

**BETWEEN**

**FRANK BEHAN**

**PLAINTIFF**

**AND**

**DEERING TRANSPORT LTD, TSN LOGISTICS LTD, THE PALLET  
NETWORK (IRL) LTD & INDEPENDENT EXPRESS CARGO LTD**

**DEFENDANTS**

**Judgment of Mr Justice Cian Ferriter dated this 10<sup>th</sup> day of February 2023**

### **Introduction**

1. These proceedings concern a claim for damages for personal injuries arising out of an accident which occurred during the course of the plaintiff's duties as a truck driver employed by the first defendant haulage company. The accident occurred at 3am on the morning of 30 October 2014 when the plaintiff alighted from the cab of a truck he was driving for the first defendant, onto the floor of a warehouse premises owned, occupied or operated by the second, third and fourth defendants (for ease, "the other defendants").
2. In the personal injuries summons issued by the plaintiff on 15 February 2016, he pleaded that "*In the course of alighting from the truck, at the [other defendants'] premises, owing to the presence of a wet floor, the plaintiff was caused to slip and fall thereby injuring his right knee in consequence whereof he suffered severe personal injuries, loss and damage*". That description of the mechanism of the fall was consistent with the particulars included on his application to PIAB for authorisation to issue his proceedings.
3. The application now before me is an application brought by the plaintiff seeking permission pursuant to order 28 Rules of the Superior Courts to amend the particulars of claim contained on his personal injuries summons as issued. In short, the plaintiff seeks to amend his summons to now plead that "*In the course of alighting from the truck, at the [other defendants'] premises, owing to the criss-cross running ridges of the lowermost step of the cab of the truck being worn the plaintiff was caused to slip and fall thereby injuring his right knee in consequence whereof he suffered severe personal*

*injuries, loss and damage*" (amendment highlighted) i.e. that the accident was caused by a defective step on his employer's truck and not by the floor onto which he alighted being wet. He also seeks to amend his particulars of negligence and breach of duty as against the first defendant, flowing from the foregoing proposed amendment. The plaintiff has in fact now discontinued his claims against the other defendants given that he is no longer maintaining that his fall was caused by the state of the floor of the other defendants' premises.

4. The first defendant opposes the application on the basis that it would be unfair to it at this remove to allow the proposed amendments given that they fundamentally alter the nature of the claim sought to be made by the plaintiff, and that the amendments if allowed would cause significant prejudice to the first defendant, including by potentially depriving it of a defence under the Statute of Limitations.

#### **Background and material Chronology**

5. Before setting out the material background to the application, it is useful to set out a chronology of key events, including key steps in the proceedings to date:

**2nd July 2015:** by this date, the first defendant was in possession of CCTV footage of the accident from the other defendants.

**11th November 2015:** the plaintiff received an authorisation from PIAB to issue proceedings against the first defendant.

**15th February 2016:** the plaintiff commenced his proceedings by issue of a personal injury summons against all four defendants.

**10th May 2016:** the other defendants filed their defence in which they expressly deny that the accident was caused by the floor of their premises being wet; rather, they expressly plead, inter alia, that the accident was caused by the plaintiff slipping on one of the steps of the truck.

**11th May 2016:** the other defendants serve a Notice of Indemnity and Contribution on the first defendant. While the court did not have sight of this notice at the hearing of this application, it appeared from exchanges in court during the hearing that this notice made the claim by the other defendants as against the first defendant that the cause of the accident lay in the plaintiff slipping on the steps of the truck and not in the state of the floor of the other defendants' premises.

**6th September 2016:** while not set out in the affidavit evidence before the court, it became clear during the hearing before me that on this date the plaintiff's expert engineer inspected the truck from which the plaintiff alighted.

**7th September 2016:** an expert inspection took place at the other defendants' premises. While the plaintiff's engineer was not present at this inspection, I was informed at the hearing that the first defendant's engineer inspected the truck on this date also.

