THE COURT OF APPEAL

[Record No. 2018/168]

Donnelly J.
Faherty J.
Ní Raifeartaigh J.

BETWEEN:

MICHAEL BEGLEY

Respondent

AND

DAMESFIELD LIMITED

AND

JOHN LALLY

Appellant

AND

THE JOLLY M MANAGEMENT COMPANY LIMITED

JUDGMENT of the Court delivered on the 19th day of March 2021

A. Background

1. This Court gave judgment in the matter on the 26th of June 2020 last. The trial judge had found that there was a breach of a collateral contract by the appellant. The appellant appealed and submitted, *inter alia*, that the trial judge erred in finding the appellant bound by such a collateral contract and that a claim for breach of collateral contract was not adequately pleaded by the respondent against the appellant.

2. In disposing of the submissions made, the Court made the following two relevant findings:-

(a) At paras. 65 and 66, the Court held that there was sufficiently cogent evidence before the trial judge to support her finding that a collateral contract existed between the respondent Mr. Begley and the appellant Mr. Lally;

(b) At para. 99, the Court found that the High Court had no jurisdiction to reach a finding as to the existence of a collateral contract in circumstances where no such claim had been advanced by the plaintiff and consequentially there had been no opportunity for the appellant to address the issue of a collateral contract, in particular by way of legal submissions.

3. Pursuant to those findings the Court decided to allow the appeal. The Court adjourned the matter to permit two further issues to be considered in advance of any final order being made. Written and oral submissions were made in respect of the following:-

(a) Whether the matter should be remitted to the High Court pursuant to the provisions of Order 86A Rule 3(1) of the RSC; and

(b) What orders should be made by the Court in respect of the costs of the appeal and the costs of the action in the High Court.

B. Remittal

4. Order 86A Rule 3(1) of the Rules of the Superior Courts provides as follows:-

"Following the hearing of an appeal, the Court of Appeal may remit proceedings to the High Court with such directions as it considers just."

5. The appellant submitted that no order for remittal should be made. Although he raised a number of grounds in his written submissions, he distilled his points of objection to two distinct grounds:-

(a) The appellant cannot now be guaranteed a fair re-trial of the issue of the collateral contract when this Court, according to his submission, has already made a finding that there was sufficient evidence before the High Court to conclude that a collateral contract existed between the parties to the appeal;

(b) The respondent should not be permitted at this remove to amend his Statement of Claim where it would require new facts to be alleged and a new plea to be advanced and where the claim arising on foot thereof would otherwise be statute-barred.

6. By the time of the oral hearing on the issue of remittal, the parties were in agreement that the decision of the Supreme Court in *MacDonncha v. Minister for Education* [2018] IESC 50, was the relevant authority on the issue of remittal to the High Court when an appeal is allowed against a judgment given on the basis of a point neither pleaded nor raised during the hearing. In that case the single issue was remitted so that it could be dealt with before a different judge.

7. The decision in *MacDonncha* is authority for the proposition that even where a judgment is given on a point neither pleaded nor raised during the hearing the matter may be remitted to the High Court in appropriate circumstances. *MacDonncha* concerned judicial review proceedings for which the Rules make plain that an applicant's case must be pleaded clearly and explicitly. The applicant succeeded in the High Court on a point that was not specifically pleaded and was not considered at the hearing in specific terms. The judge had held the matter was *ultra vires* and although *vires* had been alluded to in argument on a number of occasions, the explicit point as determined by the judge was not raised at the High Court hearing.

8. The Supreme Court held this was not a matter of mischance which had led to a departure from fairness. The Supreme Court ruled as follows:-

"28. In circumstances such as these, the Court must balance the rights of the parties. There is here a simple concept of *audi alteram partem* and fair procedures. Under the Rules of the Superior Courts, and as a matter of fair procedure a party must be entitled to know the precise case that is being pleaded against them. But, bearing in mind the elapse of time and other considerations, it would be unfair if the case were now to be determined by this Court simply on the basis of some procedural deficiency or a pleading point, which had not been raised in the High Court and had not been properly addressed by either side. This is a question of striking the right balance in fairness and outcome.

The Order

29. The order of the Court will refer to the second applicant only. No order can be made in relation to the first applicant at this time, and until the proceeding is reconstituted. In the circumstances, the Court will order that the judgment and order of the High Court, with regard to the second applicant, be set aside on the 'third issue', that is, the finding that the Minister acted *ultra vires* s.15(6) of the 2001 Act. As a matter of fair procedure, it is necessary that this single issue be reheard in the High Court before a different judge. Accordingly, this sole question of *vires* will be remitted back to the High Court for re-argument.

30. It will be necessary to file an amended statement of grounds pleading this one specific issue of *vires* explicitly, but no other issue. The respondent Minister will be permitted to file a new statement of grounds of opposition in order to deal with that question, but no other question. No other issue may be revisited or reopened. The Court will allow four weeks for the filing of an amended statement of grounds for this purpose, and four weeks for the filing of the statement of grounds of

opposition. Such further or other matters as may be necessary for doing justice in this case should be dealt with by the High Court."

9. It is appropriate to point out that in relation to pleadings generally, the Rules of the Superior Court provide at Order 28 rule 1 that:-

"The court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

10. The *MacDonncha* decision was relied on by the Court of Appeal in *English v. O'Driscoll & Ors.* [2019] IECA 153, when allowing an appeal against the finding of a trial judge based on an issue not pleaded and raised only after the evidence in the case had concluded and remitting to the High Court for a retrial.

