THE HIGH COURT

[2025] IEHC 57

[Record No. 2011/3790P]

BETWEEN

REBEKA KAHN AND KIERAN TARBETT

PLAINTIFFS

AND

CROSMAC LIMITED, MICHAEL MCNAMARA ARCHITECTURAL PARTNERSHIP, CLIFTON SCANNELL EMERSON ASSOCIATES LIMITED, KILROE DEVELOPMENTS LIMITED (IN VOLUNTARY LIQUIDATION)

DEFENDANTS

JUDGMENT of Mr. Justice Micheál O'Higgins delivered on 22nd January 2025

Introduction

1. This is my judgment on the plaintiff's motion seeking an order that the plaintiffs are entitled to maintain their claim for the losses set out in the updated particulars of loss dated 16th August 2023 in the within proceedings. The plaintiffs also seek alternative relief, if unsuccessful in securing their primary relief, namely an order pursuant to O. 28 r. 1 of the Rules of the Superior Courts granting them liberty to amend their statement of claim in order to claim the losses identified in the updated particulars.

2. The substantive claim relates to the purchase by the plaintiffs of No. 28 Tarmon Harbour, Tarmonbarry, Co. Roscommon. The property was a new build and was constructed

as part of a larger development of houses and marina berths. The first defendant, Crosmac Limited, was the main contractor with whom the plaintiffs entered into a contract for the construction of the property in 2005. The second defendant, Michael McNamara Architectural Partnership is sued as the firm of architects said to have been responsible for the design and supervision of the development. The proceedings against the second defendant relate to the issue of two certificates dated the 16th March and 2nd June 2007. The third defendant, Clifton Scannell Emerson Associates Limited, was the engineer involved in the project and it issued a certificate in respect of the structural elements and associated civil works. The fourth defendant, Kilroe Developments Limited (in voluntary liquidation) built the house in question, and on the 6th September 2006 certified that the main contracting works carried out by it were in substantial compliance with relevant Building Regulations.

3. On the 22nd November 2009 the plaintiffs' property was flooded. It is the plaintiffs' case that the finished floor level of the property had been constructed at a level lower than was provided for in the planning permission. The property is located beside a harbour on the River Shannon.

4. The plaintiffs served their statement of claim on the 27th January 2012. Defences were delivered by the first, second and third defendants. An order was made for judgment in default of defence against the fourth defendant on the 20th January 2014. Notices for particulars were raised by the various defendants and replies furnished to same. The proceedings have been listed in the non-jury case management list since January 2023.

5. The event that triggered the necessity for this motion was the service by the plaintiffs of updated particulars of loss on the 16th August 2023. On the 6th November 2023, RDJ Solicitors acting for the second defendant wrote to the plaintiffs' solicitors and asserted that the updated particulars of loss were *"an impermissible attempt to introduce, by way of particulars of loss, one or more matters that are not pleaded in the statement of claim."* RDJ

set out five matters, described as *"disputed matters"*, which they asserted were not pleaded in the statement of claim, and they further asserted that the plaintiffs were not entitled to raise a new claim by way of updated particulars of loss. The letter indicated that the second defendant would object to any attempt by the plaintiffs to raise and/or rely on the disputed matters at the trial of the action.

6. The plaintiffs' solicitors, Coakley Moloney Solicitors, responded by letter dated 22nd November 2023. The letter referred to various paragraphs of the plaintiff's statement of claim and asserted that each of the disputed matters identified by the second defendant was properly set out within the existing pleading. The letter stated that it had always been pleaded that the plaintiffs relied on the certificates of the second defendant when purchasing the property and that the contract for sale would not have closed without such certificates being provided. The particulars of breach of duty set out that the property had been constructed at a lower level than that set out in the planning permission, which was too low to be safe from flooding, and that the second defendant had failed to advise the plaintiffs of this fact and/or issued the certificates in question when it knew/ ought to have known of this fact. In relation to the disputed issues set out at (ii) to (v), the letter asserted that these were particulars of loss that had been suffered by the plaintiffs and represented updated particulars of special damage. The letter concluded by asserting that the statement of claim did not require to be amended to update particulars of special damage and/or particulars of loss.

7. The main question I have to decide in this judgment is whether the plaintiffs are correct in asserting that the existing statement of claim sufficiently pleads the disputed matters identified in the correspondence, such that an amendment to the pleadings is not required.