**3rd May 2017:** it appears from the replying affidavit of the first defendant's solicitor that the first defendant received a letter on this date making clear that the disc with the CCTV footage of the accident was downloaded by the Health and Safety Manager of the other defendants "at a slow speed to ensure that the sequence of events could be viewed clearly." This, it was said, led to the first defendant's solicitor writing to the solicitors for the other defendants almost one year later, on 13 April 2018, requesting discovery of the CCTV footage recorded in real time (see below).

**12th May 2017:** Both the plaintiff's engineer and the first defendant's engineer attend a joint inspection of the other defendants' premises. The plaintiff says on affidavit, and this was not disputed in any replying affidavit, that the plaintiff's expert informed the first defendant's expert at that meeting that as a result of the plaintiff's examination of CCTV footage of the accident, the plaintiff was making the case that the accident was caused by a defective step in the truck and not by the state of the floor of the other defendants' premises.

**10th November 2017:** in a follow-through of that position, the plaintiff served notice of discontinuance of his proceedings against the other defendants by agreement.

**15th November 2017:** the first defendant was notified of those discontinuances.

**13th April 2018:** the solicitors for the first defendant wrote to the other defendants seeking "real-time" CCTV footage. It is unclear whether, and if so when, such footage was obtained by the first defendant. There was no averment from the first defendant that such real-time footage was not now obtainable.

### **Notification of the proposed amendment application**

6. By letter of 18 May 2018 the solicitors for the plaintiff wrote to the first defendant's solicitors asking for their consent to the proposed amendments to the personal injuries summons. In that letter, it was stated: *"as you will be aware following the joint inspection which took place of this matter, on 12 May 2017 attended by Mr Karl Searson on our behalf and by your engineer, whilst the plaintiff initially understood that the accident the subject matter of these proceedings had occurred when he slipped on the floor of the warehouse when his foot touched the ground while alighting from the truck, an analysis of the CCTV coverage provided makes it clear that in fact the slip occurred with his foot came into contact with a step of the truck while he was descending and it was this which caused the fall to the ground. Our client had believed, up to having had sight of the CCTV coverage, that the slip had been caused by the condition of the floor, but the objective evidence contained in the CCTV coverage makes it clear that the mechanism was as described above"*. A copy of the proposed amended summons was enclosed with the letter. The letter then stated *"there can be no surprise to you given the fact that not only did you are possession of the CCTV coverage, but the error was communicated to you at the time of the joint inspection at the very latest"*.
7. The first defendant did not consent to the proposed amendment. The plaintiff then issued a motion seeking permission to amend, and an exchange of affidavits followed.

### **Legal principles**

8. The relevant rule is found in order 28(1) of the Rules of the Superior Courts which provides that *"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 to be made as may be necessary for the purposes of determining the real questions in controversy between the parties."*

9. There is no dispute between the parties as to the legal principles applicable to an application to amend under this rule.
10. The principles governing the application of the rule have been discussed by the Supreme Court in cases such as *Croke v Waterford Crystal* [2002] 2 IR 383 and *Moorehouse v Governor of Wheatfield Prison* [2015] IESC 21. The principles have most recently been helpfully summarised by Collins J. in *Stafford v Rice* [2022] IECA 47 at paragraph 23. I set out below the more salient aspects of that summary (using the sub-paragraph numbers of paragraph 23 of that judgment for ease of reference):
- (5) where amendment can be made without prejudice to the other party, or any prejudice can be addressed by the imposition of terms (such as terms as to costs), the amendment should be allowed;
  - (6) where a party seeks to rely on prejudice as a basis for resisting an amendment, they must be able to identify some prejudice that stems “*from the fact of the belated alteration of the pleadings, rather than the presence (if allowed) of the amendment itself*” (Clarke J. in *Woori v KDB Ireland* [2006] IEHC 156 at para 3.2);
  - (7) prejudice can be substantive e.g. a situation where a material witness has died or is unavailable or other evidence has been lost or where a material change of circumstances may have occurred in the period between the institution of the proceedings and the application to amend such that the amendment could give rise to an unfairness to the other party;
  - (9) particular considerations apply where it is said that the effect of permitting an amendment would be to deprive the defendant of a limitation defence that would otherwise be available to it, particularly bearing in mind that where a new claim is added by way of amendment of existing proceedings pursuant to order 28, that claim is deemed to have been made from the date of the commencement of the proceedings;
  - (10) accordingly, as a “general rule”, an amendment setting up a new claim will not be permitted where that claim would (or might) be statute barred if made in

proceedings issued at the time of the amendment; a real possibility that the claim is statute barred will suffice for these purposes;

