual basis whatsoever to support a fraud or any kind of deliberate misconduct claim against the second defendant" (see paragraph 37).

17. In determining whether the amendments were in reality directed to the real issues between the parties, the Supreme Court in considering the proposed amendments against the second defendant noted (at para. 38) that "no factual basis [had] been given to support any allegation against it other than the negative one of breach of duty."

18. It is also interesting to note that the Supreme Court found that the High Court in that case had been particularly strongly influenced by what it had perceived as procedural misbehaviour on the part of the plaintiff. While the Supreme Court were of the view that other factors (including procedural default by the party proposing amendment) could be taken into account in the exercise of the discretion to permit amendment, the primary purpose of O. 28, r. 1 was to give the Court wide powers of amendment so that the real issues between the parties could be determined.

19. It should also be recalled that the starting point of any application to amend is, as stated by Clarke J. in *Woori Bank v. KDB Ireland Ltd*. [2006] IEHC 156 (at paragraph 3.2):

> "In addressing the question of prejudice, it is, of course, important to recollect that a party does not require any leave of the court to formulate its pleading (whether of claim or defence), in any manner it chooses in the first place. A party has a very wide discretion as to the manner in which it may plead its case or its response. Insofar as there are limitations, same stem from the rules of court which permit aspects of pleadings to be struck out in the unusual and limited circumstances where the pleadings may be found to be inappropriate by being, for example, vexatious, scandalous or disclosing no cause of action."

20. Starting from the position that a party could have included the plea in the first place without requiring any leave from the court, Clarke J. stated (at para. 3.2) that the prejudice which needs to be established "must be a prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered. The prejudice must stem, therefore, from the fact of the belated alteration in the pleadings rather than the presence (if allowed) of the amendment itself."

21. The learned judge then went on to state that, in principle, prejudice could be established in one of two ways: first, a party resisting the amendment might be able to satisfy the court that, by virtue of the absence of the amended plea in the first place, steps had been taken which now make it impossible or significantly more difficult to deal with the case should the amendment be allowed. Secondly, a party might be able to persuade the court that "logistical prejudice" could occur. Counsel for the defendant relied on this aspect of prejudice (referring to it as "general prejudice", but nothing turns on the use of this slightly different term). Clarke J. described this type of prejudice in the following terms (at para. 4.2):

> "This will particularly be the case where the amendment is sought at a very late stage and could have the effect of significantly disrupting the intended proceedings. In such cases it may be that an amendment which could properly have been made at an earlier stage might be refused because to permit the amendment would have the effect of so altering an imminent trial as to require a significant adjournment to the prejudice of the party against whom the amendment is sought."

22. In addition, Clarke J. referred at para. 4.6 to the fact that in specific performance or in other similar procedure proceedings, the very existence of the proceedings can have an effect on the ability of the parties to deal in a commercial fashion with their assets. In my view, this is a case where the very existence of the proceedings potentially has an effect on the ability of the party who is ultimately adjudged to be entitled to possession of the property to deal with their assets, and delay, even of the general sort, is therefore potentially prejudicial. Counsel for the plaintiff accepted at the hearing of this motion that the plaintiff was currently in possession of the Property. That being the case, should the defendant be found at trial to have succeeded to the rights and remedies of Ulster Bank under the Mortgage, contrary to the plaintiff's contentions, then it will have been deprived for a significant time of its right to the income from the Property as well as the benefit of those rights and remedies. The plaintiff is most likely not a mark for costs and therefore the ability of the Court to ameliorate that prejudice is limited. In reality, this potential prejudice is an argument in favour of ensuring that the trial is not significantly delayed by the introduction of amendments at this stage.

23. It would appear, therefore, that the critical issues are, first, whether the proposed amendments address "real questions of controversy between the parties" and, secondly, whether to permit the amendments at this stage would cause prejudice to the defendant which cannot be ameliorated by the taking of other steps, such as procedural directions and the making of orders for costs.

24. While these appear to be the principal questions which I should address, several discrete issues were also raised by the defendant which should first be addressed.

Significance of previous case management

25. First, counsel for the defendant in this application relied on *European Property Fund plc v. Ulster Bank* [2016] IEHC 58, in which Costello J suggested that, where a case had been entered into the Commercial List, procedural default would be significant notwithstanding

the comments on this point by the Supreme Court in *Croke*. (It should be noted that in *Woori Bank*, Clarke J. also identified the impact of late amendment on the case management of proceedings admitted to the Commercial List.) It was argued before me that, because the proceedings have, together with related proceedings, been heavily case managed, the proceedings should be approached on the basis that they were analogous to proceedings which had been admitted to the Commercial List, and the effect on case management should therefore be regarded as prejudice which would justify refusal of liberty to amend.

26. I'm afraid I do not agree that the case management of these proceedings means that these proceedings should be approached as if they had been admitted to the Commercial List. The situation in *Croke*, where the proceedings had been the subject of case management in the High Court, appears to me to be on all fours with the situation in this application and overemphasis on procedural default would not be the correct approach. This case has not been entered into the Commercial List and therefore the comments in *European Property Fund* are not applicable. The procedural history of this case appears to be more aligned with the proceedings in *Croke* where the Supreme Court held that the High Court had erred in becoming overly persuaded of the impact of the late amendments on earlier case management.

27. In any event, it is notable that in *European Property Fund*, Costello J. permitted new claims notwithstanding that the case had been entered in the Commercial List. It is true that discovery had not been sought or made in that case and it had not been fixed for trial. However, the defendant was unable to say in the course of this application whether discovery would be required by reason of the proposed amendments and it does not seem that, at least in relation to the proposed amendments which do not seek to introduce any radically different issues, any delay to the trial will be significant.