8. The disputed matters identified in the RDJ correspondence are as follows:

(i) That *"had the plaintiffs been informed and/or advised of the fact that the floor levels of the unit in question were laid out at the correct level (mod) they would not have purchased the unit."*

(ii) That the plaintiffs *"had expected to be able to rent the Property and if they had done so, they would have obtained rent in the range of €64,000 to €158,500 which would have been sufficient to discharge the mortgage payments and would have allowed the Plaintiffs to retain the Property and make some profit on same."*

(iii) That the plaintiffs *"were unable to pay the mortgage on the Property as a result of being unable to let same and/or to recover any rent in respect of the Property."*

(iv) That the *"judgment was marked against the Plaintiffs for the management company fees."*

(v) That the plaintiffs *"have experienced considerable stress over the years dealing with the ownership of a property in respect of which they could not rent and which meant they were unable to fully discharge the mortgage payments or management company fees."*

9. As it was the event that triggered the present dispute, I will set out in full the plaintiffs' updated particulars of loss dated the 16th August 2023:

"The Plaintiffs were unable to pay the mortgage on the Property as a result of being unable to let same and/or to recover any rent in respect of the Property. A receiver was appointed and sold the property in or about June 2022 for the purchase price of €215,000. Had the Plaintiffs been informed and/or advised of the fact that the floor levels of the unit in question were not laid at the correct level (mod) they would not have purchased the unit. The Plaintiffs are at a loss of the entire price paid for the

Property (the purchase price being €400,000) together with an ongoing liability for the interest on the mortgage used to finance the purchase of the Property. The plaintiffs have experienced considerable stress over the years dealing with the ownership of a property in respect of which they could not rent and which they were unable to fully discharge the mortgage payments or management company fees.

Judgment was marked against the Plaintiffs for the management company fees.

The plaintiffs had expected to be able to rent the property and if they had done so, they would have obtained rent in the range of €64,000 to €158,500 which would have been sufficient to discharge the mortgage payments and would have allowed the plaintiffs to retain the property and make some profit on same.

Particulars of special damage

(a) Deposit paid by the purchasers to purchase the property: €40,000.

(b) Mortgage balance as of 28 March 2023: €301,557.61.

(c) Mortgage payments made by the Plaintiffs: €43,375.39.

(d) Management company fees judgment against plaintiffs: €8,513.90.

The plaintiff reserves the right to serve further particulars of loss and expense."

Grounding affidavit of Julian Kahn, dated 15th March 2024

10. The plaintiffs' motion is grounded on the affidavit of Julian Kahn, a partner in the firm of Coakley Moloney Solicitors. Mr. Kahn exhibits the relevant pleadings and correspondence and identifies the relevant areas of dispute between the parties. At a case

management listing on the 14th February 2024, submissions were made by counsel for the second defendant objecting to the plaintiffs' reliance upon the updated particulars of loss. Counsel for the third defendant adopted the submissions of the second defendant in that regard. There was no attendance on behalf of the first defendant.

11. At para. 13 of his affidavit Mr. Kahn avers that considerable time may be lost at the hearing unless the issue raised in the correspondence regarding the entitlement of the plaintiffs to rely on the updated particulars of loss is determined. He relies upon his firm's letter of the 22nd November, asserting that the matters set out within the updated particulars of loss were clearly pleaded in the statement of claim and the replies to particulars delivered on the 4th September 2014. He avers that the plaintiffs do not seek to plead new causes of action. Rather, the relevant facts have always been pleaded, namely reliance on the certificates issued by the second and third defendant in closing the sale for the property. The updated particulars of loss set out the losses suffered arising from those facts and were within the existing claim for damages. In the premises, he contends that the plaintiffs are entitled to maintain their claim for the losses set out in the updated particulars of loss.

12. At para. 15 Mr. Kahn states that the plaintiffs' losses have been ongoing since the property was flooded. He says the plaintiffs were unable to service the mortgage for the property as they were unable to rent it. The plaintiffs understand that a receiver was appointed to the property and that the receiver sold the property at an online auction on the 30th June 2022 for the sum of €215,000. Notwithstanding the sale, the plaintiffs continue to owe significant sums on their mortgage for the property. The updated particulars of loss were served in August 2023 setting out the losses which the plaintiffs continue to suffer as of that date.

Replying Affidavit of Marianne Lonergan, dated 5th April 2024

13. A replying affidavit was sworn on behalf of the second defendant by Marianne Lonergan, partner in the firm of RDJ LLP. Ms. Lonergan states at para. 11 that in the statement of claim, it is clearly pleaded that the particulars of loss suffered are the cost of remedial works and professional fees. There is no plea set out alleging a "no transaction" case and that the property would not have been purchased in the manner now being pleaded. Ms. Lonergan states that a period of nineteen months passed where no steps were taken in the proceedings until the plaintiffs issued a notice of intention to proceed on the 27th August 2013.

14. At para. 16 Ms. Lonergan avers that the updated particulars of loss furnished do not come within the pleadings and are an impermissible attempt to introduce, by way of particulars of loss, one or more matters that are not pleaded in the statement of claim. Having exhibited the relevant correspondence identifying the "disputed matters", Ms. Lonergan says that the disputed matters, and in particular the alleged "no transaction" claim by the plaintiffs, failed to have any or any adequate regard to the Contract for Sale dated the 25th October 2005 and the fact that the plaintiffs had agreed to purchase the property the subject matter of the within proceedings.

