

**Neutral Citation No: [2021] NICH 25**

**Ref: McB11693**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

**ICOS No: 2018/61750**

**Delivered: 16/12/2021**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

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**Between:**

**IMELDA MAGUIRE, CAROLINE MAGUIRE-BLONSKI AND  
LORRAINE MAGUIRE**

**Plaintiffs/Respondents**

**and**

**FINOLA COFFEY AND JOHN MAGUIRE**

**Defendants/Appellants**

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**Mr Graeme Watt BL (instructed by Gibson, Solicitors) for the plaintiffs/respondents**

**John Maguire, second named defendant/appellant appeared as a litigant in person**

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**McBRIDE J**

**Introduction**

[1] The first and second defendants/appellants, Finola Coffey and John Maguire (“the defendants”) by notice dated 25 August 2021 seek to appeal the decision of Master Hardstaff dated 16 June 2021 when he granted the plaintiffs/respondents’ application to amend the statement of claim in accordance with the draft amended statement of claim appended to the summons.

[2] The plaintiffs/respondents (“the plaintiffs”) were represented by Mr Watt of counsel. The second-named defendant appeared as a litigant in person. The first-named defendant did not appear by reason of ill-health. The court unusually permitted, due to the exceptional circumstances arising in this case to permit the second-named defendant to appear on behalf of the first-named defendant. The exceptional circumstances related to her ill health; the fact that the interests of the

first and second-named defendants were *ad idem*; the need for expedition and the fact the plaintiffs consented to the second-named defendant acting on behalf of the first-named defendant. The plaintiffs advised the court that they did not want any further delay or further interlocutory applications based on the first defendant's non-attendance at court. The plaintiffs were mindful of the associated costs involved in delay in what has already been a prolonged and acrimonious family litigation.

[3] The court is grateful to all parties for their detailed and carefully researched written submissions which were of much assistance to the court.

### **The application**

[4] Mr Watt on behalf of the plaintiffs sought to amend the statement of claim as follows:

- (a) To join the first-named defendant in her capacity as personal representative of James Andrew Anthony Maguire, deceased.
- (b) To add in additional particulars of an existing claim as set out in paragraph 2E(b), which stated as follows:

“The following farm plant and machinery:

2 x Tractors  
1 Land Roller  
1 Siloroter  
1 Acrobat  
1 Link Box  
1 Muck Spreader  
1 Buck Rake  
1 Lagoon Mixer  
Numerous feeding troughs  
Bucket for Tractor  
1 Slurry Tanker  
1 Yard Scraper  
Contents of workshop containing generator, welders,  
tools and other similar items.”

- (c) To add paragraph 4 of the proposed amended statement of claim which states as follows:

“During the lifetime of the deceased, he was in the business of the running of the farm, the land of which was in his registered ownership. Upon his death the deceased's estate became entitled to the assets of the

business. The first defendant, as the deceased sole personal representative, holds the deceased's interest in said business for distribution in accordance with the deceased's will. The plaintiffs' claim and account of the said business assets and a transfer of them of their share."

(d) To add additional relief as set out in paragraph F of the prayer of the proposed amended statement of claim, which stated as follows:

"In accordance with (4) above, an account of the said business assets and a transfer of their respective shares of the said assets to each of the plaintiffs."

### **Background to the present proceedings**

[5] The application to amend was made by Notice to Master Hardstaff dated 2 March 2021. The application was heard and determined on the basis of affidavit evidence sworn by Ruth McKenny, solicitor, sworn on 16 December 2020, together with written and oral submissions by all the parties.

[6] On 16 June 2021 Master Hardstaff granted the application and permitted all the proposed amendments.

[7] The defendants now appeal against the decision of Master Hardstaff. As this is an appeal from the Master it is a *de novo* hearing. There was however no new evidence introduced by the party and each party relied upon the same affidavit evidence and the same written submissions which were made before the Master.