Absence of explanation for delay

28. Secondly, the defendant also stressed that the plaintiff had offered no reasonable explanation for the delay in introducing the amendments the subject of this application. The only explanations offered were, first, the delays caused by the Covid 19 pandemic, and secondly, the necessity for senior counsel to settle the proceedings. I am in agreement with counsel for the defendant that these explanations are inadequate. Preparation of amended proceedings was something which clearly could have occurred on a remote basis even in the early part of the pandemic when the courts themselves closed for a short period before resuming, mainly through remote hearings. And quite apart from the fact that the senior counsel who settled the proceedings has apparently been involved in applications in these proceedings at various times since October 2017, the plaintiff's solicitors were at liberty to choose any senior counsel and not to await the availability of any particular senior counsel. The lack of availability of counsel can only be an excuse for a relatively short period of delay, as it is reasonable to maintain continuity of representation.

29. Furthermore, the period of delay in this case runs from March, 2020, to the end of November, 2020. Delay of that magnitude, particularly in drafting an amended reply and

defence to counterclaim, in a case which had been subject to specific directions, cannot be justified by the need to involve senior counsel. Indeed, it was not particularly clear how this justified any delay. No allegation of delay by counsel was made, and the purported explanation was that the proceedings would benefit from being settled by senior counsel. This begs the question as to why senior counsel was not retained to deal with the statement of claim, rather than waiting to the eleventh hour by first involving him in settling proceedings when the case was awaiting delivery of an amended reply and defence to counterclaim.

30. However, the fact that no reasonable explanation has been given for the delay does not advance matters much. In *Potteridge Trading Ltd. v. First Active plc*. [2007] IEHC 313, it appears that the precise effect of *Croke* on the materiality of delay and whether an explanation for it has been given was argued in some detail before Clarke J., who accepted that the question of delay and the adequacy of the explanation for it was still relevant, notwithstanding that the Supreme Court in *Croke* had held that the earlier case law had overemphasised these issues. However, he was of the view that no great weight could be put on this factor save where there was a fine balance involved in assessing the competing interests of justice arising (see para. 3.4).

Whether new issues can be raised in a reply

31. Thirdly, the defendant raised in its written submissions the undoubted principle that new issues should not, in general, be introduced in a reply. The plaintiff accepted that there was a general rule to this effect but submitted that it was not a cardinal rule and relied on the fact that it was clear from para. 2.3 of *Potteridge* that a reply could be amended. However, that is not in dispute and it should be noted that Clarke J. referred to the amendment of the reply with regret in that paragraph, apparently on the basis that it had been permitted so as to prevent the statement of claim itself from being amended but this had not achieved the desired result of a more efficient management of the proceedings. This point was not pressed strongly at hearing and I therefore do not propose to determine the application on this basis, nor, given the application of the relevant principles by the Supreme Court in *Croke*, do I believe that it is determinative of the correct approach to the application.

Abuse of process

32. Along with those points, counsel for the defendant relied as the principal basis for resisting the application the submission that it was an abuse of process.

33. As I understood it, there were two aspects to this argument. First, there was the significance of the No. 2 judgment and whether that, in effect, debars the plaintiff from seeking to query the defendant's status as the successor-in-title and assignee of Ulster Bank.

34. The second aspect of the defendant's stance that the plaintiff, by this application, was engaged in an abuse of process, related to a more general complaint of non-compliance with the rules of court and, in particular, with directions made by this Court in the course of case management of the proceedings. The defendant points to the attempt by the

plaintiff to include new claims in a reply when he had already moved to amend his statement of claim twice, and had not included them there, as was more appropriate. This second aspect overlaps significantly with the claim of general or logistical prejudice and my comments below in relation to that form of prejudice apply to this element of the abuse of process complaint also.

35. Turning to the No. 2 judgment, the defendant relies heavily on the fact that, in applying to vacate the previous interlocutory order made on foot of the No. 1 judgment, it satisfied the court at that stage on the balance of probabilities that the defendant had acquired Ulster Bank's interest in the Loans, Facilities, and Mortgage. Counsel for the defendant also relied heavily on the repeated statement in the judgment that the plaintiff had not disputed that he had taken the loans from Ulster Bank or that he had granted security to Ulster Bank in the form of the Mortgage.

36. Counsel for the defendant submits that, by reason of the fact that the defendant satisfied Murphy J. to the threshold of the balance of probabilities in the course of that application, the judgment cannot be regarded as being in the ordinary category of an interlocutory judgment and that, in effect, the plaintiff is now debarred from re-litigating the issues determined in that judgment. My preliminary comment in relation to that argument would be that, if that submission is correct, the plaintiff would appear now to be debarred from many of the pleas found in its original statement of claim. That is a matter for the trial judge, and indeed this issue of issue estoppel is raised by the defendant in its amended draft defence. Indeed, in doing so, the defendant appears to have taken the opportunity to introduce a new point while responding to the Capita pleas; the original defence was delivered after the No. 2 judgment and issue estoppel was not raised as part of the very general plea at para. 19 of the original defence, even though that para. refers to both judgments of Murphy J.

37. However, the issue I have to consider is whether this leads to a conclusion that the plaintiff should not now be permitted to amend his reply and defence to counterclaim.

38. Counsel for the defendant relied heavily on the judgment of the Court of Appeal in *Quinn v. Irish Bank Resolution Corporation* [2016] IECA 21, a judgment of Irvine J. That concerned an application to amend a statement of claim after the determination of a preliminary issue in a manner adverse to the plaintiff. The preliminary issue had been directed in the course of case management in the High Court and the plaintiff had been unsuccessful both in the High Court and on appeal to the Supreme Court. The Supreme Court had analysed the original statement of claim as confining any allegation of invalidity of the securities and guarantees as being consequential on the alleged illegality of the underlying loans. There was no claim that the securities and guarantees were in themselves unlawful.

