APPROVED

THE HIGH COURT

[2024] IEHC 119

Record No. 2018/5296P

BETWEEN:

GREANEY SOLAR PRODUCTS LIMITED

Plaintiff

-AND-

THE REVENUE COMMISSIONERS, IRELAND AND THE ATTORNEY GENERAL

Defendants

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 1st day of February 2024

INTRODUCTION

Preliminary

1. This is the Defendants' application for an order pursuant to O. 28, r. 1 of the Rules of the Superior Courts 1986 (as amended) ("RSC 1986"), seeking liberty to deliver an amended Defence pursuant to a Notice of Motion dated 15th November 2023 grounded on an Affidavit from Ruth Lynch, State Solicitor, sworn on 15th November 2023.

2. Paul McGarry SC and Eamon Marray BL appeared for the Plaintiff, and Patrick McCann SC and Nathan Reilly BL appeared for the Defendants.

3. The background to the application concerns the Plaintiff's challenge, brought by way of a plenary action, to the lawfulness of the application of administration charges (effectively administrative deductions) by the First Named Defendant in the amount of €500 per vehicle when processing VRT[1] refunds which were due to the Plaintiff arising from its business of exporting large quantities of second-hand motor vehicles. The total sum of the administrative deductions between 17th April 2013 and 31st December 2015 is alleged to be €450,100.

4. The Plaintiff, in the substantive action, *inter alia* seeks repayment and restitution of this sum of €450,100, damages, interest and costs. Reliance is placed on the decision of the Court of Justice in Case C-552/15 *Commission v Ireland* (Registration Tax) (ECLI:

[1] Vehicle Registration Tax.

EU:C:2017:698)[2] where it was *inter alia* held, on the facts of that case, that the existence of a deduction of €500 from the amount of registration tax by way of an administration charge to be refunded, did not comply with the principle of proportionality. The Court of Justice held that by failing to provide for the payment of interest when registration tax was refunded and by deducting €500 by way of an administration charge from the amount of registration tax to be refunded, Ireland had failed to fulfil its obligations under the freedom to provide services in Article 56 of the Treaty on the Functioning of the European Union (TFEU). Arising from section 49 of the Finance Act 2015, the amount of the administration charge prescribed in section 135D(4)(b) of the Finance Act 1992 was reduced from €500 to €100 from 1 January 2016.

5. Again, while a matter for the Trial Judge, in its Defence delivered on 11th March 2019, the Defendants *inter alia* plead that the decision of the Court of Justice in Case C-552/15 *Commission v Ireland* (Registration Tax) only relates to temporary cross-border leasing or rental of motor vehicles and is not of more general application.

6. The chronology of the proceedings is as follows: the Plenary Summons is dated 11th June 2018; a Memorandum of Appearance was entered on 29th June 2018; a Statement of Claim was delivered on 13th July 2018; a Notice for Particulars is dated 23rd October 2018; the Replies to Particulars is dated 11th January 2019; the Defence is dated 11th March 2019; a Notice of Change of Solicitors for the Plaintiff is dated 21st September 2022.

[2] The Grand Chamber of the Court of Justice delivered judgment on 19th September 2017. The Opinion of Advocate General Szpunar was delivered on 2 March 2017 (ECLI:EU:C:2017:162).

THE PROPOSED AMENDMENT

7. In addition to some suggested minor procedural amendments, the proposed amendment seeks to insert a new paragraph 17 to the amended Defence as follows:

> "*17. Strictly without prejudice to the foregoing and below pleas and/or strictly in the alternative, the Plaintiff is not entitled to any of the Reliefs sought on the following grounds:*
>
> *(a) The Plaintiff at no time during the period 17th April 2013 to 19th September 2017 contested the validity of the €500 deduction for examination and processing of Vehicle Registration Tax refunds or commenced any proceedings for Declarations or restitution/Damages.*
>
> *(b) Further, and strictly without prejudice to the pleas above and below, in so far as the Plaintiff has not and does not contest the validity of the current €100 administrative charge, to include technical examination and/or administrative charge it is pleaded that any recovery of the full amount of the €500 charge would amount to unjust enrichment. The Defendants rely on the EU legal principle against unjust enrichment.*
>
> *(c) Article 56 TFEU is expressed in general terms at a level of high principle consistent with provisions of TFEU. A broad discretion was conferred on the Oireachtas in addressing a scheme for Vehicle Registration tax and refunds thereunder.*