### **Factual background**

[8] The present proceedings concern a dispute over family land in Fermanagh contained within Folio 127721 Co. Fermanagh. The plaintiffs and defendants are siblings and the children of James Andrew Anthony Maguire, deceased ("the deceased").

[9] The deceased made an *inter-vivos* transfer of the lands contained within Folio 127721 Co. Fermanagh ("the lands") to his children. The second-named defendant is a successor in title of one of the original grantees. On 18 October 2017 all of the parties were registered as tenants in common of an undivided one fifth share each of the lands. The lands consist of part of the family farm.

[10] By writ action dated 26 June 2018 the plaintiffs sought partition and/or sale in lieu of partition of the said lands. This partition action included a claim for mesne profits against the second-named defendant in respect of occupation of the lands to the exclusion of the other parties.

[11] The deceased died testate on 21 February 2016. His last will dated 15 May 2013 made the following material bequests:

“I leave my single farm payments and any other statutory entitlements at the date of my death to be divided pro-rata among my children according to the area of each of their respective farms of land. It is my wish that any other tractors and farm machinery which I own at the date of my death shall remain on the farm at Coolbeg for use by the owner thereof. I leave the residue of my estate after payment of my just debts, funeral and testamentary expenses to be divided equally among my nine children.”

[12] A dispute developed in respect of the administration of the deceased’s estate and on 29 January 2020 the plaintiffs amended the statement of claim in the partition proceedings to include a number of claims relating to the administration of the estate of the deceased.

[13] The amendments made at that time are set out at paragraphs 2A to 2H of the statement of claim and paragraphs ca, cb and cc of the prayer (“the first amendments”).

[14] The first amendments, in summary, make the case that the second-named defendant converted the single farm payments and other statutory entitlements to his own use; that he unlawfully retained rental income and converted various chattels including cattle and farm machinery comprised within the deceased’s estate to his own use; possessed the land to the exclusion of the other beneficiaries; allowed the land to deteriorate in value and caused the first-named plaintiff to sustain loss and damage by reason of not permitting her to remain in occupation of the lands. Further relief was sought by way of accounts and enquiry together with a claim for damages.

[15] The first amendments were made on consent.

[16] In his last will the deceased named and appointed as his sole executor his brother-in-law, John McGovern. John McGovern renounced probate and on 26 November 2016 the first-named defendant was appointed as personal representative of the estate of the deceased.

[17] The present application to amend the statement of claim arises as a result of directions given by the plaintiffs’ senior counsel who directed that it was necessary to sue the first-named defendant in her personal capacity as well as in her capacity as personal representative of the deceased. Senior counsel further directed that paragraph 4 be added. The plaintiffs accept that this claim which relates to a claim over the farm business is a new claim. The other amendments include adding some particularity to an already existing claim that the second-named defendant has

converted certain assets in the deceased's estate to his own use. The last set of proposed amendments relate to amendments to the prayer to include relief consequent upon the proposed amendments set out in the body of the proposed amended statement of claim.

### **Power of the court to amend proceedings**

[18] The Rules of the Court of Judicature (Northern Ireland) 1980 permit amendments to pleadings in some cases without the leave of the court and in others with leave. Order 20 rule 5 provides as follows:

“5.-(1) Subject to Order 15, rules 6, 7 and 8, and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. ...”

### **Relevant legal principles**

[19] I consider the following principles emerge from the jurisprudence:

- (i) The guiding principle of cardinal importance is that generally speaking all amendments ought to be made for the purpose of determining the real question or questions in the controversy between the parties to any proceedings or of correcting any defect or error in any proceedings – see per Jenkins LJ in *GL Baker Ltd v Medway B&S Ltd* [1958] 1 WLR 1216.
- (ii) The court ought to correct all *bona fide* errors or mistakes, if it can do so without injustice – as per Bowen LT in *Cropper v Smith* [1883] Ch D 700 who stated at 710-11.

“There is no injustice if the other side can be compensated by costs.”