15. At para. 19 Ms. Lonergan states that whilst the plaintiffs are now alleging that they were unable to discharge the mortgage due to the flooding and the unavailability of rental income, this cannot be the case where the plaintiffs have openly confirmed that they ceased making mortgage repayments on the property in May 2009, some six months *before* the flooding. She says that an attempt to introduce this head of loss as regards the non-repayment of the mortgage is clearly undermined by the fact that the plaintiffs, for reasons necessarily unrelated to the flooding and the alleged acts or omissions of the defendants, ceased to make the mortgage repayments. Therefore, the losses regarding the mortgage balance of €301,557.61 do not arise out of the pleading herein.

16. At para. 20 Ms. Lonergan states that at no point prior to service of the updated particulars of loss do the plaintiffs plead or otherwise allege that this was a "no transaction" case. The averments set out in the affidavit of Julian Kahn are not accepted in that regard. She states that one cannot plead new causes of action by way of replies to particulars.

17. At para. 21 Ms. Lonergan states that the updated particulars of loss purported, for the first time, to recast the plaintiffs' claim as a "no transaction" case: a claim that were it not for the defendant's negligence, the plaintiffs would not have purchased the property, so that the plaintiffs therefore claim all losses sustained by them arising out of the purchase of the property.

18. At para. 22 Ms. Lonergan states that the updated particulars of loss contain an entirely new cause of action and the second named defendants do not accept that paragraphs 12, 13, 16, 17 and 22 of the statement of claim support the "no transaction" pleadings now being asserted.

19. At para. 23 Ms. Lonergan states that the plaintiffs issued their proceedings in 2011 and are now seeking to introduce further heads of loss some thirteen years after the proceedings issued, and some fifteen years after the flooding event in 2009. She says there is no sufficient explanation as to why these matters were not pleaded in the statement of claim and notes that no mention was made in replies to particulars delivered in 2014 and/or at any time over a period of thirteen years until August 2023.

20. At para. 24 she states that should the court grant the plaintiffs leave some thirteen years after commencing the litigation to include the additional particulars of the 16th August 2023 and to maintain a "no transaction" case, the second defendant will be prejudiced in defending the claim, given the delay by the plaintiffs in bringing this application and raising the additional particulars twelve years after commencing the litigation.

21. At para. 25 Ms. Lonergan avers that the reason additional discovery has not been sought arising out of the updated particulars is that the second defendant is objecting to the said updated particulars, and should the court grant the plaintiffs leave to amend the statement of claim, the second defendant will have to deliver an amended defence, seek additional discovery and engage a solicitor expert as to the issue of "no transaction" at considerable cost, all of which amounts to additional prejudice to the second defendant. This will necessarily delay the trial of the matter.

22. I heard the case remotely during the Personal Injuries sessions in Waterford in October 2024. The plaintiffs' application was opposed by both the second and third defendants. Their respective counsel developed the argument that the plaintiffs were impermissibly seeking to advance a new and un-pleaded case. I will now summarise the main arguments made by the defendants in resisting the motion.

Summary of objections raised by the second defendant

23. In written and oral submissions, the second defendant relied on the background context to the purchase. The contract for sale was one of two documents executed in connection with the transfer of the constructed units which are in dispute in these proceedings. The contract for sale of the sites was executed on the 24th October 2005 – seventeen months before the first certificate was issued by the second defendant. In keeping with normal practice, there was a separation of the site transfer from the building contract. The building agreement was entered into on the same date as the contract of sale. The contracts provided for the following consideration: €110,000 (contract for sale) and €690,000 (building agreement). These figures have to be apportioned between the two properties, only one of which is the subject of this action.

24. As against the second defendant, there are references to the execution of a certificate on the 16th March 2007, but there is no plea of fact that the second defendant made any representation in connection with the furnishing of documents on or before closing. The plea in contract records the responsibility of the first defendant who contracted for the furnishing of the materials.

25. The second defendant submits that para. 16 of the statement of claim attributes knowledge to the second and other defendants that the plaintiffs would rely on the certificates and be induced to complete the purchase. In fact, the material pleaded in connection with the second defendant does not include any representation *at all*. The second defendant asserts that "conspicuously absent" from the pleaded claim is any reference to:

> *"when a misrepresentation occurred;*
>
> *when completion occurred; and,*
>
> *whether and to what extent one induced the other."*

26. In the proceedings originally constituted in 2011, the plaintiffs referenced the cost of remedial works and professional fees, suggesting that the value of the property had been reduced having regard to the alleged breach of planning permission and the risk of flooding. It is clear from the pleadings that the plaintiffs were seeking the costs of the remedial works. However, the core facts necessary to identify reliance by the plaintiffs on the certificate in deciding to enter or complete the contract at all, are missing.

27. It is clear from the pleadings that the contract had been executed in each case on the 24th October 2005. There is no suggestion that the certificate was produced until, on or after the 16th March 2007. Nowhere did the plaintiffs say when they or their agents received either certificate produced by the second defendant. If the claim was being pursued on the basis of a "no transaction" claim, it would have been necessary to distinguish between the amounts paid pursuant to the contract (before and after practical completion) in purported reliance upon the

certificates, and such loss could only have arisen to the extent that this was not already incurred at the time of completion.