(d) *Article 56 did not purport to address the details of a tax such as Vehicle Registration Tax or its detailed workings. Article 56 did not clearly or directly address the circumstances partly addressed in the Judgment.*

(e) *As regards the Judgment, the Judgment was not foreshadowed by any judgment dealing with the same legal and factual material. There was no prior determination by an EU or a national court. Further, and without prejudice to the forgoing, the Judgment was not stated to have, nor could it have, retrospective effect.*

(f) *The conduct of the Defendants was excusable.*

(g) *The Defendants, prior to the Judgment, without prejudice to its position that the administration fee of €500 was not unlawful, reduced the administration fee to €100 to allay any residual concern regarding the operation of the refund system.*

(h) *The Oireachtas did not manifestly or gravely disregard the limits on the exercise of its powers.*

(i) *The Defendant pleads that a breach of Article 56 TFEU is not per se actionable by any person that has suffered or risks suffering loss as a result. A breach of a directly effective provision of EU law, such as the last sentence of Article 108(3) TFEU, is only actionable if three conditions are met: (1) the rule of law infringed must be intended to confer rights on individuals; (2) the breach must be sufficiently serious;*

and (3) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

(j) *The Plaintiff has not made any allegation or pleaded any facts which are or could be relied upon to address the second of those conditions, namely that the breach must be sufficiently serious.*

(k) *In the premises, the Plaintiff's claim for damages for breach of TFEU does not disclose any cause of action.*

(l) *Without prejudice and in the alternative, there has been no breach of any "important" rule of EU law (as per the decision in R v Secretary of State, ex parte Factortame [2000] 1 AC 524 and related case law).*

(m) *Any alleged breach was not deliberate. The public administration reasonably believed that the scheme was appropriate, lawful and proportionate.*

(n) *The Defendants acted to remedy the matter as soon as the breach was established. None of the costs allegedly incurred were caused after judgment.*

(o) *The Plaintiff did not complain about the charge. Any loss suffered by the Plaintiff was passed on to the end purchasers and were in any event of limited seriousness for the Plaintiff. There was no loss to the public at large.*

(p) *Further and/or in the alternative on the issue of the administrative charge the position of the Commission was not*

confirmed until 26th February 2015 and the State, without legal obligation and notwithstanding the non-binding nature of the Letter of Formal Notice and/or Reasoned Opinion, started to put in place arrangements to satisfy the Commission."

8. In addressing this application and the above proposed amendment, it is not the task of this court to assess the merits of the application. That is a matter for the Trial Judge at the substantive hearing.

9. Arising from the proposed amendment (set out above), the Defendants argue that they have sought to address more fully the Plaintiff's claims, including its reliance on *inter alia*, Case C-552/15 *Commission v Ireland* (Registration Tax) and have also sought to address the position where the Defence of no "*manifest*" or "*sufficiently serious breach*" of EU law was not made as explicitly as it might otherwise have been in the Defence delivered on 11th March 2019 and the Defendants anticipated that there was a risk that the Plaintiff might not consider that such a Defence had been engaged.

10. In this regard – and as both parties submit – the question of whether damages, for example, could be awarded against the State for an alleged breach of EU law (which again is a matter for the Trial Judge) involves consideration of the principles set out in cases such as *Francovich and Bonifaci v Italy* (Joined Cases C-6/90 and C-9/90) [1991] E.C.R. I-5357 as applied in *Brasserie du Pechêur S.A. v Germany* (Case C-46/93) and *R v Secretary of State for Transport ex p. Factortame* (Joined Cases C-46/93 and C-48/93) [1996] E.C.R. I-01029 where in the context of a failure to transpose a Directive,

the Court of Justice decided that this failure could conditionally give rise to a right to damages if: first, the provisions of the Directive in question included the grant of rights to individuals; second, it was possible to identify the content of those rights from the provisions of the Directive; and third, there was a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

11. On behalf of the Defendants, it is submitted that where a State fails to implement EU law properly, damages do not arise in every case. In summary, it is submitted that a party is only entitled to damages where the breach of EU law is manifest or sufficient – while this was latent in the original defence, the proposed amendment makes it express. From a pleading perspective, it is submitted that the proposed amendment also has to be seen in the context of O.21, r. 6 RSC 1986 which provides that "*[n]o denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted*."