39. After the determination of the preliminary issue in the Supreme Court, the plaintiffs attempted to introduce into the proceedings the issue of the "stand-alone" issue of the illegality of the securities and guarantees. In both this Court (Haughton J., [2015] IEHC 313) and in the Court of Appeal, this attempt failed. The Court of Appeal found that, to

permit the introduction of this issue by way of an amended statement of claim would be a breach of the Rule in *Henderson v. Henderson* (1843) 3 Hare 100. Approving a judgment of Hogan J. in *Ashcoin Ltd v. Moriarty Holdings Ltd (No. 2)* [2013] IEHC 8 the Court set out the following principles:

(i) The Rule in *Henderson v. Henderson* may be applied in any case where the court is satisfied that a party has held back in reserve an alternative argument with the intention of using it should the court reach a determination adverse to its interests on other arguments.

(ii) The Rule should not be applied with remorseless severity.

(iii) The Rule is one designed to prevent a defendant from harassment or other abusive conduct.

(iv) It is relevant to the discretion whether it can be demonstrated that the party seeking the relief does so in order to overreach, act oppressively or circumvent unfairly an adverse judicial ruling.

40. In *Quinn v. Irish Bank Resolution Corporation*, the Court of Appeal found that the High Court had been correct in holding that the Rule in *Henderson v. Henderson* was relevant to the exercise of the discretion and it could apply even in the absence of earlier litigation. The proceedings were under active case management, and the preliminary issue had been directed so as to ensure the efficient conduct of proceedings and had been determined on appeal in the Supreme Court. Those were sufficient reasons to apply the Rule.

41. In my view, that case has no application in these circumstances. The trial of a preliminary issue in the High Court, upheld on appeal to the Supreme Court (as was then the procedure), was the final determination as a preliminary issue *in the trial* of a specific aspect of the case. Part of the reasoning in the Supreme Court on the trial of a preliminary issue appears to have been predicated on the basis that no stand-alone illegality was raised in relation to the securities and guarantees themselves, the only issue in relation to illegality which was raised by the Quinn family related to the lawfulness of the advancement of the loans. Permitting the stand-alone illegality points to be introduced after the final determination of the preliminary issue by the Supreme Court would have allowed the plaintiff in that case to undermine the Supreme Court judgment, notwithstanding that it was a final determination of significant issues in the trial.

42. The defendant also relied on *European Property Fund plc v. Ulster Bank Ireland Limited* [2016] IEHC 58, in which certain aspects of the original claim had been dismissed as frivolous or vexatious or bound to fail were sought to be reintroduced by way of amendment at a later time. In essence, Costello J. did not permit those amendments which sought to undermine her earlier dismissal of certain aspects of the claim.

43. That is not comparable to the situation here, where Murphy J. had been satisfied, albeit on the balance of probabilities, of certain issues in the context of an interlocutory application by the defendant. No authority was cited to me for the proposition that an interlocutory application changes its character merely because a higher threshold of proof is imposed on one of the parties in seeking to move their interlocutory application (in this case, the defendant in moving its application to lift the previous interlocutory injunction granted). Although it was not opened to me, reference was made by counsel for the defendant in the course of argument to *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671 where Kelly J. referred to the low burden on a party seeking to substitute one party for another in an application pursuant to Order 15 of the Rules.

44. However, I do not see how the fact that a higher threshold was applied in the application to vacate the stay on the appointment of the receiver fundamentally alters the nature of that application as being an interlocutory one. It is well established that a higher burden of proof may be established for certain types of interlocutory relief, particularly where mandatory orders are sought: see the discussion in *Tola Capital Management LLC v. Linders* [2014] IEHC 316. They remain, however, interlocutory orders which may be reversed after further evidence or legal submissions at trial.

45. Indeed, the precise effect of the No. 2 judgment and whether it creates an issue estoppel which effectively disposes of many of the plaintiff's arguments in this case has been raised in the amended defence at para. 39A(a). It is therefore clear that the effect of that judgment and its impact on the claims made by the plaintiff even in its original statement of claim will be canvassed at trial. Should the amendments be permitted, the effect of the No. 2 judgment on the amended pleas will no doubt similarly be in issue, but I do not see the basis for asserting that the amendment cannot be made in the first place.

46. The essential difference, it seems to me, between an interlocutory matter and a trial is that, even if an issue is canvassed at interlocutory stage, the parties will have the opportunity at trial, before a final determination is made, to seek to introduce additional evidence on that matter, or to make further legal submissions as to the effect of that evidence. The fact is that the issues are still to be finally litigated and I do not believe that either *Irish Bank Resolution Corporation v. Quinn or European Property Fund plc* govern the approach to this application to amend. In both cases, the proceedings, whether by way of motion to dismiss or by way of trial of a preliminary issue, were finally determined.

47. By contrast, findings on an interlocutory hearing are not a final determination of an issue in any proceedings. As Keane C.J. stated in *Minister for Agriculture v. Alte Leipziger A.g.* [2000] 4 I.R. 32, at 45:

> "An interlocutory application deals with the substance of the proceedings but without deciding it."

Although Keane C.J. differed from the majority on the issue in that case, which was whether the determination of a preliminary issue as to jurisdiction was an interlocutory

matter, the majority judgments demonstrate a similar understanding that the very nature of an interlocutory matter is that it does not finally decide any issues in the proceedings.

48. Similarly, in *Sweeney v. Horan's Hotel (Tralee) Ltd.* [1987] I.L.R.M. 240, at 242, the Supreme Court held that failure to raise an issue of prejudice in an earlier motion to dismiss for want of prosecution did not mean that the defendant was estopped from raising it in a second motion of the same kind, notwithstanding that it would have been open to the defendant to do so. In so finding, the Court placed some reliance on the fact that both applications were interlocutory in nature.