28. It is clear that the plaintiffs were contractually committed to the transaction some years prior to the issue of any certificate.

29. Moreover, the *structure* of the claim advanced by the plaintiffs does not focus on the circumstances leading to the closing of the sale, nor is there any material which references the manner in which reliance was reposed by the plaintiffs. It is not clear from the pleadings if the certificate was provided before or after completion. The focus of the claim is problematic because the amended statement of claim attempts to reverse the nature of the case by changing the allegation of how damages are to be calculated, and not how the cause of action should be correctly understood. There is an assertion that the plaintiffs would not have purchased the unit had they been aware of certain issues, however the body of the statement of claim provides no information to confirm/ plead that this is the case so that, even now, there is no reference to the date of completion.

30. The elements of loss advanced by the plaintiffs are, in substance, the same claim for heads of loss originally pleaded. This, says the second defendant, is inconsistent with a "no transaction" approach.

31. In the replies to particulars dated 22nd January 2024, the plaintiffs confirm that they did not endeavour to let the property after it flooded and ceased paying the mortgage in May 2009. This was some six months *before* any flooding event. Therefore, it is contended, the updated particulars are without foundation, insofar as they suggest that the plaintiff's inability to pay the mortgage and/or let the property was related to the flooding event in November 2009.

32. The core submission of the second defendant is that the updated particulars of loss advance a claim that is inconsistent with the "no transaction" claim. The updated particulars

of loss also seek to recast the claim so that the plaintiffs can avoid the consequences of their failure to mitigate, and their decision to stop paying the mortgage six months before any flooding took place. The second defendant says there is a fundamental inconsistency in the types of loss now being advanced by the plaintiffs, which the application as currently drafted, does not acknowledge.

33. The second defendant highlights the chronology of pleadings and contends that the plaintiffs have been guilty of delay and years of inactivity in reactivating the proceedings. The second defendant relies upon this passage of time to resist any application to amend the pleadings. The flooding event occurred some fifteen years ago, the proceedings issued twelve years ago, and discovery was sought, obtained and complied with based upon the existing pleadings. At no stage did the plaintiffs advance a "no transaction" case and no trial preparation has been engaged in by the second defendant based upon such a case.

34. Separately, the second defendant pleads that the updated particulars of loss confirm that the property was sold by a receiver in June 2022 for €215,000. Under the mortgage deed, the receiver is the agent of the mortgagor (the plaintiffs). It appears from the discovery that the contract for sale identifies the vendors as the plaintiffs acting for the receiver. No matter *how* the property was sold, it was sold many years after it was acquired. On any view, the plaintiffs waited until the receiver had sold the property before pleading a "no transaction" case. The consequences of that are not addressed at all by the plaintiffs. Correspondence indicates that the plaintiffs objected to the sale of their property. In addition, the receiver in selling the property relied upon the very certificates which the plaintiffs sue upon in these proceedings.

35. Addressing the alternative aspect of the plaintiffs' motion, the second defendant submits that the amended proceedings would require a completely reconstituted discovery request, focusing on the circumstances of the alleged representation, reliance, and in

particular, any issues in relation to the completion, and a review of the funding of the transaction and the ability of the builder to refund monies, if called upon to do so. The second defendant therefore contends that it would be significantly prejudiced if the plaintiffs were permitted to amend the pleadings at this remove.

36. The essence of the claim, even in the amended statement of claim, references a defective transaction rather than a "no transaction" case. Up until the 16th August 2023, the plaintiffs' claim was based on what it would cost to put the property into compliance with what they say should have been conveyed to them. They also sought damages for a reduction in value. The case now put by the plaintiffs is materially different.

37. To permit the claim to change into something quite different, namely a "no transaction" case, would require the focus in the case to move on to the actions of the plaintiffs at the time of purchase, as well as at the time of the flooding, and the arrangements put in place over an extended period of time between the entry of the original contracts and the completion of the contract. The second defendant contends that issues in relation to the intent of the plaintiffs, the extent of the plaintiffs' financial commitment to the property, and the drawdown of funds, are all material to the loss which would arise in a "no transaction" claim. The problem for the plaintiffs, it is argued, is that there is a transaction here going back to the original contract of the 24th October 2005 and the events which then took place over the period of two years or thereabouts, when completion at some stage took place.

38. The replies to particulars, and specifically reply 7 (b), state that the sale would not have closed with the certificate being provided. This is not the same as saying that the plaintiffs' claim was based on the sale transaction being treated as never having occurred, and the claim in the statement of claim was clearly for remedial works and associated costs. Reply 13 in the replies to particulars provided little clarification, instead suggesting that no further repairs, beyond emergency repairs, had been carried out for fear of a recurrence of

flooding, and offering no calculation of loss consistent with treating the claim as a "no transaction" claim.