12. In a domestic administrative law perspective, similar principles arise from the decision of the Supreme Court in *Glencar Explorations plc v Mayo County Council (No.2)* [2001] IESC 64; [2002] 1 I.R. 84 where, for example, Fennelly J. held at page 150 that a duty imposed by legislation on a public body "… *will not be held to create a right to damages for its breach unless it can be shown to have within the scope of its intendment a reasonably identifiable protective purpose and identifiable class intended to benefit*…".

13. In essence, the proposed amendment seeks to plead out the possible legal consequences of the application of these legal authorities, if applied to the facts of this case, and, as was submitted on behalf of the Defendants, to de-risk its defence of the action.

APPLICABLE LEGAL PRINCIPLES

O.28, r. 1 RSC 1986

14. O. 28, r. 1 RSC 1986 provides that "*[t]he 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*."

15. Generally, the approach of the court to an application to amend pursuant to O. 28 RSC 1986 was outlined in the judgment of the Supreme Court[3] in *Croke v Waterford Crystal Ltd* [2004] IESC 97 (at paragraph 28); [2005] 2 I.R. 383 (at page 394), where Geoghegan J. referred to the judgment of the Supreme Court[4] (McGuinness J.) in *O'Leary v Minister for Transport* [2001] 1 ILRM 132 (at page 143) which adopted the following statement from Lynch J. in *DPP v Corbett* [2001] ILRM 674 at page 678:

[3] The Supreme Court was comprised of Murray C.J., Denham, McGuinness, Geoghegan and Fennelly JJ.

[4] The Supreme Court was comprised of Denham, Barron and McGuinness JJ.

"*[t]he day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party.*

While courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendments should be made. If there might be prejudice which could be overcome by an adjournment then the amendments should be made and an adjournment also granted to overcome the possible prejudice and if the amendments might put the other party to extra expense that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party shall indemnity the other party against such expenses …".

16. In *Stafford v Rice* [2022] IECA 47 the Court of Appeal[5] (Collins J.), at paragraphs 22 and 23 of the judgment further considered the applicable and relevant principles which the court should apply to an application under O. 28 RSC 1986, (adding to the similar exercise commenced by the High Court (Birmingham J.)[6] in *Rossmore Properties Limited v ESB* [2014] IEHC 159) and referred, non-exhaustively, to the following principles:

"*(1) [t]he power of amendment is a broad one. That is evident from the terms of Order 28 Rule 1 itself, which provides that the Court may*

[5] The Court of Appeal was comprised of McCarthy, Ní Raifeartaigh and Collins JJ.

[6] As he then was.

allow either party "to alter or amend his indorsement or pleading in such manner and on such terms as may be just."

(2) In principle, any claim, cause of action or defence that could have been pleaded ab initio can be added by way of amendment, even if that has the effect of materially – even radically — altering the nature and/or scope of the existing proceedings: see (inter alia) Wolfe v Wolfe [2001] 1 IR 313, per Herbert J at 135; Shell E & P Ireland Ltd v McGrath [2006] IEHC 99, [2006] 2 ILRM 299, per Laffoy J at 311 and Rossmore Properties Limited, at para 19.6. Rossmore Properties Limited usefully illustrates the breadth of the amendment power, involving as it did the deletion of the entirety of the existing statement of claim and the substitution for it of a completely new pleading. Reference should also be made in this context to the judgment of Donnelly J in this Court (Baker and Costello JJ agreeing) in Persona Digital Telephony Limited v Minister for Public Enterprise [2019] IECA 360, at para 15.

(3) Order 28, Rule 1 is " intended to be a liberal rule" (Croke v Waterford Crystal Ltd [2004] IESC 97, [2005] 2 IR 383, per Geoghegan J at para 36). Again, that is evident from its express terms, providing as it does that "[a]ll such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties" [Collins J.'s emphasis].

(4) The requirement that the amendment is necessary for the purpose of determining " the real questions in controversy between the parties"

– the language used in Order 28, Rule 1 — " simply means that the amendment must raise or relate to an issue between the parties arising from the subject matter of the proceedings": Delany & McGrath on Civil Procedure (4th ed; 2018) (para 5–200). It does not mean that the amendment is necessary for the purpose of determining the "existing" questions in controversy.

(5) Where an amendment can be made without prejudice to the other party, or where any prejudice can be addressed by the imposition of appropriate terms (such as terms as to costs), the amendment should be allowed: per Geoghegan J. in Croke v Waterford Crystal Ltd, at para 25, citing O' Leary v Minister for Transport [2001] 1 ILRM 132; Moorehouse v Governor of Wheatfield Prison [2015] IESC 21, per MacMenamin J at para 42.