- (11) however, that rule is not an absolute one and ought not to be applied overly rigidly. Where the plaintiff seeks to amend their pleadings to add a new cause of action arising out of the same facts or substantially the same facts as already pleaded, the amendment may be permitted; it may be relevant in this regard that the defendant has had an opportunity to investigate the facts underpinning the new claim.

### **Discussion**

11. In my view, the amendments sought are necessary to determine the real issues in controversy between the parties. The relevant issue in controversy is the precise cause of the plaintiff's fall during the course of his employment on 30 October 2014.
  
12. For the reasons I shall now come to, I have concluded that the facts here are such that there is no true prejudice or unfairness to the first defendant that cannot be remedied by appropriate terms, including terms as to costs in the event that the proposed amendments are allowed. On the facts of this case, the contention that the plaintiff's accident was caused by a fall from the steps of the truck and not by the wet floor of the other defendants' premises was a pleaded contention as against the first defendant within these proceedings from May 2016 and the first defendant had in fact investigated the facts underpinning the proposed amended claim (i.e. the contention that a step of the truck was the true cause of the accident) in September 2016, within the limitation period. I do not believe that there is a real possibility that the first defendant will be deprived of a limitation defence or otherwise prejudiced in the circumstances.

### ***Delay***

13. While the first defendant complains of delay in the bringing of the amendment application, the delay was explained by the plaintiff on affidavit and on the facts before me is not of itself a basis for refusing to make the amendments sought. In my view, the real question is that of prejudice to the first defendant if the amendments are permitted now, including the alleged prejudice of being potentially deprived of a limitation defence.

14. I will accordingly turn to those matters.

***Alleged prejudice***

15. The first defendant submitted that the plaintiff had consistently (in his accident report form, the description of the accident furnished to his medical advisers, his PIAB application, his letter of claim and his original personal injury summons) made the case that the cause of his accident was the wet floor of the premises of the other defendants. The first defendant submitted that the plaintiff was seeking to introduce wholly new facts such as to fundamentally alter the nature of his claim and to cause the first defendant real prejudice in meeting that amendment if allowed. It submitted that it would be unfair to allow the plaintiff make the amendment sought at such a remove from the date of the accident.
16. While a factual element of the matrix of fact giving rise to the claims in negligence and breach of duty is sought to be corrected and a previously unpleaded fact is sought to be included in the proposed amendments, I do not see that reliance on this new fact is such as to prejudice the first defendant in its defence of the amended claim or otherwise cause an injustice.
17. The first defendant in its solicitor's replying affidavit to the application made the following averment as to prejudice:

*"The first named defendant will suffer prejudice and injustice if the proposed amendments are allowed by the Court in circumstances where the date of the cause of action is pleaded as the 30th October 2014, and this defendant has spent a significant amount of time and money investigating and preparing the defence of the action based upon the plaintiff's claim that he was caused to slip and fall owing to the presence of a wet floor at the second, third and fourth named defendant's premises. I say by way of example that a further and different engineering inspection will be required, a further set of engineering reports produced, different photographs and perhaps production of the said vehicle which over 4 years post-accident may well be problematic. In any event, any inspection will not be of any assistance in relation to the state of wear and tear, if any, of the said step at all material times."*

