APPROVED

THE HIGH COURT

[2024] IEHC 161

Record No. 2023/218 CA

(Circuit Appeal Record No. 6086/2019)

BETWEEN:

ANTHONY (OTHERWISE TONY) MEEHAN AND BRENDA MEEHAN

Plaintiffs

-AND-

PROMONTORIA SCARIFF DAC AND STEPHEN TENNANT

Defendants

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 5th day of March 2024

INTRODUCTION

Preliminary

1. This is the Plaintiffs' appeal from the decision and order of the Circuit Court (His Honour Judge John O'Connor), dated 14th November 2023 striking out the Plaintiffs' motion and refusing to allow an amendment of the Equity Civil Bill and Indorsement of Claim issued on 13th September 2019 and further refusing to transfer the Plaintiffs' claims to the High Court. As this is a Circuit Court appeal, the application falls to be determined, therefore, by reference to the statutory jurisdiction and Rules of the Circuit Court.

2. Stephen Moran BL appeared for the Plaintiffs and Rudi Neuman BL appeared for the Defendants.

BACKGROUND

3. The Plaintiffs are a married couple who bought a residential property located at Apartment 59, The Water Mill, Bettyglen, Raheny ("the Property") as an investment in 2007 with secured financing provided by First Active plc. First Active plc transferred the loan to Ulster Bank in 2010 and in turn Ulster Bank transferred the loan to Promontoria Scariff DAC ("Promontoria") in late 2018.

4. Cabot Financial (Ireland) Limited ("Cabot") acted as agent for the secured lender on dates relevant to the initial Equity Civil Bill and the proposed amended Equity Civil Bill.

5. Whilst the original loan provided for the monthly repayment of principal and interest, by virtue of an agreement in relation to alternative repayment arrangements ("ARA"), the Plaintiffs paid interest only on the loan until 1st May 2018 and between the time the last interest only ARA and the new repayment ARA commenced, arrears of approximately €5,500 had accrued.

6. From in or around 4th September 2018 on foot of a new ARA, as just mentioned, the Plaintiffs commenced making increased payments of interest and capital.

7. The alleged underlying dispute in these proceedings concerns the request by the First Named Plaintiff to have the accrued arrears of €5,500 capitalised (*i.e.*, add the arrears to the total amount owed and pay it back over the lifetime of the loan). In brief summary, the First Named Plaintiff alleges that he was assured that after completing six months of making repayments on the new ARA, his request/application for capitalisation of the arrears, which had accrued to that point in time, would be reviewed.

8. The Plaintiffs made six repayments under the new ARA and requested in February 2019 that the bank review the capitalisation request.

9. By in or around February 2019, while Cabot managed the loan on its behalf, Promontoria had acquired the loan.

10. The Plaintiffs' claim was pleaded initially by way of an Equity Civil Bill and Indorsement of Claim issued on 13th September 2019, where the Plaintiffs sought

specific performance of the ARA allegedly agreed between them and a Cabot official on behalf of Promontoria (as successor or assignee of Ulster Bank Ireland DAC), on foot of an initial telephone call on 27th July 2018 and evidenced in writing by correspondence dated 8th August 2008 and 30th August 2008.

11. As pleaded out, the Plaintiffs allege that during the course of a further telephone conversation on or about 28th November 2018 between Mr. Anthony Meehan and a Cabot official, it was represented to Mr. Meehan that the capitalisation of arrears, which had accrued at that point, would occur following six consecutive payments by the Plaintiffs of the new ARA (paragraph 10(b) of the Indorsement of Claim of the Equity Civil Bill issued on 13th September 2019 alleges that the Cabot official or agent "… *communicated that the alternative repayment arrangement provided that the arrears would be capitalized after six monthly repayments of €1,652, at which point the monthly repayment would increase to €1,680*").