(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 in the pleadings rather than the presence (if allowed) of the amendment itself" (per Clarke J in Woori Bank and Hanvit LSP Finance Ltd v KDB Ireland Limited [2006] IEHC 156, para 3.2)

(7) Prejudice can arise in different ways. It may be substantive, in the sense that, by virtue of the fact that the amended plea was not made in the proceedings as originally constituted, the other party is or may be disadvantaged in answering that plea. Delany & McGrath on Civil Procedure identifies as "obvious examples" of this category of

prejudice a situation where a material witness has died or is unavailable or where other evidence has been lost (para 5–217). More generally, 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 would give rise to unfairness to the other party.

(8) Prejudice may be practical or, in the language of Clarke J in Woori Bank, "logistical". Where the effect of allowing an amendment would be to significantly disrupt the management and determination of proceedings, that will weigh – and in some circumstances may weigh decisively – against allowing the amendment. Historically, it may have been thought that this form of prejudice can be adequately addressed by the making of an appropriate order for costs. However, as Clarke J observed in Woori Bank, contemporary ideas of appropriate case management and the increasing emphasis on the need for the efficient use of court resources suggest that this form of prejudice "may loom large in the considerations of the court" (at para 4.2).

(9) Particular considerations apply where it is said that the effect of permitting an amendment would be to deprive a defendant of a limitation defence that would otherwise be available to it. In contrast to the position where a new defendant is joined to proceedings (where, by virtue of Order 15, Rule 13 RSC, the proceedings against that party are deemed to have begun only on the making of the joinder order 1), 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: Mangan v Murphy [2006] IEHC 317, at pages 4–5. As Mangan v Murphy illustrates, the addition of a new claim by way of amendment thus has the potential to cause serious prejudice to a defendant if that defendant would have a basis for pleading a limitation defence if that new claim were advanced by way of separate proceedings rather than amendment of the existing 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: Weldon v Neal (1887) 19 QBD 394. It is not necessary for a defendant to establish as a matter of probability that the new claim is statute-barred: a real possibility that the claim is barred will suffice: see, e.g., Mangan v Murphy at page 6 (it is "clear that there is a possibility that allowing the amendment would cause prejudice to the defendants by excluding them from reliance upon the Statute of Limitations") and Smyth v Tunney [2009] IESC 5, [2009] 3 IR 322, per Finnegan J at para 30 (the " Statute of Limitations may well have run and the defendants would be prejudiced by the amendments sought as to additional publication").

(11) However, that rule is not an absolute one and ought not to be applied overly rigidly. 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.

(12) There is some suggestion in the authorities that the power of the High Court under Order 28 to permit an amendment "on such terms as may be just" would allow the court to permit a new claim to be added by way of amendment expressly on terms that the amendment will take effect only from the date of the amendment order. The judgment of Birmingham J in Rossmore Properties Limited can be read as indicating that he intended that the order made by him in that case should have that effect. The issue was also considered by the High Court (Barniville J) in Microsoft Ireland Operations Limited v Arabic Computer Systems [2021] IEHC 538, at para 82. While expressing a

tentative view that the terms of Order 28 gave such a power, it was not necessary for Barniville J to reach any concluded view in the circumstances of that case: para 109. The issue was not argued in this appeal and its resolution must await a case in which it properly falls for determination. I therefore express no view on the point.

(13) The court is not generally concerned with the merits of any proposed amendment or its prospects of success at trial: see the discussion in Delany & McGrath on Civil Procedure (at para 5–206) and following, citing (inter alia) Woori Bank v KDB Ireland. Where, however, it is manifest that an amended claim is doomed to fail, the amendment should not be permitted. Requiring a defendant to plead to and defend such a claim may be seen as a form of prejudice.

(14) Lastly, there appears to be no rule of law precluding the amendment of proceedings to add a claim that has accrued since the commencement of the proceedings: Delany & McGrath on Civil Procedure (at para 5–266), citing Moorview Developments Ltd v First Active plc [2008] IEHC 274, [2009] 2 ILRM 262."

17. The aforesaid principles are well-settled and before examining their application to this case, I now set out, in summary, the arguments presented on behalf of the Defendants and the Plaintiff.

THE DEFENDANTS' POSITION

18. On behalf of the Defendants, Mr. McCann SC's first submission is that the Defendants do not need to furnish or offer an explanation or excuse as to the proposed amendment. It is also submitted that the Defendants are entitled to monitor the case on a continuous basis and seek an amendment whenever it considers it is necessary to do so.