18. In her submissions at the hearing of the motion, counsel for the first defendant also relied on the potential cost implications of service on the first defendant of a notice of indemnity and contribution by the other defendants.
19. Counsel for the first defendant also submitted that the period of time between the amendment application and the date of the accident would have a prejudicial effect on the first defendant's ability to defend the claim, with witness recollection evidence said to be the most obvious issue. However, no specific issue as regards potential witness recollection was averred to in the first defendant's replying affidavit. It was not suggested, for example, that there was a witness or witnesses who had witnessed the accident but from whom no statement had been taken at the time and whose recollection was now impaired.
20. In my view, it is also material to an assessment of any alleged prejudice to have regard to the fact that the first defendant was in possession of CCTV footage of the accident by early July 2015 (having been provided with that footage by the other defendants) i.e. prior to the institution of proceedings and that the other defendants, based on the contents of that footage, had been in a position to specifically plead in their defence filed on 10 May 2016 that the accident was not caused by the floor of their premises being wet, but rather, as expressly pleaded by them, *"the plaintiff's accident occurred as a result of the plaintiff, when alighting from the truck which he was driving, missing a step in the truck he was driving as a result of which when landing on the ground he fell to the ground"*. In the alternative, the other defendants expressly pleaded that *"the plaintiff while alighting from the truck which he was driving, slipped on one of the steps on the truck as a result of which when landing on the ground he fell to the ground"*. The other defendants expressly denied in their defence that the state of the floor of their premises caused the plaintiff to slip and fall. The other defendants also expressly pleaded in their defence that the plaintiff's accident was caused by the first defendant and/or by the negligence and/or contributory negligence of the plaintiff. We know that CCTV footage of the accident is available and, while the first defendant's solicitor averred that his engineer had not been able to view the original CCTV footage in real-time, the first defendant did not aver that it could not, even at this remove, now obtain a real-time showing of same to assist in its defence of the action (it being clear that the plaintiff was able to view the CCTV footage in real-time).
21. While the first defendant did not make clear in its affidavit evidence on this motion when precisely it became aware of the other defendants' position that the cause of the accident related to the steps of the truck and not the state of the floor of the premises, the material before the court made clear that the other defendants served a notice of indemnity and contribution on the first defendant on 11 May 2016. Surprisingly, the first



defendant did not disclose in its affidavit evidence on the motion that it arranged for its engineering expert to inspect the truck in question (which, of course, was its own truck) on 7 September 2016 i.e. just 7 months after being served with the personal injuries summons and less than four months after receipt of the notice of indemnity and contribution from the other defendants. The fact of this inspection strongly suggests that the other defendants had put the first defendant on notice of the position set out in their defence of the plaintiff's claims namely that the cause of the accident lay in the steps of the first defendant's truck and not in the state of the floor of their premises. Accordingly, very early in the proceedings (and certainly before the expiry of the two-year statute of limitation period), the first defendant was sufficiently aware of the contention that the cause of the accident was being attributed to the steps of the truck and not the state of the floor of the other defendants' premises, to cause it to instruct its expert to inspect the truck and steps to meet that case.

22. In truth, there was no evidence before me of any likely actual prejudice resulting to the first defendant in the event that I was to allow the proposed amendments, and certainly no prejudice that could not be cured by appropriate orders in costs and/or other conditions of the amendment. The first defendant was on notice of a factual (and related legal) case made by the other defendants to the effect that the accident was caused by a slip on the steps and not a wet floor. It had its engineering expert examine the truck in early September 2016 to be in a position to meet that case. There was no evidence before the court that any lapse of time between the plaintiff originally notifying its claim against the defendant (which happened in July 2015, at which point the plaintiff was framing the factual part of his case in terms of the other defendants' floor premises being wet) and the inspection of the truck some 14 months later in September 2016 left it in a position where it could not fairly meet a case as to alleged defect in the steps of the truck. In the event that the first defendant's engineer was hindered in carrying out an effective inspection of the steps on the truck arising from the belated raising of this issue in the other defendants' defence or in their notice of indemnity and contribution served on the first defendant (or by other communication), I would have expected such evidence to be before the court; however, no such evidence was advanced.