12. The sixth and final payment of €1,652 was made on or about 1st February 2019.

13. By letter dated 30th April 2019, Promontoria wrote to Mr. Meehan and allegedly demanded repayment within seven days of the facility being the sum of €338,421.12 (including arrears of €5,562.84) and allegedly appointed the second named Defendant as receiver over the property from on or about 13th May 2019.

14. It is alleged that by letter dated 26th June 2019, Cabot sought to repudiate the alleged agreement on the basis that "… *the documentation provided does not confirm that Ulster Bank DAC or Cabot Financial Ireland Ltd agreed to capitalise the arrears on the mortgage account.*" In the initial Equity Civil Bill issued on 13th September 2019,

the Plaintiffs claim loss of rental income of €6,656 (ongoing) as particulars of special damage.

15. The Plaintiffs also allege that had they been informed that the bank would not agree to the capitalisation of the arrears as part of the ARA, or that entry into the ARA was contingent on the repayment of the arrears, they would have discharged the arrears then due.

16. The Defendants' Entry of Appearance was dated 7th October 2019; the Defence was delivered on 2nd March 2020; the Plaintiffs' Notice to Admit is dated 13th March 2020; the Plaintiffs' Notice for Particulars and Notice to Produce is dated 13th March 2020; the Plaintiffs' Supplemental Particulars of Special Damages is dated 20th March 2020; the Defendants' Replies to Particulars is dated 7th July 2023; the Plaintiff's updated Particulars of Claim is dated 18th January 2023.

17. A document entitled "*Supplemental Particulars of Claim*" dated 3rd March 2023 was sought to be delivered by the Plaintiffs in "… *amplification of their case against the defendants and as pleaded in the Equity Civil Bill issued 13th September 2019 and the supplemental particulars of special damage delivered 20 March 2020.*"

18. This document was essentially the forerunner of the proposed amended Equity Civil Bill and Indorsement of Claim attached to the letter of 6th March 2023 and to the Plaintiffs' subsequent motion herein dated 4th April 2023.

19. As mentioned, the "*Supplemental Particulars of Claim*" dated 3rd March 2023 presages each paragraph with the description "… *in amplification of* …" at paragraphs 5, 8, 10, 12, 13, 14, 15, 16, 17, and 21 of the Equity Civil Bill dated 13th September 2019.

20. Mr. Neuman BL refers, in particular, to paragraph II of the "*Supplemental Particulars of Claim*" which allegedly refers to the Plaintiffs' interaction with the Ulster Bank prior to the date of 27th July 2018, which was the date of the alleged initial telephone call and agreement pleaded in the Equity Civil Bill dated 13th September 2019. Reference is made, for example, to correspondence dated 30th March 2018, 2nd May 2018, 5th May 2018, 14th May 2018, 29th May 2018, 8th June 2018, 21st June 2018, 28th June 2018, 2nd July 2018, 3rd July 2018, 10th July 2018, 14th July 2018 and 23rd July 2018.

21. The Defendants issued a motion on 8th March 2023 seeking to strike out the "*Supplemental Particulars of Claim*" (it appears that that motion and the costs of same stand adjourned).

22. In or around the same time, by solicitor's letter dated 6th March 2023, the Plaintiffs withdrew the "*Supplemental Particulars of Claim*" and effectively sought to substitute it with the proposed amended Equity Civil Bill/Indorsement of Claim, stating *inter alia* that:

> "*We formally seek to amend the Civil Bill (as enclosed) so as to expressly plead/incorporate the Supplemental Particulars raised. We would invite you to consent to the delivery of the amended pleadings, and furthermore to consent to the exercise of unlimited jurisdiction by the Dublin Circuit Court. We confirm on behalf of the Plaintiffs, that they will discharge the Defendants' reasonable costs as may be associated with the foregoing i.e. the raising of such Particulars as necessary, and in view of the replies, the delivering of an amended Defence thereto.*"

FIRST ISSUE: PROPOSED AMENDMENTS

23. By way of Notice of Motion dated 4th April 2023, the Plaintiffs sought *inter alia* an Order pursuant to O. 65, r. 1 of the Circuit Court Rules ("CCR") allowing the amendment of their Equity Civil Bill and Indorsement of Claim issued on 13th September 2019. The proposed amendments were grounded on the Affidavit of Anthony Meehan sworn on 31st March 2023.