19. Alternatively, if, however, an explanation is required, Mr. McCann SC refers, in particular, to paragraph 14 of the Affidavit of Ruth Lynch, State Solicitor of the Chief State Solicitor's Office ("CSSO"), sworn on 15th November 2023 to the effect that in preparation for the trial and after the conclusion of the review of the discovery process and in light of further information, the Defendants decided to deliver an amended Defence. It is stated that arising from that exercise, the Defendants had been advised that the defence of no "*manifest*" or "*sufficiently serious breach*" of EU law had not been made as explicitly as it might otherwise have been in the initial Defence delivered on 11th March 2019, and there was a risk that the Plaintiff might not consider that such a defence had been engaged. Ms. Lynch states that to ensure all issues were ventilated, the Defendants proposed delivering an Amended Defence which would capture the "*manifest*" breach claim and the "*unjust enrichment*" claim.

20. In addition to seeking to plead out more explicitly the possible application of *Francovich*/*Brasserie du Pechêur S.A./Factortame* line of jurisprudence, the Defendants refer to O. 21, r. 6 RSC 1986 and make the point that, as a matter of practice, a defendant does not have to put in issue the question of damages. It is observed that while this point could be made at the trial of the action, it runs the risk of an objection being made on behalf of the Plaintiff.

21. In their oral and written submissions, the Defendants also make the point that the proposed amended pleas are stated to be without prejudice and in the alternative to each other and to the original Defence. The Defendants submit that they did not act in breach of EU law and in the alternative, they have available the defence from the *Francovich*/*Brasserie du Pechêur S.A./Factortame* line of authority.

22. The Defendants also stated that the Plaintiff has not sought discovery up to this point and whilst they do not accept that the proposed amendment gives rise to a fresh discovery inquiry, it is submitted that the proposed amendment and any discovery process which may ensue will ultimately be in ease of the Plaintiff.

23. In summary, the Defendants contend that the Defence which was delivered on 11th March 2019 had not been set out as clearly or as expressly as it could have been and that it will be of assistance to the court and to the Plaintiff to have the real issues between the parties set out in a clear and express manner.

THE PLAINTIFF'S RESPONSE

24. In response to the aforesaid arguments made on behalf of the Defendants, the Plaintiff, in summary, makes the following points.

25. First, it was fairly accepted by Mr. McGarry SC that the issues raised by the proposed amendment were *arguable.*[7]

[7] *Havbell DAC v Harris* [2020] IEHC 147.

26. Second, and similarly, it was accepted that the matters set out in the proposed amendment arose from the same set of facts and circumstances as pleaded in the Statement of Claim delivered on 13th July 2018 and the Defence delivered on 11th January 2019.

27. Third, likewise, it was accepted the points proposed in the amendment arose from the controversy between the parties.

28. Fourth, it was therefore argued that whilst no *substantive prejudice* arose from the proposed amendment, *logistical prejudice* did, however, arise in (a) the management of the litigation because there was now an exposure to costs arising from the need to look for discovery from the First Named Defendant (the Revenue Commissioners), and (b) the consequential delay in not getting the case on.

29. It was pointed out, for example, that the application to amend came approximately four to five weeks before the hearing date on 12th December 2023 and sometime after discovery was made and approximately four and a half years after the pleadings were closed.

30. In summary, Mr. McGarry SC submitted that the reason why this application for an amendment was being opposed by the Plaintiff was essentially two-fold: first, there had been a failure to adequately explain the basis for the amendment; and second, there would be consequential delay.

31. On behalf of the Plaintiff, it was also submitted that the proposed amended pleas involved factual matters which will require further interlocutory inquiry, including discovery, and further evidence. It was submitted that the hearing would now take 3-4 days rather than initial 2-3 days (it appears that 2 days had been assigned to the hearing of the application).

32. Mr. McGarry SC argued that the Defendants could not have it both ways – it could not be maintained that the proposed amendment was *necessary* but was also *implicit* in the Defence already delivered on 11th March 2019.

33. It was submitted that the explanation proffered for the amendment was inadequate and that there was nothing in the discovery process (which, it is said, related only to the Plaintiff's vehicles) which could have led to that being the basis and rationale for a proposed amendment which sought to plead the Defence of no "manifest" or "sufficiently serious breach" of EU law and that this information was already in the possession of the Defendants and there was nothing new in the material discovered.