### ***Statute arguments***

23. In the speaking note furnished to the court by counsel for the first defendant at the hearing of the application, the following was said on behalf of the first defendant, under the heading "statute of limitations":

*"clearly, by delaying issuing this motion to amend his personal injury summons until 20 June 2018, the plaintiff's amended claim would be statute barred in the ordinary way, given the date of the cause of action being 30 October 2014. The Court must also consider the problematic issue of the authorisation issued to the plaintiff by the personal injuries assessment board on 11 November 2015 allowed him to issue proceedings predicated upon a manifestly different claim".*

24. No supporting authority addressing any situation analogous to the facts here was opened to the court in support of the first defendant's argument and accordingly I will address the argument on the basis of the established principles.
25. In my view, the plaintiff is correct in his submission that the proposed amendments do not so alter the basis of his originally pleaded claim that to permit the amendments would result in a real possibility of depriving the first defendant of a statute of limitations defence it would otherwise have. I have arrived at that conclusion for the reasons set out below.
26. The claim as originally pleaded against the first defendant was a claim for negligence and breach of duty (including breach of statutory duty) as against the first defendant arising out of an accident said to have occurred on 30 October 2014 while the plaintiff was alighting from the first defendant's truck at the premises of the other defendants during the course of performing his employment duties for the first defendant. That cause of action remains.
27. The original pleaded particulars of negligence and breach of duty against the first defendant included *"(a) failing to take any or any adequate precautions for the safety of the plaintiff whilst he was properly carrying out his work duties; (b) exposing the plaintiff to risk of damage or injury of which the first named defendant knew or ought to have known; (f) failing to operate a safe and proper system of work; (g) failing to comply with the provisions of the Safety Health and Welfare at Work Act 2005 and the regulations made thereunder."* Those particulars remain and additional ones are sought to be added, in addition to other originally pleaded particulars being deleted, arising from the shift in focus from the wet floor to the defective step as being the cause of the mechanism of fall.
28. As already noted, the amendments sought are necessary to determine the real issues in controversy between the parties, the relevant issue in controversy being the precise cause of the plaintiff's fall during the course of his employment on 30 October 2014. The

proposed amendments do not involve the addition of any new cause of action; the cause of action remains one in negligence and breach of duty against the first defendant. The factual basis of that cause of action is sought to be amended. However, the allegation of fact by the plaintiff against the first defendant which is the subject of the proposed amendments does not in truth introduce a wholly new allegation of fact into the proceedings as the allegation that the fall was caused by the steps of the first defendant's truck is already an allegation that has been pleaded in the proceedings by the other defendants both as against the plaintiff and the first defendant. Indeed, that pleaded allegation led to the first defendant having the truck examined by its expert shortly after the other defendants filed their defence and served a notice of indemnity and contribution on the first defendant. That inspection took place a relatively short time (some 7 months) after the institution of the proceedings and within the limitation period.

29. In those circumstances, "substantially the same facts" have already been pleaded in the proceedings, thus bringing the amendment within the type of scenario for permissible amendment contemplated in *Smyth v Tunney* [2009] 3 IR 322 and *Krops v Irish Forestry Board* [1995] 2 IR 113. As Collins J. stated at paragraph 23(11) of *Stafford v Rice* (noted earlier in para. 10 of this ruling):

"Where a plaintiff seeks to amend their pleadings to add a new cause of action arising out of *"the same facts or substantially the same facts"* as have already been pleaded, the amendment may be permitted: *Krops*, per Keane J. at 121. The *"addition of a new cause of action by amendment will be permitted notwithstanding that by the date of the amendment the Statute of Limitations had run if the facts pleaded are sufficient to support the new cause of action. Facts may be added by amendment if they serve only to clarify the original claim but not if they are new facts"*: *Smyth v Tunney*, per Finnegan J. at para 29. In such circumstances – neatly illustrated by the facts of *Krops* – permitting a new claim to be made by way of amendment causes no material prejudice to the defendant because they are already on notice of a claim(s) arising from the same facts, which they will have had an opportunity to investigate. The new claim cannot therefore be characterised as a "stale claim" or one which unfairly re-opens a past transaction(s) which the defendant might otherwise have legitimately regarded as closed." (emphasis added)