39. The heads of loss instanced as falling within the existing pleadings include a claim for lost rent which could not form part of a no transaction claim, as well as a claim that they could not pay the mortgage because of the inability to let or recover rent, assuming this is not simply double counting.

40. The discovery sought was quite specific and referenced the case the plaintiffs had then made. Discovery was only furnished in January 2024; the information sought was in relation to particular aspects of the loss and damage being advanced.

41. If the plaintiffs are permitted to effectively re-plead the case to address the plaintiffs' intentions at the time, it will be necessary to take several steps: examine the full circumstances at the time; confirm the position of insurance and indemnity; identify what sums were paid, when and by reference to what contracts; identify the nature of the transaction and the fashion in which it was accomplished; and identify whether in fact the documentation relied upon as an alleged representation, was in fact available at the time of the agreement to close the property.

42. The second defendant contends that it has no information in relation to these matters as it was not a party to the underlying transaction and will now be forced, at a remove of *circa* sixteen years after the transaction, to see what documentation still exists. All of this, it is contended, amounts to unfair prejudice.

43. It is concerning that the plaintiffs have offered no real explanation as to why the "no transaction" plea was not advanced originally or at a much earlier stage. If the plaintiffs wish to make the case that they would not have entered into the transaction, this was presumably something that was known to them in 2011 when the proceedings were issued, and does not arise because of a new discovery or some unexpected turn in the litigation. In all the

circumstances, the second defendant submits that firstly, the existing pleadings do not cover the disputed matters, and secondly, that it would not be in the interests of justice or fairness to permit the plaintiffs to enlarge the pleadings at this remove.

Summary of submissions made by the third defendant

44. Counsel for the third defendant adopted the submissions made by counsel for the second defendant. Counsel emphasised the importance of proceedings being clear and precise and relied on relevant caselaw. At the time the statement of claim was delivered, the plaintiffs had elected to affirm the contract. The position remained that way for many years thereafter and was even maintained in replies to particulars delivered by the plaintiffs. That position remained until August 2023 when the updated particulars were delivered. At that point, the plaintiffs reversed from a position of affirming the contract, to a radically different approach of a "no transaction" claim. This, says counsel, is impermissible, at least without obtaining the leave of court. In the circumstances, it behoves the plaintiffs to acknowledge the radically different approach that has now been taken and seek the leave of the court to amend the pleadings so as to accommodate properly the case now sought to be made.

45. Separately, counsel addressed the plaintiffs' alternative argument concerning the amendment to the pleadings. It was submitted that it was too late at this remove for the plaintiffs to change the structure of their claim. The amendments sought should not be allowed on grounds of prejudice. In that regard, counsel adopted the arguments already made by the second defendant.

Discussion of the first disputed issue

46. It seems to me the main issue I have to decide in this motion is the question of whether the existing statement of claim, properly interpreted, accommodates the claim that,

had the plaintiffs been informed and/or advised that the floor levels of the property were not laid at the correct level, they would not have purchased the property. The plaintiffs point to the following specific pleas which, they contend, individually and/or cumulatively put the disputed matters in issue:

(a) At paras. 12 and 13 of the statement of claim it is pleaded that the second defendant certified that the development and associated works were in substantial compliance with Building Regulations and Planning Orders.

(b) At para. 16 of the statement of claim it is pleaded that:

"At the time of making the said representations the Second, Third and Fourth Defendants intended and well knew or ought to have known that the Plaintiffs would rely thereon and would be induced thereby to complete the purchase of the said dwellinghouse and marina berths."

(c) At para. 17 of the statement of claim it was expressly pleaded that:

"Acting on the faith of the said certificates and representations contained therein and in reliance thereon the plaintiffs completed the purchase of the aforesaid dwellinghouses and marina berths."

(d) At paras. 22 (k), (l) and (r) of the statement of claim, the following was pleaded as regards the breach of duty of the second defendant:

"(k) Issued a certificate of compliance with planning permission when it knew or ought to have known that number 28 Tarmon Harbour had been constructed at a level lower than that set out in the planning permission…

(l) Issued a certificate of compliance with Building Regulations when it knew or ought to have known that number 28 Tarmon Harbour was constructed at too low a level to be safe from flooding having regard to its proximity to the harbour…

(r) Failed to advise the Plaintiffs that number 28 Tarmon Harbour had been constructed at a level 105mm lower than that set out in the planning permission or drawings."

(e) In the replies to particulars served on the second defendant on the 4th September 2014, it was expressly stated in reply 7 (a):

"The Second Defendant as the Architect responsible for the design and supervision of the development knew that the houses in the development were being constructed for the purposes of being sold on to prospective purchasers. In such circumstances it owed such prospective purchasers a duty of care. Further it knew or ought to have known that certificates of compliance with planning permission and building regulations are standard documents required in contracts for sale and it provided such certificates in respect of number 28 Tarmon Harbour."

(f) At reply 7(b) of those replies to particulars, it was expressly pleaded that:

"The contract for sale would not have closed without such certificates being provided by the Second Defendant."