24. The proposed amendments are as follows:

(a) paragraph 5 of the Indorsement of Claim mirrors paragraph I of the Supplemental Particulars of Claim and provides a short history of the Plaintiffs' engagement with ARA;

(b) the two proposed amendments at paragraph 8 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph II of the Supplemental Particulars of Claim dated 3rd March 2023. As set out earlier, for example, paragraph II refers to particulars of what is alleged to be the Plaintiffs' interaction with the Ulster Bank prior to 27th July 2018, which is the alleged date of the agreement pleaded in the Equity Civil Bill dated 13th September 2019.

(c) the proposed amendments at paragraph 9 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph III of Supplemental

Particulars of Claim dated 3rd March 2023 and refers to correspondence dated 7th August 2018, 8th August 2018, 28th August 2018, 30th August 2018 and 15th November 2018 alleging separate correspondence as between the Plaintiffs, Ulster Bank and Cabot alleging *inter alia* agreement of the transfer of the mortgage to Promontoria, alleged confirmation of the terms of the ARA and that payments commenced in line with the ARA;

(d) the proposed amendments at paragraph 10 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph IV of Supplemental Particulars of Claim dated 3rd March 2023 and alleges further details of the telephone call with an official from Cabot on or about 28th November 2018;

(e) the proposed amendments at paragraph 12 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph V of the Supplemental Particulars of Claim dated 3rd March 2023 and alleges correspondence from Ulster Bank to the Plaintiffs, *inter alia* confirming the transfer of the mortgage loan to Promontoria and the appointment of Cabot;

(f) the proposed amendments at paragraph 13 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph VI of the Supplemental Particulars of Claim dated 3rd March 2023. This refers to a number of alleged matters including correspondence dated 17th January 2019 and 19th January 2019

from Ulster Bank *inter alia* referencing the alleged telephone conversation with a Cabot official on 28th November 2018, referring to alleged payments made to date, the Plaintiffs' alleged legal position in relation to the loan and pointing out that the entity controlled by the Buyer would allegedly be determining the management and conduct of the loan and to contact the Buyer to discuss the possibility of capitalisation;

(g) the proposed amendments at paragraph 14 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph VII of the Supplemental Particulars of Claim dated 3rd March 2023. This alleges correspondence (including e-mails) and conversations in the period following the sixth and final payment allegedly addressing the request for capitalisation and also the status of the account;

(h) the proposed amendments at paragraph 17 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph X of the Supplemental Particulars of Claim dated 3rd March 2023 and alleges further breaches of communication by Promontoria and alleges email and letters dated 24th May 2019 and 10th, 13th 14th and 25th June 2019 wherein it is alleged that the Plaintiffs, including through their agents, offered to discharge the arrears of €5,562.84 and alleges that Cabot offered the Plaintiffs a new ARA which allegedly provided for the immediate capitalisation of arrears before allegedly withdrawing the offer by letter dated 11th March 2020;

(i) the proposed amendments at paragraph 21 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph XI of the Supplemental Particulars of Claim dated 3rd March 2023 and seeks to amend the particulars of special damage and alleges *inter alia* loss of rental income of €82,870.09 (and alleged to be ongoing), the alleged differential loss to the Plaintiffs had the mortgage account been operated in accordance with the ARA was alleged to be estimated at €34,892.52, the Plaintiffs' loss was alleged to have been reduced by rent received by the Second Named Defendant and whilst the total sums were unknown, the Plaintiffs refer to the sum of €8,683.32 as having been applied as credit to the Plaintiffs' loan on 20th December 2021; alleged professional fees to the Plaintiffs' financial consultant of €1,400 and fees to Devaney Solicitors of €1,845; the Plaintiffs estimate that it would cost approximately €1,950 to replace keys, locks *etc.*, and that unless properly maintained, the property would require approximately €10,000 to restore the property to tenantable condition; it is alleged that the First Named Plaintiff, as a self-employed quantity surveyor, was required to take time off work to deal with the matters of the subject of the litigation resulting in a loss of earnings (which was alleged to be ongoing and to be ascertained); it was alleged that the First Named Plaintiff had been refused credit and/or had his credit worthiness downgraded as a result of submissions made by or on behalf of the First Named Defendant to the Central Credit Register or other credit bureaus; the Plaintiffs sought an indemnity from the First Named Defendant in respect of any loss or damage occasioned by the actions or inactions of the Second Named Defendant;