30. In my view, the passage underlined above is applicable to the case here. The plaintiff through his proposed amendments seeks to add further particulars of negligence and breach of duty of the first defendant which are focused on particulars relating to a failure to properly maintain the steps of the truck in good condition thereby causing the plaintiff to slip and fall. He does not seek to introduce a new cause of action or claim as such. While it can of course be said that the plaintiff is seeking to add a material new fact (the

state of the truck step) to his claim against the first defendant, in my view an unduly mechanistic view should not be taken of the concept of the introduction of new facts where such facts have already in substance been raised and put in issue in the proceedings. The practical reality is that the first defendant has been on notice, since early on in the proceedings, of the claim to the effect that the accident was caused by the truck steps and not the wet floor. The first defendant availed of the opportunity to investigate that claim shortly after it was made by the other defendants and did so within the limitation period applying to the plaintiff's claim. The type of mischief which the Statute is designed to capture does not therefore arise in this case. In the circumstances, in my view, it would be just to allow the amendments sought.

31. Insofar as the first defendant submitted that "problematic" issues arose from the fact that the authorisation issued to the plaintiff by PIAB on 11 November 2015 allowing him to issue proceedings against the first defendant was premised on an asserted case that the accident was caused by the wet floor of the premises of the other defendants, I propose to make clear in my order granting amendment that the first defendant will remain entitled, notwithstanding the amendments, to raise any ground of defence it sees fit stemming from the contention that the case now sought to be made is different from the case which was the subject of the PIAB authorisation (thereby rendering that authorisation invalid). In stipulating that condition of the amendment, I am not to be taken as expressing any view on the merits or otherwise of such a line of defence.

***Prejudice of unnecessarily incurred costs***

32. As we have seen from the extract of the first defendant's affidavit set out above, the first defendant asserted that it was prejudiced by the incurrence of significant amounts of time and money investigating and preparing for the defence of the action based upon the plaintiff's claim that his accident was caused by a wet floor on the other defendants' premises. If this was a case where there were costs clearly wasted or unnecessarily incurred to date in light of the proposed amended case, I would be minded to award such costs as a condition of the proposed amendments. However, in circumstances where the first defendant has indicated that it is not accepting in fact that the plaintiff's accident was caused by any defect in the truck steps and where the first defendant (as it is fully entitled to do) is seeking to maintain a claim over against the other defendants notwithstanding that the plaintiff has discontinued his claims as against them, I do not believe that I can fairly determine any contention as to wasted or unnecessarily incurred costs at this point.

33. Accordingly, it seems to me that the first defendant should revisit, as it sees fit, any such question of wasted and/or additional costs arising from the amendment at the conclusion of these proceedings and accordingly I will expressly reserve to the trial judge any question of a claim for costs arising from the grant of the amendment, other than the costs of the first defendant having to amend its defence in light of the amended personal injury summons and the costs of the first defendant raising particulars on the amended parts of the personal injuries summons (such costs to be adjudicated in default of agreement). I will place a stay on the adjudication of those costs pending determination of these proceedings.

### **Conclusion**

34. For the reasons outlined above, I will make an order permitting amendment of the personal injuries summons on the basis set out in the exhibited draft amended personal injuries summons subject to the following conditions:

- (i) the first defendant will remain entitled, notwithstanding the amendment, to raise any ground of defence it sees fit stemming from the contention that the case now sought to be made is different from the case which was the subject of the PIAB authorisation, thereby rendering that authorisation invalid.
- (ii) the plaintiff must pay to the first defendant the costs of the first defendant having to amend its defence in light of the amended personal injury summons and the costs of the first defendant raising particulars on the amended parts of the personal injuries summons (such costs to be adjudicated in default of agreement). I will place a stay on the adjudication of those costs pending determination of these proceedings.
- (iii) I will reserve to the trial judge any question of a claim for unnecessary or additional costs incurred in the case to date arising from the amended case, other than the costs referred to at (ii) above.

### **Costs of the amendment application**

35. The normal rule on amendment applications such as this is that the amending party bears the costs of the other side meeting the amendment application, provided that the other

party has not opposed the amendment application unreasonably. My provisional view is that the normal rule should apply here but I will hear the parties on that issue in the event that the plaintiff wishes to argue for a different costs order.