49. Indeed, the application before Murphy J. for the purposes of the No. 2 judgment was whether or not she should lift the stay preventing the defendant from appointing a receiver, which had previously been granted on the application of the plaintiff. Presumably, had the defendant failed to lift the stay, it would hardly then have conceded that it was estopped from contending at trial that it had power to appoint a receiver.

50. It should also be noted that issue estoppel is distinct from the Rule in *Henderson v. Henderson* and applies to issues decided finally in earlier proceedings as opposed to the discretion to prevent parties from raising issues which ought to have been raised in earlier proceedings: see the discussion in McDermott, *Res Judicata and Double Jeopardy* (Butterworths, 2007) at paragraphs 7.01-7.02. As the argument raised in this case was based on the matter having been in fact the subject of a determination by Murphy J. in the No. 2 judgment, it seems that the defendant was relying on issue estoppel, which is an aspect of the doctrine of *res judicata* and was defined by Costello J. in *D. v. C*. [1984] I.L.R.M. 173, 193 (adopting the definition in *Halsbury's Laws of England*, 4th ed., Vol. 16, at para. 1530) as follows:

> "A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue has been solemnly and with certainty determined against him. Even if the object of the first and second actions are different a finding on a matter which came directly (not collaterally or incidently) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies." [Emphasis added.]

Issue estoppel therefore requires final determination of an issue in earlier proceedings, whereas the Rule in *Henderson v. Henderson* is directed to the failure to raise an issue at an earlier time.

51. The situation in this case is different from *Quinn* and *European Property Fund* in two respects: first, there has been no final determination in this case but only a determination at interlocutory stage, and secondly, the issue as to the defendant's entitlement to succeed to the rights and interest of Ulster Bank in relation to the Loans, Facilities and Mortgage has been raised from the outset and indeed is a bedrock of the plaintiff's entire case.

52. In my view, therefore, the Rule in *Henderson v. Henderson* has no application to the issue decided in the No. 2 judgment, nor is the plaintiff estopped from continuing to question the rights of interests of the defendant as successor and/or assignee of Ulster Bank, and I now turn to consider the plaintiff's application by reference to the general principles relevant to the amendment of proceedings.

Application of general principles

53. Returning to the two primary questions, the issue of whether the amendments are directed to the "real questions in controversy" between the parties is best considered in light of the individual amendments which I deal with on basis of certain categories as set out below. I therefore now deal first with whether there is prejudice to the defendant if the proposed amendments are introduced.

Prejudice asserted by the defendant

54. The defendant in this application relied on the prejudice to it, which it said arose in several ways. First, the defendant says the plaintiff is engaged in an abuse of process by continually delaying the hearing of the proceedings, by means of which he remains in possession and in receipt of the rents and profits. Of course, the respective entitlements of the parties to possession is in dispute in the proceedings but, if it turns out that the Receiver appointed by the defendant ought to have been entitled to collect rents and to manage the property since his appointment in 2015, then that will turn out to be a very significant prejudice to the defendant. On the other hand, while there appears to be an allegation that the Receiver in fact went into possession previously, the plaintiff acknowledges that he is himself currently in possession. From the point of view of this application, therefore, further delay cannot prejudice the plaintiff in the sense of preventing him from exercising his rights in relation to the Property: potential prejudice under this heading can only arise for the defendant.

55. This is, in my view, a significant prejudice which cannot be ameliorated in any meaningful way by procedural directions and orders for costs. Therefore, insofar as the proposed amendments would lead to significant delay in bringing the proceedings on for trial, this is a potential prejudice which has to be taken into account in considering the application for amendment.

56. Secondly, the defendant relied on what it termed "general prejudice", arising out of the fact that the benefit of case management of these and the related receiver proceedings could be lost if the result of the amendments were, in effect, to reset the proceedings so as to require new rounds of particulars, discovery, and possibly even interrogatories. Falling under this heading also is the delay to trial. During the hearing of the application, counsel for the defendant asserted that the trial could take place before the end of this legal year, Covid 19 restrictions notwithstanding. Given the recent easing of restrictions, the proceedings in their current form might well be capable of being heard this legal year. However, in considering this "general prejudice", I must take into account the undertaking volunteered by counsel for the plaintiff, first, not seek any further particulars in relation to the defendant's Capita pleas (at para. 39A of the amended defence), and secondly, not to seek discovery in relation to any pleas permitted in this application.

57. In considering prejudice under this heading, I must also have regard to the fact that the Capita pleas were permitted by my colleague, O'Connor J, on 24 October 2019 and also to the fact that the defendant was unable, on the hearing of this application, to advise the court as to impact that the granting of the amendments now proposed would have on its preparation for trial, and could not say whether, by reason of the amendments, it would need to seek discovery or call additional witnesses.

58. The nature of the prejudice which appears to arise in this case, therefore, is first, general prejudice arising from the fact that the plaintiff now seeks to introduce lengthy, and in some cases significant, amendments by way of amendment to his reply and defence to counterclaim, at a very late stage of the proceedings, and secondly, the prejudice potentially suffered by the defendant who, if it establishes that it is entitled to appoint a receiver and exercise the other rights and remedies of the mortgagee, will have been prejudiced by the continuing delay in bringing the proceedings to a conclusion.

59. In relation to the first of these, it is my view that the defendant has not demonstrated prejudice sufficient to resist the proposed amendments. The amendments will create delay and perhaps result in the trial taking place in the Michaelmas term as opposed to during this legal year. However, the dispute in relation to the amendments themselves added approximately five months to the proceedings before the application was set down for a day in April 2021. In that context, the proposed delay would not appear to be hugely significant. Furthermore, the defendant was not in a position to say, at the hearing of the motion, what the specific effect on its preparations for trial would be. In my view, the defendant did not identify general prejudice of such a nature as would justify refusing amendments which are directed at the real issues between the parties.