(j) The proposed amendments at paragraph 23 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023) pleaded the Plaintiffs' reservation of the right to lead expert evidence at the trial of the action including on the areas of banking and finance, accountancy, and/or property valuation;

Basis for & appointment of receiver

(k) the proposed amendments at paragraph 15 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph VIII of the Supplemental Particulars of Claim dated 3rd March 2023 and alleges that the letter of demand dated 30th April 2019 was not a proper demand and did not serve as a valid basis to appoint the Second Named Defendant as receiver;

(l) the proposed amendments at paragraph 16 of the proposed amended Equity Civil Bill/Indorsement of Claim (attached to the letter of 6th March 2023 and to the Plaintiffs' motion dated 4th April 2023) repeats Paragraph IX of the Supplemental Particulars of Claim dated 3rd March 2023 and alleges a failure by Promontoria in their contractual dealings with the Plaintiffs and particularly before appointing the receiver and in not reviewing and considering the alleged commitment by Ulster Bank to review and consider the Plaintiffs' then arrears of approximately €5,500 as part of their agreed ARA, following the alleged discharge of six consecutive monthly payments and where it is alleged that the Plaintiffs were in a position to demonstrate affordability and a financial capacity to repay;

The Claims for Relief

(m) as indicated in the correspondence dated 6th March 2023, the proposed amended Equity Civil Bill/Indorsement of Claim mirrored the Supplemental Particulars of Claim dated 3rd March 2023 in the additional reliefs claimed. The additional reliefs claimed (at paragraph III) were "*[i]nsofar as may be necessary, a Declaration that the first defendant failed to review or to otherwise give due or any fair consideration to the plaintiffs' request for the capitalisation of arrears despite the representation and assurance given by and on behalf of the first defendant's predecessor's in title that such a review would take place following the discharge of six monthly payments pursuant to a new ARA*", and secondly (at paragraph IV) that "*[t]he plaintiffs will seek at the trial of the action, as part of any order for specific performance, that orders be made: declaring the appointment of the second defendant on 13 May 2019 to have been invalid; requiring the defendants to immediately deliver up vacant possession of the property at Apartment 59, the Water Mill, Bettyglen, Raheny to the plaintiffs; directing the first defendant to give due and fair consideration to the capitalisation of any arrears on the plaintiffs' account prior to 13 May 2019 or, in the alternative, the option to the plaintiffs to discharge said arrears; together with such further or other orders including as to damages or accounting adjustments as may be just in the circumstances.*"

ASSESSMENT & DECISION ON THE FIRST ISSUE

25. To recap, by way of Notice of Motion dated 4th April 2023, the Plaintiffs sought *inter alia* an Order pursuant to O. 65, r. 1 CCR, allowing the Plaintiffs to amend their Equity Civil Bill and Indorsement of Claim issued on 13th September 2019.

26. For the following reasons, I am of the view that the proposed amended Equity Civil Bill should be allowed subject to the conditions set out in the proposed Order which is referred to at the end of this judgment.