34. In commenting on the proposed amendment, the Plaintiff argued that the Defendants appeared to accept that the reduction of the administrative charge from €500 to €100 meant that while some charge was justified, they were uncertain as to what level of charge would amount to a manifest error (this argument was rejected on behalf of the Defendants).

ASSESSMENT & DECISION

35. In my view, for the following reasons, the proposed amendment *is* necessary for the purpose of determining the real questions of controversy between the parties.[8]

36. Whilst it is argued on behalf of the Plaintiff that the explanation proffered by the Defendants is inadequate and that Defendants are trying to have it both ways by stating that the proposed amendment was in fact latent or foreshadowed in the original Defence but are also, at the same time, seeking this amendment and, therefore, that it cannot be both implicit and necessary, the proposed amendment, in my view, brings further clarity to the legal consequences flowing from matters already canvassed in the original defence[9] and is supported by the general principles which the court must consider (referred to earlier in this judgment).

37. In this context, for example, paragraph 6 of the Defence delivered on 11th March 2019 denies that the administration charge was deducted without "justification or proportionality" from the VRT refunded as alleged in paragraph 6 of the Statement of Claim and pleads that the administration charge constituted a reasonable administrative charge for the provision of the export refund service at issue and no objection to the deduction of that charge was made by the Plaintiff; paragraph 10 of the Defence delivered on 11th March 2019 *inter alia* pleads that the decision of the CJEU in *Case C-552/15* was confined to the circumstances of that case, namely where the vehicle was imported on a temporary basis and the duration of that lease or rental had been

[8] *Croke v Waterford Crystal Ltd* [2005] 2 I.R. 388 per Geoghegan J. at 393.

[9] *D.G. Gross Premium Masterfund (In Liquidation) v PNC Global Investment Service (Euro) Ltd now known as BMY Mellon Investments Service (International) Ltd* [2016] IEHC 742 per McGovern J. at 5.

determined precisely and was known in advance; paragraph 15 of the Defence delivered on 11th March 2019 distinguishes the 2011 Letter of Formal Notice from the Plaintiffs' circumstances adding that it predated the introduction of the administration charge in 2013; paragraph 16 of the Defence delivered on 11th March 2019 pleads *inter alia,* on a without prejudice basis, that even if the Letter of Formal Notice and/or Reasoned Opinion had dealt with the situation of a company in the Plaintiff's position (which the Defendants deny), it was denied that the initiation of the pre-litigation procedure by the European Commission pursuant to Article 258 TFEU demonstrated that the administration charge at issue was contrary to EU law; paragraph 19(f) of the Defence delivered on 11th March 2019 pleads that the Statement of Claim does not plead – or in the alternative does not properly plead – a basis for any claim for failure to comply with Article 56 TFEU against the Defendants.

38. The proposed amendment at paragraphs 17 (a) to (p) inclusive are pleaded without prejudice and in the alternative to each proposed amended plea and to the original Defence delivered on 11th March 2019.

39. Further in this regard, the Defendants, in these proposed amendments at paragraphs 17 (a) to (p) have, in my view, also sought to address and capture the possible consequences of the decision of the CJEU in Case C-552/15 *Commission v Ireland* (Registration Tax) (ECLI: EU:C:2017:698) and rely on the principles established in *Francovich and Bonifaci v Italy* (Joined Cases C-6/90 and C-9/90) [1991] E.C.R. I-05357 as applied in *Brasserie du Pechêur S.A. v Germany* and *R v Secretary of State for Transport ex p. Factortame* (Joined Cases C-46/93 and C-48/93) [1996] E.C.R. I-01029 (or in a domestic context the application of the principles in *Glencar*

Explorations plc) by pleading these matters out in a more express manner (alternatively and without prejudice) whilst maintaining that the onus of proving damages remains with the Plaintiff as reflected in O.21, r. 6 RSC 1986 ("*[n]o denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted*").

40. I consider that this approach is consistent and in accordance with the principles adumbrated in the decision of the Court of Appeal (Collins J.) in *Stafford v Rice* [2022] IECA 47, and in particular the principles set out at paragraphs (1), (2), (3) and (4) therein and the Plaintiff accepts that substantive prejudice (*i.e.*, canvassed at principle 7), does not arise.