60. However, the prejudice which will have been visited on the defendant should it transpire that it was at all times entitled to take possession of the Property and to exercise other rights and remedies of a mortgagee is more significant. By way of a general comment, it does not, however, appear to me that, insofar as the amendments are a clarification or expansion of the issues between the parties at the moment, that any delay occasioned which could be regarded as significant, particularly given that the proceedings have already been ongoing for six years. However, insofar as the amendments seek to introduce entirely new issues into the proceedings, this has the capacity to occasion significant delay, and this prejudice may, therefore, justify refusal, given the potential prejudice to the defendant in exercising its rights under the Loans, Facilities and Mortgage. I return to this point as I consider the proposed amendment below.

Whether the amendments are directed to the "real questions in controversy"

61. Before proceeding to consider whether the proposed amendments are directed to the real questions in controversy between the parties, so as to fall within O.28, r.1, it is convenient to deal with them by reference to five separate categories:

    (a) Minor or inconsequential amendments referring solely to the fact that the original defence is now an amended defence, and altering the dates accordingly, and matters of that nature

(b) Pleas which seek to expand on the issues already raised, or indeed to repeat them

(c) Entirely new claims and/or causes of action

(d) The amendments in response to the defendant's amendments to its defence ("the Capita amendments")

(e) The amendments to the defence to counterclaim

(a) Minor or inconsequential amendments

62. As regards the proposed amendments to the reply, the amendments set out at paras. 1, 16, 17, 26, 27 and 28 of the drafted amended reply appear to me to be simply consequential amendments changing references to the "*defence*" to "*amended defence*", and so forth. This category also includes para. 29 of the amended defence to counterclaim, and most of para. 33 (with the exception of the reference to related proceedings, to which I will refer further below).

63. Insofar as these are inconsequential amendments, they are in the main housekeeping matters relating to the original claim and do not cause any prejudice to the defendant and I therefore propose to allow them.

(b) Pleas which seek to expand on or repeat the issues already raised

64. It was striking, on review of the amended reply and defence to counterclaim, that very large portions of it appear to expand on the fundamental complaint of the plaintiff which is that the defendant is not in a position to demonstrate that it is the successor in title or an assignee of Ulster Bank and is therefore not in a position to recover on foot of the loans which the plaintiff admits were advanced to him by Ulster Bank, or to exercise the powers of mortgagee as set out in the Mortgage which the plaintiff admits he granted to Ulster Bank.

65. Leaving aside for the moment some specific objections made by counsel for the defendant, it seems to me that paras. 2, 3, 4, 7 (b) and (d), 8, 9, 10, 11, 12, 13, 14, 15, 18, and 25 are, in substance, largely a repetition of or an expansion upon the case originally made by the plaintiff in his statement of claim.

66. I need to add, however, some slight qualifications to that general proposition. First, paras. 2 and 4 (and, by extension, 9) expand on the initial claim so as to seek to take advantage of the judgment of the Court of Appeal in *Promontoria v. Burns* [2020] IECA 87. However, the inclusion of this point is a natural extension of the plaintiff's approach to the proceedings, which has been to challenge each and every aspect of the assignment from Ulster Bank to the defendant, and to put the defendant on full proof of its rights and interest.

67. In addition, para. 11 complains that the demands were not issued *bona fide*. No detail is given in relation to this. However, this is a matter in respect of which the defendant can raise particulars, and with a tight timescale, this need not significantly delay trial.

68. In addition, paragraph 6 challenges the validity of a deed of novation dated 12 February, 2015, and the defendant contends that this is a new claim. However, I do not think that this is a radically new claim, if indeed it is new at all. One of the principal elements of the claim from the outset has been to challenge the entitlement of the defendant to rely on any of the suite of documents referred to in the defence (of which this is one). I therefore think that this amendment should be permitted.

69. Because the amendments discussed under this heading do not constitute a radically different case, it seems that any prejudice to the defendant will not be hugely significant. The plaintiff has undertaken not to seek discovery arising out of the amended pleas and the defendant was not in a position, at the hearing of the application, to say whether it would require discovery if all or any of the proposed amendments were allowed. It therefore does not seem to me that permitting the amendments would significantly delay trial and therefore they should be permitted, but strictly on condition that the plaintiff files and serves a fresh draft of the amended reply and defence to counterclaim within one week of electronic delivery of this judgment. This is to prevent further delay arising out of the failure of the plaintiff to comply with directions of O'Connor J. in relation to the delivery of this document, and to limit the delay occasioned by this application.

(c) Entirely new claims and/causes of action

70. As regards new claims, paras. 5 and 7 (c) are admitted by the plaintiff to be entirely new claims. Paragraphs 5 and 7(c) claim that the mortgagee's interest is a "chose in possession" rather than a chose in action and cannot be assigned. A sweeping reference is also made in these paragraphs to the fact that the defendant is engaged in "champerty and maintenance", with no indication whatsoever as to how these might arise or be applicable to the within proceedings. This paragraph also alleges that if the assignment of the mortgage is invalid, then this in turn invalidates the assignments of the loans from Ulster Bank to the defendant. Paragraph 7 (c) is, essentially, a repeat of these new, and rather sweeping, pleas in para. 5.

71. In addition, para. 7 (a) inadvertently includes the Bank in the plea, and counsel for the plaintiff accepted that this was in error. However, it was for the plaintiff to plead its case accurately. Given that the plaintiff accepts that the title of Ulster Bank to grant the mortgage was not sought to be put in issue and given that even if it were recast to exclude Ulster Bank it would be entirely repetitive of other pleas, I find that this plea is not directed to the questions in controversy between the parties and I refuse leave to include it.