27. This application is governed by O. 65, r. 1 CCR which provides that "*[t]he Judge or the County Registrar as appropriate may, on such terms as he considers just, at any stage of the proceedings, allow any party to amend or alter his pleading or other document, or may disallow any amendment already made, or may amend any defect or error in any proceeding, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*"

28. O. 65, r. 1 CCR is in similar terms to O. 28, r. 1 of the Rules of the Superior Courts, 1986 (as amended) ("RSC").

29. By analogy, the approach to the exercise of the court's discretion in this Circuit Court appeal was outlined in the judgment of the Supreme Court[1] in *Croke v Waterford Crystal Ltd*,[2] to the effect that where an amendment can be made without prejudice to

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

[2] [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 (McGuinness J.) in *O'Leary v Minister for Transport* [2001] 1 ILRM 132 (at page 143) which adopted the statement from Lynch J. in *DPP v Corbett* [2001] ILRM 674 at p. 678.

the other party and thus enable "… *the real issues* …" to be tried, the amendments should be made. In relation to the central issue of prejudice, the court stated that if the alleged prejudice could be overcome by an adjournment then "… *the amendment 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 indemnify the other party against such expenses.*"[3]

30. More recently in *Stafford v Rice* [2022] IECA 47, the Court of Appeal[4] (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 the substantially equivalent O. 28 RSC 1986, (adding to the similar exercise commenced by the High Court (Birmingham J.[5]) in *Rossmore Properties Limited v ESB* [2014] IEHC 159), which principles can be applied to the amendments sought in this case, as follows.

31. The power of amendment, for example, is a broad and liberal one, so that any claim or cause of action 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. When applied to this case, I think there is force in the submission from Mr. Moran BL (for the Plaintiffs) that the amendments sought in the proposed amended Equity Civil Bill/Indorsement of Claim are part of the same general transaction. In this regard, the real controversy between the parties must

[3] *Op.cit.*

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

[5] As he then was.

relate to an issue between the parties arising from the subject matter of the proceedings and not necessarily "… *the existing questions* …" in controversy.

32. Against this, Mr. Neuman BL (for the Defendants) submits that the amendments constitute a new claim making allegations far beyond that contained in three letters and two telephone conversations about ARA. Rather, Mr. Neuman BL submits, the Plaintiffs now seek to allege *inter alia* that Promontoria, and Cabot as its agent, failed in its "… *consumer protection obligation* …" (citing Mr. Moran BL's reference to the Consumer Protection Code 2012 and the duty of care of a regulated authority) to properly respond to correspondence from the Plaintiffs in an alleged breach of, *inter alia*, its obligations under that Consumer Protection Code which, he submits, has nothing to do with the two conversations and correspondence about ARA. The submission by Mr. Neuman BL that the proposed amendments introduce new claims and causes of action is not, however, dispositive, in and of itself, against an amendment and, for example, an amendment has been allowed where an existing statement of claim has been substituted by a completely new pleading.[6]

33. Mr. Neuman BL's central objection is that proposed amended Equity Civil Bill and Indorsement of Claim seeks to introduce alleged claims and pleas relating to

[6] In *Stafford v Rice* [2022] IECA 47 the Court of Appeal (McCarthy, Ní Raifeartaigh and Collins JJ. The judgment of the court was delivered by Collins J.), at paragraphs 22 and 23 referred to *Wolfe v Wolfe* [2000] IEHC 156; [2001] 1 I.R. 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; *Rossmore Properties Limited v ESB* [2014] IEHC 159 per Birmingham J. (as he then was) at paragraph 19.6; *Persona Digital Telephony Limited v Minister for Public Enterprise* [2019] IECA 360 per Donnelly J. at paragraph 15 (Baker and Costello JJ agreeing) and referred to the example of where the entirety of an existing statement of claim had been substituted by a completely new pleading.

documentation, interactions and representations which are not referred to in the Indorsement of Claim in the Equity Civil Bill dated 13th September 2019 and involves pleading matters against the Ulster Bank which pre-dates 27th July 2018, which is the date that the initial telephone call is alleged to have occurred.