(g) At reply 7(c) it was expressly pleaded that:

"The Second Defendant was the Architect responsible for the design and supervision of the development and owed a duty of care to persons such as the Plaintiffs whom it knew were purchasing properties at the said development to ensure that the works were carried out in accordance with the plans and specifications and in accordance with the planning permission and building regulations or alternatively it owed the Plaintiffs a duty of care to inform them if such was not the case and/or not to issue a certificate in respect of the works."

47. While I take the point that replies to particulars are not the same as a formal pleading, the defendants should have been aware from the existing materials that the plaintiffs were contending that, had they been told that the floor levels of the property were not laid at the correct levels, they would not have finalised the sale. The statement of claim clearly references the representation that the development was in substantial compliance with Building Regulations and planning permission, and that the plaintiffs relied on this in completing the sale. In my view, on a fair reading of the pleadings, the defendants were on notice of the plaintiffs' contention that, absent the representation that the development was in substantial compliance with applicable Building Regulations and Planning Permissions, they would not have gone ahead with the purchase. In my view, no issue of an ambush or surprise can fairly be said to arise.

48. It is clear from paras. 16 and 17 of the statement of claim that the plaintiffs claim to have relied on the certificates of compliance of the second defendant when purchasing the property. Implicit in the claim of reliance and inducement is the contention that, but for the alleged breaches, the purchase would not have gone ahead. The particulars as drafted pleaded that the property had been constructed at a lower level then that set out in the planning permission, which was too low to be safe from flooding. The pleadings set out that the second defendant had failed to advise the plaintiffs of this fact and had issued the certificates when it knew/ ought to have known of this fact.

49. My view in this regard is bolstered by the contents of reply 7 (b) in the replies to particulars, detailed at para. 46 (f) above.

50. Also relevant to my considerations is reply 7(c), set out at para. 46 (g).

51. While a replies to particulars is not a formal pleading, it seems to me that when assessing whether a party has been given fair notice of the case sought to be advanced at trial, it is appropriate to have regard to any notice for particulars and replies to particulars

exchanged between the parties. The plaintiffs rely upon a recent decision of Mulcahy J. which to my mind is very much in point. In *Reddy v. Hyper Trust Limited* [2023] IEHC 278, Mulcahy J. considered whether heads of loss had been pleaded in a counterclaim, or whether the defendant required an amendment to include those pleas. The plaintiff had issued a motion seeking to prevent the defendant pursuing these two heads of loss. The court found that one head of loss had already been sufficiently pleaded, and that in respect of the second head of loss, leave to amend the counterclaim should be granted so as to allow that particular plea to be made. Mulcahy J. referred to the purpose of pleadings as set out by Finnegan P. in *A.S.I. Sugar Limited v. Greencore Group Plc* [2003] IEHC 131, namely:

> *"The function of pleadings is to define with clarity and precision the issues of fact and law between the parties. Where issues are so defined each party will have given fair and proper notice to his opponent of the case he has to meet and each party will be enabled to prepare his own case for trial."*

52. The first of head of loss considered by Mulcahy J. was the claim as to the amount of the undervalue at which the lands had been sold. Mulcahy J. held that this head of loss was within the pleaded claim and the plaintiff's complaint in reality related to *"particulars of the pleaded claim"*. Mulcahy J. stated as follows:

> *"18. Taking that as a correct statement of the law, whether a plea can be said to "fall squarely" within the pleadings, to use the Defendant's term, can be assessed by considering whether the other party has been given fair and proper notice of the claim such as to enable it to prepare for trial.*
>
> *19. Approaching the matter from this perspective, I am satisfied that the defendants claim for damages in respect of the undervalue of the lands the subject of the 2020 transfer is sufficiently identified in the claim to have put the plaintiff on*

notice that it was an issue in the case and to enable them to prepare for trial on that issue.

20. The question of whether the lands had been transferred at an undervalue was clearly in issue between the parties. Moreover, the defendant had particularised that claim in response to a query from the Plaintiffs, by identifying what it claimed was the 'true' value of the lands. The Plaintiffs have denied that the lands were transferred at an undervalue. It could readily have been anticipated from the pleadings, therefore, that the Defendant would lead evidence at the trial regarding the value of the lands and that the Plaintiffs might therefore have to address the evidence at the hearing of the action."

53. I agree with the core submission made by the plaintiffs in this motion that, given the matters pleaded in the statement of claim and set out within the replies to particulars, it is beyond any serious doubt that the issue as to whether the plaintiffs relied upon the certificates when closing the sale for the property was squarely within the plaintiffs' case. Moreover, the defendants were fairly on notice of the claim that, but for the matters complained about, the purchase would not have gone ahead. In my view, this finding is sufficient to dispose of the first of the "disputed matters" identified in the RDJ correspondence.

Objections (ii) to (v) in the RDJ correspondence

54. I turn now to consider the objections (ii) to (v) as identified in the letter from RDJ Solicitors. In my view, these objections relate to the manner of calculation of the plaintiff's claimed losses, rather than core elements of the substantive cause of action. I have detailed these "disputed matters" at para. 8 of this judgment.