41. I also consider that the explanation offered by Ms. Lynch in her affidavit, particularly at paragraph 14 thereof, is clear and reasoned, even if it is accepted that it is concise. Likewise, while Mr. McGarry SC states that there was nothing in the discovery process, in and of itself, – because it was confined to dealing with the Plaintiff's vehicles – which would give rise to, or prompt, a requirement to seek an amendment so as to plead a defence of no '*manifest*' or '*sufficiently serious breach*' of EU law, *i.e.*, it is submitted that this information was already in the possession of the Revenue Commissioners, the Defendants point out that the discovery referred to was a *temporal* factor, as stated by Ms. Lynch at paragraph 14 of her Affidavit sworn on 15th November 2023 and it was not a question of, for example, *cause and effect*.

42. Further, I note the following observations of this court (Bolger J.) in *PC (a minor) v Doran & Ors* [2022] IEHC 367 where at paragraph 14 of the court's judgment, Bolger

J. referred to the decision of the court (Clarke J). in *Porterridge Trading Limited v First Active Plc* [2007] IEHC 313 and stated:

> "… *14. The plaintiff criticises the paucity of the defendant's explanation for the need to amend, i.e. senior counsel's advice as following a liability consultation. That is not a surprising or inadequate reason. Even if it was, Clarke J. in Porterridge Trading Ltd v. First Active Plc [2007] IEHC 313 suggests that this is not an issue on which any great weight is to be placed, "save where there is a fine balance involved in assessing the competing interests of justice arising". No such fine balance arises here. The defendant's explanation is therefore both credible and sufficient*."

43. Also, in *Croke v Waterford Crystal & Anor* [2004] IESC 97 at paragraph 30 of the judgment of the Supreme Court, Geoghegan J. observed that there had been an overemphasis on an obligation to give good reason for having to amend the pleadings.[10]

44. Turning to the issue of alleged *collateral prejudice*, in the penultimate paragraph of his Affidavit (paragraph 17) sworn on 20th December 2023, Cathal Gibbons Solicitor for the Plaintiff avers that it is "… *also the case that the Plaintiff has incurred substantial*

[10] Geoghegan J. observed that some of the previous High Court decisions cited before the court appeared to be derived directly or indirectly from only one part of an extract of the unreported judgment of the High Court (Barron J.) in *Shepperton Investment Company Limited v Concast [1975]* 1993 WJSC-HC 1393 (High Court (Barron J.), 21 December 1992).

legal costs preparing for the full hearing of the case which was to commence on the 12th December 2023 but which had to be adjourned on the 22nd November 2023 because of the Defendants' decision to proceed with its application to formally seek an Order from the Court amending its Defence in the terms of the proposed draft Amended Defence."

45. In *Moorehouse v Governor of Wheatfield Prison* [2015] IESC 21 at paragraph 42, McMenamin J. observed that if a proposed amendment puts another party to extra expense, this could be regulated by a suitable order as to costs or by the imposition of an indemnification condition addressing such expenses.

46. In *Porterridge Trading Limited v First Active Plc* [2007] IEHC 313 at paragraph 3.3 the High Court (Clarke J.) similarly observed that "*[t]o the extent that extra legal costs are incurred then the court can deal with same by making an appropriate order as to such costs*."

47. Referring to both of these authorities in *PC (a minor) v Doran & Ors* [2022] IEHC 367 this court (Bolger J.), by reference in particular to the decision in *Porterridge*, referred to the possibility that some additional element of effort and expense will, even in the simplest of cases, inevitably result from an alteration in the course of the proceedings and, for example, a respondent to a motion to dismiss would have to show far more tangible prejudice (for example, irremediable prejudice) and more than a prejudice that could be ameliorated by something like an adjournment or an appropriate costs order.

48. The trial date for the substantive action was 12th December 2023.

49. In this case the CSSO furnished the proposed amended Defence on 7th November 2023 to the Plaintiff's solicitors seeking its consent within seven days and stating that "… *in light of the proximity of the trial date in the absence of any response agreeing to the delivery of an amended Defence within 7 days an application will have to be brought before the Court for liberty to deliver same*."

50. On 9th November 2023, the Plaintiff's Solicitor C.P. Crowley & Co. Solicitors responded and objected to the proposal to amend the Defence for the following reasons:

> "*1. The pleadings have been closed since March 2019, a period of over four and half years ago;*
>
> *2. The Notice of Trial was served almost four years ago;*
>
> *3. The matter has been before the non-jury Judge on a number of occasions prior to the fixing the hearing date;*
>
> *4. It is extraordinary that your client would seek to introduce such a far-reaching and substantive amendments within a few weeks of the trial of a plenary action;*
>
> *5. No explanation has been provided for the failure to plead these matters before now. As you are aware, it is a condition of all*

applications for amendment that some credible reason be advanced as to why it has not been possible to include these pleas prior to this time.