34. The expression of this alleged *substantive prejudice* is articulated *inter alia* in the Affidavit of Kevin Carter Solicitor (of Beauchamps) sworn on 20th April 2023 at paragraph 12, on behalf of the Defendants, which while stated in the context of the (subsequently withdrawn) *Supplemental Particulars of Claim*, applies *mutatis mutandis* to the proposed amended Equity Civil Bill (and Indorsement of Claim):

> "*I say that my client is significantly prejudiced by being required to meet an entirely different claim some 4 years after the issuance of proceedings. I respectfully submit and believe that in preparation for trial last month it became apparent to the Plaintiffs that my clients had established and made out a full defence to their claim which is the true explanation for the abandonment of the hearing date and attempt to introduce an entirely different claim. I say that the first named Defendant is the successor in title to Ulster Bank Ireland Limited … and the passage of four years has significantly impeded my clients' ability and entitlement to revert to Ulster Bank seeking information and documentation regarding the claims sought to be advanced in the proposed amended pleading. I say that in all loan sales there are agreed transition periods whereby cooperation with the predecessor institution is facilitated but this transition period has now lapsed in the*

context of the assignment of the Plaintiff's facility and security. I say that the four-year delay by the Plaintiffs in properly pleading their claim has deprived my clients of their ability to fulsomely defend the proposed revised claim which is an unanswerable prejudice".

35. Mr. Neuman BL also points to the *logistical prejudice* arising from the proposed amendments and submits that there has been no explanation as to why the proposed amendments, first signalled in the (subsequently withdrawn) "*Supplemental Particulars of Claim*" dated 3rd March 2023 and then duplicated in the proposed amended Equity Civil Bill (and proposed Indorsement of Claim) came so late (during 2023), on the eve of the hearing in the Circuit Court.

36. Mr. Neuman BL makes the case that there is no prejudice to the Plaintiffs withdrawing this amendment application and issuing proceedings in the High Court and the Defendants, through counsel, have stated that they would not raise any defence based on *res judicata* or the rule in *Henderson v Henderson* (1843) 3 Hare 67 E.R. 313[7] in the event that the Plaintiffs withdrew their application for an amendment and issued fresh proceedings in the High Court which replicated that sought in the proposed amendment.

37. Mr. Moran BL in addressing the claimed prejudice of the Defendants makes a number of responses.

[7] See the recent application of the rule in *Henderson v Henderson* in the judgment of O'Donnell C.J. in *Munnelly v Hassett & Ors* [2023] IESC 29.

38. In terms of the posture adopted in the Defence, he points to the fact that the Defendants, as is their right, have effectively put the Plaintiffs "… *on full proof* …" of everything and, by way of example, points to paragraph 2 of the Indorsement of Claim in the initial Civil Bill issued on 13th September 2019 where it is pleaded that "*[t]he Plaintiffs were the owners of the property known as Apartment 59, The Water Mill, Bettyglen, Raheny (otherwise "the Property"). The Property is situated within the jurisdiction of this Honourable Court. The value and/or the rateable valuation of the Property is within the jurisdiction of this Honourable Court.*" In the Defendants' Defence delivered on 2nd March 2020, paragraph 3 pleads that "*[p]aragraph 2 is denied and the Plaintiffs are put on full proof of same*."

39. In brief, the onus is squarely on the Plaintiffs to prove those aspects of their case which are not admitted or accepted. Also, in terms of the prejudice asserted by Mr. Carter (referred to above), it is submitted that the Plaintiffs have looked for information in relation to the transitional arrangements as between the First Named Defendant and its predecessor.

40. Mr. Moran BL submits that the Plaintiffs' fundamental objection – in the initial Equity Civil Bill and in the proposed amended Civil Bill – is the same: Promontoria have not recognised, at any stage, the ARA proposal and the capitalisation of the arrears, which Cabot was materially involved in; and, rather than properly addressing and considering the Plaintiffs' requests in this regard, Promontoria has gone ahead and made a decision to appoint a receiver.