55. In my view the disputed matters identified at (ii) to (v) can be addressed in the normal way by the defendants raising further particulars in relation to the particulars of loss claimed

and, if necessary, seeking discovery. As it happens, further particulars of the updated particulars of loss were raised by the second defendant on the 28th November 2023. The plaintiffs provided replies on the 22nd January 2024.

56. I am fortified in this conclusion by para. 22 of the judgment in *Reddy v. Hyper Trust Limited* where Mulcahy J. said the following:

> *"It may be, as the Plaintiffs contend, that the Defendant cannot, at the same time, succeed in a claim for loss in the value of the lands and, in effect, the return of the lands, but that does not mean that both claims do not fall within the pleadings. Insofar as the Defendant claims damages, the Plaintiffs say that it is not clear for what the Defendant is seeking damages, whether, for example, it is for the difference in value of the lands, the loss of use, or the loss of rental income from the lands. In my view these represent particulars of the pleaded claim and can readily be addressed by seeking further particulars."* (emphasis added).

57. Counsel for both defendants emphasised a number of suggested frailties and inconsistencies in the claims particularised in the updated particulars of loss. The second defendant in particular emphasised that the relevant chronology of events did not support a causal connection between the flooding event and the ceasing of mortgage payments. It was said to be telling that in the replies to particulars dated 22nd January 2024 the plaintiffs confirmed that they did not endeavour to let the property after it flooded and ceased paying the mortgage in May 2009. This was six months *before* any flooding event. The second defendant submits on this basis that any claim that the plaintiff's inability to pay the mortgage or let the property was connected to the flooding in November 2009, is without substance.

58. The defendants have undoubtedly identified a number of issues that will require to be fully explored in the evidence and in cross examination. However, it seems to me that the

bulk of the defendants' arguments under this heading go to the substantive *merits* of the case, rather than the discrete *pleadings* issue with which we are solely concerned here. The defendants have identified several suggested frailties in the plaintiffs' case, including the claim that, as a result of the flooding, the plaintiffs were unable to pay the mortgage and/or rent out the property. It would not be appropriate for the court to make any comment on the strength or otherwise of these points. These are classically issues for the trial judge.

59. It is also important to bear in mind that this is not an application pursuant to O. 19 r. 28 RSC to strike out a claim for failure to disclose a reasonable cause of action or for being frivolous or vexatious. Rather, the court is solely concerned with the pleading objections identified by the second named defendants in the RDJ correspondence concerning the breadth of the case now sought to be advanced by the plaintiffs.

60. For all these reasons I hold that the plaintiffs are entitled to maintain their claim for the losses set out in the updated particulars of loss dated 16th August 2023 in the within proceedings. As to whether the claim for the losses in question should succeed on the merits, will ultimately be a matter for the trial judge.

Application for liberty to amend the statement of claim

61. Arising from the view I have taken on the first issue, it is strictly speaking not necessary for the court to determine the second issue in the application, namely whether the plaintiffs are entitled to an order pursuant to O. 28 r. 1 RSC granting the plaintiffs liberty to amend the statement of claim. However, it occurs to me that in the interests of justice, and also with a view to minimising costs from the point of view of all parties, it would nonetheless be appropriate for me to indicate my view on the amendment issue, which could potentially become relevant in the event one or other of the defendants appealed my decision on the first issue.

62. Having carefully considered the submissions advanced by the parties on the amendment question, it seems to me that, were it necessary to decide the point, the balance of justice would favour granting the amendments sought. It seems to me that, even if I am incorrect in my conclusion on the first issue, the amendments proposed would fall within substantially the same facts as those already pleaded. In my view, the extent of surprise and prejudice asserted by the defendants is over-stated.

63. The defendants have sought to identify several strands of prejudice which they contend would result from the amendments proposed. It seems to me that the bulk of the points raised concern difficulties that may arise from the defendants having to deal with the substance of the amended case, rather than difficulties arising from the delayed pleading.

64. In the replying affidavit of Ms. Lonergan of RDJ Solicitors, it is averred that the second defendant will have to *"to deliver an amended defence, seek additional discovery and also have to engage a solicitor expert as to the issue of "no transaction" at considerable cost"*. I agree with the plaintiff's submission that these asserted prejudices are not the type of prejudice which the case law permits reliance upon to resist an amendment.

65. The leading case on this issue is the decision of the Court of Appeal in *Stafford v. Rice* [2022] IECA 47. At para. 23 Collins J. summarises the principles applicable to applications to amend pleadings as follows:

> *"(1) The power of amendment is a broad one…*
>
> *(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…*
>
> *(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" (my 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 IRLM 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)".

66. It is clear therefore that a party seeking to resist an amendment application 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. It seems to me that such matters as have been asserted by the defendants as amounting to prejudice here relate

more to the presence of the amendment itself, rather than the fact of the belated alteration in the pleadings.