72. In considering the entirely new claims that assignment was not legally possible (as opposed to invalidly done), I have to consider the fact that reliance on a plea that "the said assignment contravenes the laws of champerty and/or maintenance" and a plea that the mortgage "constituted … a chose in possession, as opposed to a chose in action" such that it was not capable of assignment, I had to take into account the fact that these issues were never raised previously and the only explanation for introducing them now was the acceptance by counsel for the plaintiff at the hearing that the plaintiff was "*on the back foot*" after the No. 2 judgment.

73. This of course begs the question as to why, when the original reply to defence and counterclaim was delivered on 16 June, 2017, the contents of that judgment of 17 May, 2017, were not taken into account in drafting it.

74. However, that point cuts both ways as the defendant, as I understand it, now heavily relies on an "issue estoppel" against the plaintiff arising out of the same judgment, and they at no point sought to amend their defence to include such a plea. It was first introduced in the amended defence and counterclaim in response to the amended statement of claim delivered on 25 October, 2019. Therefore, I do not think I can criticise the plaintiff for a delay in reacting to the No. 2 judgment, when it appears the defendant took no steps to plead the issue estoppel until provoked to do so by the service of the amended statement of claim two and half years later.

75. What is of more concern to me in considering these pleas is the complete lack of specificity in relation to them. Turning first to the pleas relating to maintenance and champerty, the Supreme Court stated recently in *Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2017] IESC 27 (per Denham C.J., at para. 25):

> "Maintenance may be defined as the giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation. Champerty is where the third party, who is giving assistance, will receive a share of the litigation succeeds."

76. It is entirely unclear as to who the third party said to be funding or investing in the litigation is and there is absolutely no doubt but that if this plea is allowed, the defendant will have to raise particulars and, if there is any substance at all to the plea, one can easily see how it would set off a chain of further pleadings, discovery, and perhaps even interrogatories by one or other of the parties (albeit that the plaintiff has undertaken not to seek discovery) which could significantly add to the issues at trial and almost certainly would require the calling of additional witnesses.

77. The explanation of Clarke J. in *Woori Bank* (see para. 19 above) I think is instructive as to how to approach this plea. Although the starting point is that a plaintiff may sue without leave of the court, there is ample provision in the rules (see for example O.19, r.28) and pursuant to the inherent jurisdiction of this Court to prevent abuse of the processes by the bringing of vague, generalised and, on the face of it, hopeless or frivolous claims. In my view, the pleas at paras. 5 and 7 (c) make no effort whatsoever to identify how maintenance and champerty could have any application to the proceedings, or indeed to the identity of the person against whom these allegations are made.

78. Even if I am wrong in that, the likely effect on pre-trial procedures as the defendant seeks to ascertain and prepare to defend the case against it is such that the potential prejudice to the defendant in being unable to act on foot of what might turn out to be its lawful right to take possession of the Property and to exercise the powers of mortgagee will be greatly exacerbated. Trial is likely to be delayed significantly and there is no realistic means of ameliorating or compensating for the prejudice which would be occasioned by

permitting this very vague and generalised plea, and I therefore refuse permission to include it.

79. In my view, the very general and vague pleas in relation to champerty and maintenance should not be permitted, as I do not believe that it is necessary to resolve the "real questions in controversy between the parties", which is the starting point for the application of the test in *Croke*. Counsel for the plaintiff was explicit in his submission that this was introduced purely as a reaction to the No. 2 judgment and he did not seek to expand in any way on the very vague and general plea at para. 5 or to explain how champerty and maintenance could have any relevance to the position of the defendant. *Croke* demonstrates that legalistic pleading without any factual basis is not permissible, notwithstanding the liberal discretion to permit amendment, and in my view, this plea falls squarely within that description.

80. Similarly, I think it is appropriate to refuse permission to introduce the pleas in those paragraphs that the Mortgage was a "chose in possession" as opposed to a chose in action and therefore not capable of being the subject matter of an assignment. *Halsbury's Laws of England,* 5th ed., Vol. 80 (2020) gives a commentary on the law of personal property, and at para. 806, discusses choses in possession and choses in action. While distinguishing these concepts by reference to the fact that the former are enjoyed in possession where the latter are enjoyed in action, the authors point out (at para. 806) that:

> "Personal property may also be partly in possession and partly in action, for example bills of exchange and promissory notes. The debt secured by them is a chose in action, but the actual document is a chose in possession. […] Choses (or things) in possession include all things which are at once tangible, movable and visible, and at which possession can be taken, for example animals, household articles, money, jewels, corn, garments and everything else that can properly be put in motion and transferred from place to place." [Emphasis added.]

81. By contrast, the authors describe "things in action" as meaning things recoverable by suit or action at law as contrasted with things or choses in actual physical possession. It seems clear that the rights of a mortgagee under a document such as the Mortgage, which relates to unregistered land, creates an interest in land in favour of the mortgagee, and not a chose in possession. Of course, the mortgagee has certain rights for which he can sue, and these must be choses in action. The only material chose in possession may be the right to have physical custody of the mortgage document (and perhaps associated documents of title) but this does not affect the legal entitlement to assign one's rights as mortgagee.

82. It therefore seems to me that the law in relation to choses in possession is not material to the "real questions in controversy" between the parties as it is difficult to see how it has any application to the Mortgage but that, even if it were, there appears to be no basis for alleging that choses in possession cannot be transferred to another person. The amended plea claims that they cannot be "assigned" and it is true that ownership of choses in

possession is generally transferred by the delivery of possession rather than by assignment. However, Halsbury, *loc. cit*., states (at para. 850) that they may also be transferred by deed, contract of sale or exchange, and, in equity, by declaration of trust. The proposed amendment, therefore, seems to be entirely unfounded and, in effect, a frivolous or vexatious claim.