41. In assessing the arguments of both parties, I consider that the Defendants have not made out a case of substantive or logistical prejudice such as to warrant the court disallowing

the Plaintiffs' leave to deliver an amended Equity Civil Bill. Applying the approach suggested by the High Court (Clarke J., as he then was) in *Woori Bank and Hanvit LSP Finance Ltd v KDB Ireland Ltd* [2006] IEHC 156, (beginning at paragraph 3.2), and as stated earlier, the amendments sought in the proposed amended Equity Civil Bill/Indorsement of Claim are, in my view, part of the same general transaction and the amendments seek to allege the real controversy between the parties. Further, the initial claims and the proposed amended claims remain alleged claims made against Promontoria.

42. This is not a case where, for example, the parties have waited for two or three years after the underlying facts took place. There has, rather, been continued engagement and the nature of the central alleged claim has not changed, *i.e.*, alleged interest and capital repayments, alleged commitment to review after six instalments in relation to capitalisation of arrears, this allegedly did not occur, and instead, an alleged demand for repayment and the appointment of a receiver. The central thrust of the Plaintiffs' claim relates to Promontoria's alleged behaviour in not reviewing the issue of recapitalisation and its decision to appoint a receiver. The basis of the Plaintiffs' case against Promontoria and the receiver remains the same. Further, Promontoria has access to its own file, can make inquiries of Ulster Bank and has open to it third party discovery (with possible consequential costs implications for the Plaintiffs). In that context, even accepting that the amendments have come late in the day, it cannot, in my view, be said that the proceedings have progressed on one basis and are now sought to be altered in a way which causes prejudice because, for example, steps have been taken which now make it impossible or significantly more difficult to deal with the case, should the amendment be allowed. Equally, I do not believe that the proposed amendments will

lead to a logistical prejudice. There may, in fact, be a more efficient use of court resources to have all the claims which arise from the same transaction dealt with in one amended action. Further the alleged *prejudice* claimed by the Defendants from what it asserts constitutes the belated alteration in the pleadings,[8] can, in my view, be addressed by the imposition of appropriate terms (as to costs) to allow the proposed amendment to be made[9] and, if it is required, by third party discovery (which, as stated, also carries with it certain costs implications). This matter is addressed in the proposed Order referred to at the end of this judgment.

SECOND ISSUE: APPLICATION TO TRANSFER

43. The second substantive relief sought by the Plaintiffs in the Notice of Motion dated 4th April 2023 is an order pursuant to O. 35, r. 4 CCR and/or section 22(8)(a) of the Courts (Supplemental Provisions) Act 1961 (as amended) transferring these proceedings from the Circuit Court to the High Court.

44. O. 35, r. 4 CCR provides that, "*[w]hen any action or proceeding shall be sent forward or transferred to the High Court from the Court, the County Registrar shall transmit to the proper Officer of the High Court the file in the action or proceeding.*"

[8] As stated by Clarke J in *Woori Bank and Hanvit LSP Finance Ltd v KDB Ireland Limited* [2006] IEHC 156 at paragraph 3.2.

[9] See the observations of Geoghegan J. in *Croke v Waterford Crystal Ltd* at paragraph 25, referring to *O'Leary v Minister for Transport* [2000] IESC 16; [2001] 1 ILRM 132; *Moorehouse v Governor of Wheatfield Prison* [2015] IESC 21, per MacMenamin J. at paragraph 42.

45. Section 28(8)(a) of the Courts (Supplemental Provisions) Act 1961 as amended and substituted by section 21 of the Courts Act 1971 provides that "*[a]ny interested party may at any time apply to the judge of the Circuit Court before whom an action commenced in that court or an appeal from the District Court is pending to have the action or appeal forwarded to the High Court and thereupon, in case the action or appeal is one fit to be tried in the High Court and the High Court appears to be the more appropriate tribunal in the circumstances, the said judge may send forward the action or appeal to the High Court upon such terms and subject to such conditions as to costs or otherwise as may appear to him to be just, and an appeal shall lie under section 38 of the Act of 1936, as applied by section 48 of this Act, from the decision of the judge granting or refusing any such application.*"

46. This application is opposed by the Defendants who say that a substantive and procedural lacuna arises in seeking to amend an Equity Civil Bill in the Circuit Court in a proposed amended claim of approximately €100,000 in one motion which also seeks to "amend and adopt" (*i.e.*, adopt or transfer to the High Court).