- (iii) Multiplicity of legal proceedings should be avoided. If, however the amendment changes the action into one of a substantially different character and it would more conveniently be the subject of a fresh action the court may refuse the amendment on that ground.
- (iv) The court is entitled to have regard to the merits of the case but only to the extent that the merits are readily apparent, that is without any prolonged investigation into the merits of the case – see *Kings Quality Homes Ltd v AJ Paints Ltd* [1997] 3 All ER 267. At the interlocutory stage the court is not well equipped to resolve disputes of fact and therefore,

I consider, that an application to amend should only be rejected on the merits if after a “rough and ready review of the merits” it is obviously hopeless and bears no prospect of success. Insofar as Master McCorry in *MM v Facebook* [2019] NI Master 5 stated the applicant seeking amendment must show his claim has “some prospect of success”. I consider that he meant no more than that the applicant must establish the claim was not a hopeless one.

### **Submissions**

[20] Mr Watt on behalf of the plaintiff submitted that the proposed amendments be granted so as to ensure the real matters in controversy between the parties were now included in the claim. As there was no prejudice to the defendants he submitted the proposed amendments were properly permitted by the Master and the appeal should be dismissed.

[21] The defendant objected to the proposed amendments on the basis that the additional claims were without merit. He further submitted that the application to amend the capacity in which the first-named defendant was sued did not comply with Order 15 rule 1 and therefore this proposed amendment was impermissible.

### **Consideration**

[22] The proposed amendments fall into four categories, namely:

- (a) The capacity in which the first-named defendant is sued;
- (b) The addition of a new claim as set out at paragraph 4 namely a claim in respect of the farm business;
- (c) The addition of additional particulars in respect of an already existing claim; and
- (d) Relief in the prayer consequent upon the proposed amendments.

### **Amendment to amend the capacity in which the first-named defendant is sued**

[23] Order 15 rule 1B provides as follows:

“Subject to rule 5(1), a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action-

- (a) if the plaintiff claims, and the defendant is alleged to be liable, in the same capacity in respect of all the causes of action; or

- (b) if the plaintiff claims or the defendant is alleged to be liable in the capacity of executor or administrator of an estate in respect of one or more of the causes of action and in his personal capacity but with reference to the same estate in respect of all the others; or
  - (c) with the leave of the Court.
- (2) An application for leave under this rule must be made *ex parte* by affidavit before the issue of the writ or originating summons as the case may be, and the affidavit must state the grounds of the application.”

Originally, the first-named defendant was sued in her personal capacity as one of the co-owners of the lands. The first amendments added a claim against the estate of the deceased. Notwithstanding the fact that the first amendments included a new claim relating to the estate of the deceased, the plaintiffs in error failed to sue the first-named defendant who was the personal representative of the estate, in that capacity. The plaintiffs now propose to amend the statement of claim to sue the first-named defendant in her capacity as personal representative of her late father’s estate.

[24] In accordance with Order 15 rule 1(b) a party ought not to be sued in both capacities in respect of two different pieces of property except with the leave of the court or alternatively in accordance with Order 15 rule 2, which provides for an application for leave to be made by way of *ex parte* application on affidavit before the issue of the writ or originating summons. In the present case no such application was made prior to the issue of proceedings. The defendant submitted that Order 15 rule 1(b) constituted an absolute bar to the first-named defendant being sued in her personal and representative capacity and on this basis he resisted the application to amend the capacity in which the first named defendant was sued.

[25] I consider that the power of the court to allow amendments under Order 20 rule 5 is wide ranging and that power is not restricted by the provisions of Order 15 rule 1(b). In particular I note that Order 20 rule 5 is not made subject to Order 15 rule 1(b). Significantly, however it is made subject to Order 15 rule 6 and rule 6(2)(b)(ii) specifically allows the addition of:

- “(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and

that party as well as between the parties to the cause or matter.”