83. As referred to above, amendments are granted liberally because the starting point is that a plaintiff is free to sue. However, where a claim is frivolous or vexatious, there is a jurisdiction to prevent the processes of the court from being abused by allowing the claim to be maintained. In the context of an application to amend, this translates into a refusal to permit such a claim to be introduced by way of amendment of existing pleadings. I am not satisfied, therefore, that this raises any real issue of controversy and that it is, in effect, a frivolous or vexatious claim.

84. I therefore refuse permission to amend to include the pleas at paras. 5 and 7 (a) and (c) of the draft amended reply and defence to counterclaim.

(d) The Capita amendments

85. Next, I turn to the Capita amendments, which are those at paras. 19 to 24. As stated above, the issue of whether Capita had in fact taken an assignment of the defendant's interest in the plaintiff's facilities and related security was introduced by amendments to the statement of claim on foot of liberty given in that regard by this court (O'Connor J.) on 24 October, 2019. In response, the defendant obviously amended its defence introducing a new paragraph 39A, with seven sub-paragraphs, the last of which is a straightforward denial of the two new paragraphs in the amended statement of claim. In the remaining sub-paragraphs, the defendant raises for the first time the impact of the second judgment of Murphy J. and claims an issue estoppel on the issue of whether the defendant is indeed the owner of the plaintiff's facilities and related security. The defendant then denies that it has assigned all of its interests to Capita, denies the plaintiff's plea as to the effect of a debenture dated 12 February, 2015, between the defendant and Capita, denies that the consent of Capita as to the conduct of the proceedings is required but claims that Capita is in any event aware of the defendant's defence of the proceedings and its counterclaim and claims in the alternative that the claim is being defended and the counterclaim is being maintained on behalf of Capita. It is then pleaded that any assignment of the defendant's interest, in order to take effect, would have to be notified to the plaintiff and no such notice has been given. Similarly, the defendant relies on clause 6.2 of the debenture and pleads that no notice has been delivered pursuant thereto as no enforcement event has occurred, and the defendant therefore asserts its right to sue and take enforcement action including the appointment of a receiver, pursuant to the facilities and related security.

86. Counsel for the defendant objects strongly to the lengthy amendment sought to be introduced by the plaintiff in its draft amended reply. These comprise six paragraphs running to over four pages in length. However, I would repeat my comment above that while this certainly gives the impression of unnecessary pleading, it is not a guiding principle for me on this application.

87. Insofar as para. 19 is concerned, this consists of denials of para. 39A (a) that also positively pleads that the defendant is estopped from raising an issue estoppel. I do not believe that this plea of estoppel properly particularised and I think it is likely that the defendants will seek further details in relation to it. However, given that the issue estoppel is only raised by the defendant in its amended defence, it seems to me that the liberal rule in Croke and the starting point that a party is entitled to plead its case as it sees fit lead me to the conclusion that this plea should be permitted.

88. Paragraph 20 also seeks to introduce an estoppel but relies for that purpose on a specific clause in the debenture and an alleged admission in legal submissions previously filed by the defendant. Again, applying the liberal rule, I do not see a basis for refusing this amendment. Paragraph 21 includes various denials which do not in themselves introduce issues not previously introduced by the amended statement of claim and amended defence, and in particular denies certain matters which are pleaded positively in the defence, which I think is an appropriate plea in the amended reply. This is particularly the case in relation to the pleas at para. 21, iii, iv, and v.

89. However, in sub para. (v), the plaintiff suggests that he may seek further and better particulars and/or interrogatories. Counsel for the plaintiff, at the hearing of this application, volunteered an undertaking not to seek further particulars in relation to the Capita pleas at para. 39A of the amended defence. The plaintiff's undertaking did not include an undertaking not to raise interrogatories but the types of pre-trial procedures which might be employed by the defendant are not an appropriate matter for pleading in any event. Accordingly, only the first two sentences of sub-para (v) will be permitted.

90. In general, notwithstanding its length, para. 21 appears to me to respond to the pleas in para. 39A of the amended defence, and, other than the reference to the seeking of particulars in the delivery of interrogatories, should be submitted.

91. Paragraphs 22, 23 and 24 contain much of the style of pleading which was criticised by the defendant's counsel. I am in agreement with many of those criticisms, but it is not the function of this court to redraft pleadings. For example, it is pleaded that the defendant is put on strict proof that no notice of its interest being assigned to Capita has been given to the plaintiff. The defendant takes position that it cannot prove a negative and if the plaintiff is saying notice was given, then he can give evidence of that himself. In my view, that issue can be dealt with at trial by way of legal argument and its introduction does not significantly prejudice the defendant.

92. In general, it seems to me that Capita amendments at paras. 19 to 24 (but excluding the last two sentences of para. 21 (v)) should be permitted, given the liberality of the rules. Like much of the pleas referred to at heading (b) above, it seems to me that while one could criticise the style of the proceedings, and the validity of the points made, these are not matters which go to the issue of whether the amendment should be permitted in the first place.

(e) Amended defence to counterclaim

93. The defendant makes the argument that the counterclaim was not amended, and this argument has some force, given that it does appear to have been contemplated by O'Connor J. when he permitted amendment of the statement of claim, that the defence to counterclaim would be amended, at least in the absence of an amendment to the counterclaim itself. At law, the counterclaim is a separate action from the claim in the statement of claim and would, for example, survive the dismissal of the claim set out in the plenary summons and statement of claim.