67. The caselaw and the wording of the relevant rule makes clear that the amendment facility is a generous one and, all things being equal, an amendment should be allowed where it is necessary in order to determine the real questions in controversy between the parties. In my view, the question of whether, in the absence of the matters complained about, the sale would or would not have proceeded, is a real issue between the parties. That conclusion on its own strongly tends in favour of allowing any amendment that would enable such issue to be litigated.

68. Moreover, when considering whether an amendment should be allowed, the court should consider whether any prejudice to the other party can be addressed or ameliorated by imposing appropriate terms, such as permitting time for appropriate steps to be taken in response to the amended pleading. Many of the points of prejudice asserted by the defendants here would be met by granting the defendants further time to raise additional particulars or seek further discovery, were such steps demonstrated to be necessary.

69. For these reasons, were it necessary for me to apply the principles identified by Collins J. in *Stafford v. Rice*, this would have led me to conclude that the interests of justice warranted granting the plaintiffs liberty to amend their pleadings in the terms indicated. However, in view of my decision on the first issue, that the existing pleading is sufficient to permit the plaintiffs to maintain their claim for the losses set out in the updated particulars of loss dated 16th August 2023, it is not in fact necessary for me to determine the amendment issue.

Defendants' arguments as to breach of fair procedures

70. There is one further aspect of the defendants' arguments that I would like to address. As part of their submissions on both the pleading and amendment issues, the defendants emphasised that if the plaintiffs were to be successful on the motion, the case would not be ready for hearing as further particulars would have to be raised, discovery would have to be looked at afresh and further pre-trial steps would have to be considered. For the reasons I have already identified, I am not persuaded that these matters should require me to refuse the plaintiffs' motion. However, it would only be fair to acknowledge that the updated particulars of loss dated 16 August 2023 materially altered the plaintiffs' methodology for computing their claimed losses. The losses particularised in the statement of claim envisaged particulars of special damage as including the cost of remedial works, professional fees and repair costs arising out of the flooding in November 2009. The updated particulars of 16 August 2023 focussed on different headings of potential loss, and claimed that: the plaintiffs were unable to pay the mortgage on the property as a result of being unable to let the property; that the plaintiffs had expected to be able to rent the property and if they had done so, they would have obtained sufficient rent to discharge the mortgage payments; and that this would have allowed the plaintiffs to retain the property and make a profit.

71. The losses claimed in the updated particulars contend that the property was sold by a receiver in or about June 2022 for a considerably lower sum than that paid by the plaintiffs. The particulars of special damage claimed in the updated particulars are, it seems to me, entirely new and include the cost of the original deposit, the mortgage balance as of 28th March 2023, the total mortgage payments made by the plaintiffs, and the management company fees judgment obtained against the plaintiffs. On any view, these are new headings of loss.

72. Two observations can usefully be made about this. First, it is of course open to the defendants at trial to pursue any potential frailties or inconsistencies in the plaintiffs' claim as

particularised in the updated particulars. At a minimum, the points identified by the defendants in their submissions potentially provide valuable opportunity for cross examination. Any such issues will be a matter for the trial judge. Second, as is the case whenever updated particulars of loss are served, the defendants are free to make the case that they need further time or further information in order to be in a position to meet the (newly particularised) case and be ready for trial.

73. By way of analogy with a personal injuries case, where a plaintiff serves an updated loss of earnings or cost of care claim on the eve of trial or even during a trial, it will be open to the opposing party to seek an adjournment to take appropriate steps to meet the case now sought to be advanced. Where that occurs, it will be a matter for the trial judge to strike the appropriate balance and give such directions as are necessary to achieve justice and accord the parties their right to fair procedures. The position in a non-jury action is no different. O. 63C, r. 4 and 5 RSC give a judge ample power to give such directions for the determination of proceedings "*in a manner which is just, expeditious and likely to minimise the costs…"*

74. The updated particulars here were delivered in August 2023, some 17 months ago. They undoubtedly contain new information and concern new heads of loss. That is not objectionable however, in and of itself, since the objective of most updated particulars is to put the other party on notice of information they are currently unaware. Moreover, the plaintiffs presumably could not have predicted at the time of delivering the statement of claim in January 2012 that a receiver would be appointed to sell the property in June 2022. However, the question of whether losses are within an existing cause of action as pleaded is a separate matter to the question whether the opposing party should, as a matter of fair procedures, be given a reasonable opportunity to respond to newly formulated particulars of loss.

75. It will be a matter for the defendants to make any potential application to the Judge in charge of the non-jury list concerning the readiness of the case for trial, and raise any other case management issues that may arise. It would not be appropriate for me in this judgment to opine on the prospects of success of any such application, save to indicate that I am expressly not determining in this ruling any additional case management issues that may be said to arise, beyond the single pleadings issue I am determining in this motion.

Conclusion

76. For the reasons indicated, I propose to grant the plaintiffs an order that they are entitled to maintain their claim for the losses set out in the updated particulars of loss dated 16th August 2023 in the within proceedings.

Micheál P. O'Higgins