[26] Secondly, I consider the whole purpose of Order 20 rule 5 is to permit defects and errors to be corrected provided the amendment will not result in any prejudice or injustice to the other party.

[27] I accept the submission that the claim against the estate is of a very different and distinct character to the partition claim. I note however that the first amendments, which added the estate claim to the existing partition proceedings claim, were consented to by the defendants. Once the estate claim was added to the proceedings the capacity in which the first-named defendant was sued ought to have been amended as this was necessary to enable relief to be granted in the event the claim was successful. Failure to amend the capacity in which the second named defendant was sued was clearly an error on the part of the plaintiffs. Given that the estate claim is now part of the proceedings and given that the amendment arises because of a *bona fide* mistake and given that there is no prejudice to the defendants I consider the pleadings should be amended so that the first named defendant is joined in both her personal and representative capacity. Accordingly, I consider the Master was right when he granted this amendment.

#### **Amendment to introduce a new claim regarding farm business**

[28] The amendment to paragraph 4 seeks to introduce a new claim in respect of the farm business and the plaintiff accepts that this is a new claim. The defendant resisted this amendment on the basis that the new claim was without merit.

[29] The defendant referred the court to a number of documents including a “Will Probate Report”, a “Memorandum of Agreement” and various documents from the Department of Agriculture (DEARA) together with various business accounts. The defendants submitted that the plaintiffs in the will probate report settled all claims in respect of the farm business and therefore were estopped from bringing this new claim. Secondly, he submitted that the memorandum of agreement together with the farm business accounts and documentation from DEARA all established that he was a joint owner of the business with the deceased and therefore upon the death of the deceased the property passed to him by survivorship. Accordingly, he submitted that the claim was without merit and had no prospect of success.

[30] At this stage the court will only disallow the amendment if the claim is obviously, on its face without merit.

[31] Having considered the documentation provided to the court I consider that a number of factual and legal issues arise which require further exploration and which can only be properly considered in the trial process. At this stage the court is not equipped to properly determine the factual and legal issues which arise. In particular, I note that the will probate report is prepared and signed by the first

defendant only and the attached signed agreements, although signed by the plaintiffs, do not specifically state that they are settling any claim they may have in respect of the farm business. Questions regarding the meaning of this document and the circumstances in which it was created and signed all need to be explored and this will require a trial where the parties can examine and cross examine the parties about these matters.

[32] I further note that there is a factual and legal dispute as to whether the farm business was held by the second named defendant and his father as joint tenants. To determine this matter it will be necessary to carefully consider the oral evidence of the second defendant and also the various documents he relies on. Such evidence can only be properly tested during a trial. Further, even if the court was satisfied the farm business was held by the second defendant and his father as joint tenants there is a real legal dispute about whether the doctrine of survivorship applies to such partnership property. To determine the legal issue the court will have to carefully consider competing jurisprudence as to the applicability of the doctrine of survivorship to the farm business assets.

[33] Accordingly, the court at this stage cannot say that the plaintiff's claim to the partnership assets of the farm business bears no prospects of success.

[34] Given that the first amendments included a claim in respect of the deceased's estate, I consider that the addition of a claim in respect of the farm business does not change the character of the action.

[35] I therefore consider that it is important that all aspects of the estate claim are included in the present proceedings to avoid a multiplicity of proceedings. I further consider that there is no prejudice in making this amendment and accordingly I permit the proposed amendment at paragraph 4.

#### **Amendment to include further particulars**

[36] This amendment simply adds particularity to an existing claim. I consider that there is no prejudice to the defendant and accordingly, I grant this amendment.

#### **Amendment to include additional relief in the prayer**

[37] I note that the proposed amendments to the prayer set out relief which is consequent to the substantive amendments to the statement of claim. Given that I have permitted the substantive amendments, it is necessary to permit the consequential amendments for relief in the prayer.

#### **Conclusion**

[38] I order that all the proposed amendments to the statement of claim be allowed. I therefore dismiss the appeal and I reserve costs.