94. Notwithstanding my concerns in this regard, again having regard to the liberal rule established by the Supreme Court in *Croke*, it seems to me that these changes are primarily simply repetitive of the exhaustive pleadings contained in the amended statement of claim and amended reply as to the alleged invalidity of any purported assignment of the security or facilities to the defendant.

95. For example, para. 30 expands on the existing defence to counterclaim by claiming that both Ulster Bank and Capita should be parties to the counterclaim, an addition which I do not think is particularly significant as the entitlement of the defendant to rely on the suite of documents (provided to the plaintiff by the defendant and the subject of the previous judgments of Murphy J.) has been in issue from the outset. Therefore, a complaint that other parties are more properly entitled to sue for the monies sought in the counterclaim does not appear to alter the plaintiff's position significantly. Paragraphs 31, 32, 33 are all repeats of previous claims, save that they refer to the related Receiver proceedings, to which I refer further below. Paragraph 35, while it is in one sense unnecessary, does not materially add to the issues raised in earlier paragraphs and there is, therefore, no real prejudice to the defendant in permitting it.

96. There are, however, three exceptions to that. First, there are numerous references to the Receiver proceedings. Insofar as the plaintiff is attempting to introduce the entirety of those pleadings into this case rather than setting out his case in the pleadings in these proceedings, it is my view that this is completely inappropriate. As Finnegan P. stated in *A.S.I. Sugar Ltd. v. Greencore Group plc* [2003] IEHC 131 at 2, the purpose of pleadings is "to define with clarity and precision the issues of fact and law between the parties." Although the proceedings are linked, it was the plaintiff's choice to institute separate proceedings. So far as these proceedings are concerned, the global references to the Receiver proceedings do nothing to assist clarity and, on the contrary, raise the suspicion that, even if the Receiver proceedings were somehow dealt with, the pleadings in that case could simply be transferred over in their entirety into this case so as to consist of claims against this defendant, an entirely separate person. In my view, the plaintiff has been given ample opportunity to plead its case and, in truth, many of the amendments permitted by this judgment are already repetitive in nature or constitute a recasting of pleas already made. They arguably do not always assist in clarifying the issues, but, given the liberality of the rules relating to the amendment at pleadings, I think it is appropriate to grant them. However, seeking to import pleadings in different proceedings against a different person is an entirely different matter, and I will therefore refuse those portions of para. 31, 32 and 33 which refer to the related Receiver proceedings.

97. Secondly, fresh letters of demand have been issued and the plaintiff raises an issue at para. 31 as to whether this constitutes a waiver of the earlier letters of demand. Counsel for the defendant says that it was thought prudent to issue fresh letters but, given that the starting point is that the plaintiff may plead as he wishes, I think the claim should be permitted.

98. Finally, para. 34 refers to summary proceedings entitled *Promontoria (Aran) Ltd v. English* bearing High Court Record No. 2017/2682S which sought a sum which the plaintiff says is €498,184.20 less than that claimed in the within proceedings. I am not sure of the significance of this to the substantive issue between the parties, but again taking the starting point that the plaintiff can plead as he sees fit and that the rule on amendment is liberal, it seems to me that the defendant will be in a position to deal with this at trial and it does not significantly prejudice the defendant to the extent that the amendment should not be permitted.

99. The exception to this is the last sentence of para. 34 which claims that it is an abuse of process and/or in breach of the rule in *Henderson v. Henderson* for the defendant to sue the plaintiff in two separate proceedings in relation to the same debt. However, it is common case that the summary proceedings have been struck out as against the plaintiff, and therefore this pleading would appear to be entirely without foundation. Given the fact that the plea depends on an assertion which it is common case is not factually accurate, this claim is unsustainable and therefore the last sentence of para. 34 will be disallowed.

Conclusion

100. I will therefore permit the amendments set out at paras. 1, 2, 3, 4, 6, 7 (b) and (d), 8, 9, 10, 11, 12 (save the last line and a half referring to the Receiver proceedings), 13, 14, 15, 16, 17, 18, 19, 20, 21 (save the last two sentences of sub-para (v)), 22, 23, 24, 25, 26, 27, and 28 of the amended reply.

101. I will also permit the amendments set out at paras. 29, 30, 31 (save the subsidiary clause mentioning the Receiver proceedings), 32 (save the last sentence which relates to the Receiver proceedings, 33 (save the last sentence insofar as it refers to the Receiver proceedings), 34 (save the last sentence) and 35 of the amended defence to counterclaim.

102. I will refuse liberty to include the remaining amendments sought, being paras. 5, 7(a) and (c) and the portions of other paragraphs indicated above as being excluded.

103. It is a strict condition of the grant of that permission that a fresh draft amended reply and defence to counterclaim reflecting this judgment should be served on the defendant (by email) and filed in court within one week of the date of this judgment. This is necessary to ensure that the matter proceeds expeditiously and that the delay occasioned by the failure to adhere to the time lines prescribed by O'Connor J. is not further exacerbated. The time allowed should be more than sufficient and therefore the application will be refused if this direction is not complied with.

104. Provided the deadline is complied with, an Order granting liberty to serve an amended reply and counterclaim in terms of the draft filed in court on or before 24 May 2021 will be made.

105. I propose to reserve the costs of the motion given that, even though the plaintiff was largely successful in the application, he was not wholly successful and was further guilty of unjustifiable delay in submitting the draft amended reply and defence to counterclaim and in breach of a previous direction that it be served on or before 3 April 2020.

106. Should either of the parties wish to dispute the proposed order as to costs, they should file a short submission (no longer than 1,000 words) as to the order they propose and the reasons for it and that submission should be filed by 7 June 2021, and should serve same on the other party on the day such submissions are filed. They each have liberty to file replying submissions on costs on or before 14 June 2021.