47. The Defendants further submit that this difficulty is of the Plaintiffs' own making because they chose to bring both applications *i.e.*, to amend and adopt, in one application. It is argued that this jurisdictional lacuna can be addressed by withdrawing the application to amend in the Circuit Court, and if the Plaintiff so chooses, to institute fresh proceedings in the High Court.

ASSESSMENT & DECISION ON THE SECOND ISSUE

48. I am satisfied, notwithstanding that the Plaintiffs' amended '*claim*' (which I propose to allow) is in excess of €75,000, that by virtue of sections 2(1) and Part 3 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, *had* the matter remained in the civil jurisdiction of the Circuit Court, and in circumstances where the parties have not consented to an unlimited jurisdiction, any award would have been limited to the Circuit Court jurisdiction of €75,000.

49. I do not consider, however, that there is a *jurisdictional* lacuna which operates to prevent the court transferring the action to the High Court having regard to O. 35, r. 4 CCR and/or section 22(8)(a) of the Courts (Supplemental Provisions) Act 1961 (as amended) (and referred to above). In this case, the proposed amendments to the Equity Civil Bill and Indorsement of Claim as set out in the amended Equity Civil Bill/Indorsement of Claim attached to the letter of 6th March 2023 and in particular the proposed amendments at paragraph 22 of the proposed amended Equity Civil Bill/Indorsement of Claim, the height of the Plaintiffs' claims passes the €75,000 jurisdiction of the Circuit Court. In those circumstances, I am satisfied to make an order pursuant to O. 35, r. 4 CCR and/or section 22(8)(a) of the Courts (Supplemental Provisions) Act 1961 (as amended) transferring these proceedings from the Circuit Court to the High Court.

PROPOSED ORDERS

50. In the circumstances, I propose to make the following orders in the following sequence.

51. First, I shall make an order pursuant to O. 65, r. 1 of the Circuit Court Rules allowing the Plaintiffs to deliver the proposed amended Equity Civil Bill/Indorsement of Claim attached to the letter of 6th March 2023 and exhibited to the Plaintiffs' motion dated 4th April 2023 subject to the Plaintiffs paying the reasonable costs of the Defendants arising from the proposed amendment.

52. In terms of those costs, I will, in the first instance, invite the parties to seek to agree the extent of that costs order (*i.e.*, the reasonable costs of the Defendants arising from the Plaintiffs' proposed amendments) and to furnish that agreement to the court. If agreement cannot be reached, I will require further written submissions from the parties on that issue, subject to a word restriction of 1,500 words and that these submissions be exchanged and furnished to the court by Tuesday 12th March 2024.

53. Second, in the event that the costs matters are agreed and/or ruled upon, I will require the parties to file submissions subject to a word restriction of 2,000 words before the Court as to whether or not a stay should be made on that order and that these be exchanged and furnished to the court by Tuesday 12th March 2024.

54. Third, I propose, pursuant to O. 35, r. 4 CCR and/or section 22(8)(a) of the Courts (Supplemental Provisions) Act 1961 (as amended) to make an order transferring these proceedings from the Circuit Court to the High Court. I will hear the parties in relation to any ancillary or consequential matters which may arise in those circumstances.

55. Finally, I will require the parties to address the question of the costs of this appeal and direct, in the event that there is no agreement, that written submissions limited to a

maximum of 2,000 words be exchanged and furnished to the court by Tuesday 12th March 2024.

56. I will list the matter before me at 10:30, for mention only, on Tuesday 19th March 2024.