In addition to the above, in the event that you make an application to the court, we will draw attention to the contents of paragraphs 2 and 3 of the State Litigation Principles, issued by the Attorney General on 21st June 2023."

51. The CSSO responded by letter dated 10th November 2023 indicating that this motion would be brought and that an early return date would be sought and setting out the context for the application (as later reflected in the Affidavit of Ms. Lynch referred to earlier in this judgment) as follows:

"*[i]n preparation for the trial, and after the conclusion of the review of the discovery process and in light of further information, the Defendant wishes to deliver an Amended Defence, I have been advised by Counsel that the Defence of no "manifest" or "sufficiently serious breach" of EU law was not made as explicitly as it might otherwise have been and there was a risk that the Plaintiff might not consider that such a Defence had been engaged. To ensure all issues are ventilated the Defendants are proposing an Amended Defence which will capture the "manifest" breach and the unjust enrichment breach.*

We note that you have not identified any specific breach prejudice suffered by reason of the amendments ...".

52. The matter was mentioned before the court (Hyland J.) at the call-over of the List on a number of occasions between 17th November 2023 and 22nd November 2023. It appears that a possible hearing date of 23rd November 2023 was canvassed but that date was not suitable for some of the parties. It also appears that in answer to the court's inquiry as to whether the trial date would have to be vacated if the application to amend the Defence was to proceed, it was indicated, on behalf of the Plaintiff that the issue raised in the proposed amendment was very different in substance.

53. When asked about discovery, while the Plaintiff had not yet had the opportunity to consider the possibility of discovery, as the Plaintiff considered that the proposed amendments were radical, it was indicated that discovery might be required and therefore the case could not proceed. In those circumstances the Plaintiff had sought its costs, including a wasted costs order, costs of the motion and the costs of a vacated hearing date. On behalf of the Defendants, it was indicated that the State was not looking to vacate the hearing date.

54. At the hearing before me, the Plaintiff submits that on 22nd November 2023 the court gave the Defendants the option of either not proceeding with the amendment application or having the case proceed. In the circumstances, therefore, of deciding to proceed with this application to amend, the substantive hearing was adjourned and a hearing date of 11th January 2024 was given for the making of this application to amend.

55. In effect, the Plaintiff refers here to *logistical prejudice* having regard, looking back, to the closure of the pleadings and the notice of trial over four years ago and, looking forward, to the requirements, for example, of discovery, possible further evidence and

the loss of a hearing date (which, it is submitted, will now be increased from 2-3 days to 3-4 days if the amended Defence is allowed) and the associated legal costs involved, which the Plaintiff seeks.

56. It is submitted on its behalf that these factors alone should be sufficient for the court to refuse the application to amend and to award the Plaintiff its costs.

57. Looking at this matters through the prism of principle 8 identified by Collins J. (set out earlier in this judgment), I do not consider that the effect of allowing the proposed amendment would be to significantly disrupt the management and determination of the proceedings or result in any disproportionately negative consequences in the efficient use of court resources.

58. Moreover, in my view, as the proposed amendment does not radically alter the issues as between the parties and, therefore, the mitigating factors of an adjournment or the award of costs – where, for example, prejudice is caused by a radical amendment – are not applicable in this instance. The amendment proposed is not a radical new plea.

59. Further, it is fairly accepted on behalf of the Plaintiffs that no substantive prejudice arises from the proposed amendments. Equally, while it is certainly the case that the application was made some four to five weeks prior to the hearing date of the substantive action, I do not consider that the proposed amendment could be said to create a prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered or that the Plaintiff will suffer any unfairness arising from the proposed amendment and any additional pleading or interlocutory applications which may arise.

PROPOSED ORDERS

60. I will therefore make an Order pursuant to Order 28, Rule 1 of the Rules of the Superior Courts, 1986 (as amended), granting liberty to the Defendants to deliver an amended Defence in terms of the amendments exhibited to the Affidavit of Ruth Lynch sworn on 15th November 2023.

61. In the circumstances my initial view is to reserve the question of the costs of this application to amend and I will list the matter before me on Tuesday 27th February 2024 for the purposes of addressing this matter and any other ancillary or consequential matters which arise.