

THE HIGH COURT

[2022] IEHC 334

[2015/6726P]

BETWEEN

PAT CLARKE

PLAINTIFF

AND

PIUS MCCARTHY, FRANCIS MANNING, FINBARR O'KEEFFE,

MARK O'HAGAN AND EAMONN MARTIN

DEFENDANTS

JUDGMENT of Ms. Justice Reynolds delivered on the 7th April, 2022

Introduction

1. This is an application brought on behalf of the second and third named defendants to amend their defence.
2. The application arises in the context of a failure by the plaintiff to disclose matters arising from which the moving parties contend that it is now necessary to amend the pleadings.

Background

3. The plaintiff's claim is for damages arising from allegations of historical sexual abuse occasioned by the third named defendant while the plaintiff was a student in De La Salle school in Dundalk, County Louth approximately five decades ago.

4. The first, second, fourth and fifth defendants are sued in their capacities as the entities responsible for the control of the school and the entities vicariously liable for the acts of the third defendant.
5. On 7 November, 2021, the court issued directions to facilitate an early hearing date for the proceedings.
6. Thereafter, correspondence was exchanged between the parties which included additional documentation provided by the plaintiff as follows: -
 - (1) Marriage tribunal documents were furnished which recorded the plaintiff as having given evidence to the Tribunal in 2011/12 wherein he asserted that there was another abuser who was now deceased (as of 2011).
 - (2) A third affidavit of discovery was furnished which did not contain missing counselling notes but did address the destruction thereof.
7. Having considered the additional documentation, the moving parties' solicitor wrote seeking consent to amend their defence.
8. A jury was impanelled to hear the case in November 2021, albeit that it had been flagged by senior counsel for the second and third named defendants that the issue of the amendment would have to be dealt with prior to its commencement.
9. Due to lack of court resources the trial did not proceed.

Amendment of pleadings

10. The relevant legal principles to be applied in the amendment of pleadings are well established.
11. Order 28, r.1 provides: -

“The court may, at any stage of the proceedings, allow either party to alter or amend his endorsement 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.

12. Accordingly, the court will only grant leave in circumstances where it is necessary for deciding the matters in dispute between the parties.
13. In *Croke v. Waterford Crystal Limited* [2005] 2 IR 383 Geoghegan J stated that the rule “is intended to be a liberal rule”, on the basis that the interests of justice are best served if all issues in controversy between the parties are before the court and can be determined by it.
14. In this regard, Geoghegan J held: -

... “It seems to me as soon as it appears that the way in which a party has framed its case will not lead to a decision on the real matters in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice as anything else in the case is a matter of right.”
15. In essence, the court will only accede to the amendment where the matter plainly relates to an issue in genuine controversy between the parties if this can be achieved without any injustice being done.
16. In so determining, the court is obliged to consider whether any prejudice will arise to the other party in the proceedings.
17. In *Woori Bank v. KDB Ireland Limited* [2006] IEHC 156 Clarke J, when considering the issue of prejudice, stated as follows: -

“The starting point for a consideration of whether to allow the amendment should be to have regard to the fact that the party could have included the plea in the first place without requiring any leave from the court. Prejudice needs to be seen against that background. The prejudice that needs to be established must be 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 of the pleadings rather than the presence if allowed of the amendment itself.”

18. What is required of the court, therefore, in its consideration is prejudice caused by the fact of the lateness of the pleading rather than the substance of the amendment itself.

19. Notably, in the instant case, the defendants could not have included the pleas as they had not been put on notice of all the relevant facts.

The amendments sought

20. The defendants seek leave in this application to amend their defence and introduce pleas, *inter alia*, as follows: -

- (1) Further and specific pleas of prejudice arising by virtue of the fact of another abuser(s) of the plaintiff and the loss of and/or failure to preserve counselling notes.
- (2) Pleas pursuant to the Civil Liability Act arising from the fact and death of another abuser of the plaintiff, which may be relied upon in abatement or extinguishment of the claim.
- (3) Pleas pursuant to s.26 of the 2004 Act and/or abuse of process arising from the approach taken by the plaintiff to date in terms of deficiencies in the pleadings and discovery.

21. The moving parties rely on the fundamental failure by the plaintiff to properly disclose matters in the pleadings and the prejudice arising from what appears to be the loss of crucial evidence and/or the existence of another deceased abuser of the plaintiff.

22. It is common case that in replies to particulars the plaintiff failed to disclose the fact that he had made a complaint to or had given evidence to the Marriage Tribunal of the Armagh Diocese in 2011/2012.

23. Further in response to a query as to whether he was ever abused by any other person the plaintiff responded: -

“The plaintiff confirms that he was not abused physically or sexually by any other person.”

24. Whilst the defendants take grave issue with these omissions, they do however concede that in furnishing their own discovery they provided a letter of 7 February, 2012 from the Marriage Tribunal to the Gardaí which had been copied to the De La Salle Order. This letter suggests that during evidence given to the Tribunal the plaintiff had acknowledged or referred to abuse by another person whom he refused to identify.

25. It is contended on behalf of the defendants that they had not addressed their mind to the significance of this document until making their own discovery, which was belatedly delivered.

26. The final amendment sought by the defendants seeks to reserve their right to make an application to dismiss arising out of these recent developments.

Discussion

27. It is essential to any successful application for leave to amend that the amendment sought is necessary for determining the real issues in controversy between the parties.

28. In the within proceedings, the plaintiff alleges abuse by the third named defendant when he was a student in school in or about 60 years ago.

- 29.** On the plaintiff's case, he only recovered memory of the alleged abuse in or about 2008/2009 on having attended a counsellor (Karen Wallace).
- 30.** The plaintiff subsequently made a complaint to the Gardaí in 2011 and in 2015 the within proceedings were commenced. Full defences have been filed on behalf of the defendants together with the usual pleas by way of preliminary objection in historic sexual abuse cases.
- 31.** The application to amend the defence arises out of the belated disclosure of facts which have always been in the knowledge or procurement of the plaintiff and which have been belatedly furnished on his behalf.
- 32.** Essentially, these are matters which go to the very core of what is at issue between the parties and are undoubtedly germane to the determination of the proceedings.
- 33.** Whilst the plaintiff has claimed that the request to amend is too late and will result in further delay, this could have been avoided had consent been forthcoming to allow the amendments.
- 34.** In conclusion, I am satisfied that the amendments sought are necessary for the proper determination of the issues in controversy between the parties and will not unduly delay such determination.