11. The appellant submits that there should be no remittal on two grounds:-

(a) That it would be unfair where the High Court would not be able to consider the issue of collateral contract afresh and without constraint in light of the finding of this Court; and

(b) That the pleadings would have to be amended thereby requiring new facts to be alleged and such a claim would be statute barred.

D. The First Ground

12. The appellant submits that this Court's finding that there was sufficiently cogent evidence of the collateral contract before the High Court would mean that another High Court judge dealing with the matter would be constrained to consider that issue deferentially. The appellant submits that there should not be a remittal in those circumstances. The appellant submitted that in *MacDonncha* the Supreme Court was careful not to give any view on whether the point would succeed.

13. This Court considers that the appellant cannot succeed on this particular objection to remittal. In the first place, as the respondent has pointed out, the Court's finding was not one that the High Court judge was obliged to find a collateral contract, rather it was a finding that there was sufficient evidence to permit her to make such a finding. Indeed, at para. 100 of the judgment, Donnelly J. explicitly stated that "[i]t is important not to confuse a finding by an appellate court that there was evidence upon which the trial judge was entitled find as she did, with a finding that a trial judge was obliged to make the particular finding she did on the evidence before her." (Emphasis in original).

14. Secondly, the High Court judge who will hear the appeal will be bound by his or her oath to apply the law to the evidence given in the trial. The High Court judge is perfectly capable and obliged to make the appropriate decision based upon the law as applied to the evidence. The High Court judge must only apply the law as found by the Court of Appeal (or Supreme Court) and must not surrender its decision-making functions simply because of a view of the facts that may have been expressed by another judge or judges, even if those judges are from an appellate court. It also bears repeating here that there is a distinction between fact-finding at first instance and appellate review of a trial judge's fact-finding.

15. It is also relevant to point out that the issue at stake in the substantive appeal was such that if the appellant succeeded in establishing that there was *no* sufficiently cogent and clear evidence before the High Court to establish a collateral contract, there would have been no remittal. This was the position in the case of *Reynolds v. Blanchfield* [2016] 2 I.R. 268 where no claim for relief on a *quantum meruit* basis had been pleaded and the Supreme Court held that there was no evidence before the High Court on which the value of the *quantum meruit* could be properly assessed. The Supreme Court

(Laffoy J.) rejected the argument that the appropriate order would be for the Court to remit for the High Court to have the value assessed, stating:-

> "The lack of relevant evidence in the High Court is attributable to the fact that the Respondent's claim was not pleaded as a claim for relief on a *quantum meruit* basis. Therefore, it would not be appropriate to remit the matter to the High Court."

16. It follows that the question of remittal will only arise in cases where there *is* evidence supportive of the claim that was not pleaded. In circumstances where a finding of the Court on the central issue under appeal would have disposed of the appeal, it was appropriate for the Court to rule on the sufficiency of evidence point, while making clear that it was so ruling as an *appellate* court. This Court is satisfied that there the first ground put forward does not prevent this Court for ordering that the case is remitted to the High Court.

E. The Second Ground

17. The appellant submits that a remittal could only take place if the Court permitted the respondent to amend his pleading. The appellant submits that any attempt at this remove to amend the statement of claim so as to include a claim that a collateral contract came into existence in 2007 would in effect be to allow a claim, which is in reality statute-barred, to proceed.

18. The appellant relied upon this Court's comment in its judgment that the statement of claim expressly stated that the reason the appellant was sued was because the common areas of the development had not yet been transferred into the ownership of the management company. The appellant submits that not only is there no plea in relation to the existence of a collateral contract in the Statement of Claim, but there is no allegation of fact that would support such a plea either.

19. The appellant relied upon the decision in *Smyth v. Tunney* [2009] 3 I.R. 322 in submitting that the authorities are clear that an amendment to pleadings will not be allowed where its purpose is to introduce a new claim based on a new factual matrix that would otherwise be statute-barred. In *Smyth* Finnegan J. stated as follows (at paragraph 39):-

> "In summary the law as to amendment now is that an amendment will be allowed if it is necessary for the purposes of determining the real issues in controversy between the parties. The addition of a new cause of action by amendment will be permitted notwithstanding that by the date of amendment the Statute of Limitations had run <u>if the facts pleaded are sufficient to support the new cause of action</u>. Facts may be added by amendment if they serve only to clarify the original claim but not if they are new facts. Simple errors such as an error in date or an error as to location which do not prejudice the defendant and enable the real questions in controversy between the parties to be determined will be permitted [...] The amendment sought here by way of the addition of causes of action does not satisfy these requirements. In order to sustain the new causes of action additional facts are required to be pleaded and indeed the notice of motion sought amendment of the statement of claim by the addition of the necessary pleadings of fact. These amendments should be disallowed." [<u>Emphasis</u> added]

20. The respondent submits that this issue of the collateral contract was not based on an entirely new set of facts; a factual matrix involving all these matters had been pleaded. Further, an amendment of the pleadings would not give rise to a Statute of Limitations point.

21. In the view of this Court, the decision of the Supreme Court in *Moorehouse v. Governor of Wheatfield Prison & Ors.* [2015] IESC 21 is relevant in understanding the

decision in *Smyth*. It is worth quoting at length from the Supreme Court's conclusions starting at para. 40:-

> "Counsel for the respondent placed considerable reliance on the judgment of this Court in *Smyth v. Tunney* [2009] 3 I.R. 322. To my mind, that reliance was misplaced. In *Smyth* this Court considered and approved the judgment of the High Court in *Krops v. Irish Forestry Board Limited & Kieran Ryan* [1995] 2 I.R. 113. In turn, in *Krops*, Keane J., then a High Court judge, pointed out that the difficulties which had arisen in considering amendments arose from an 'over-rigid' application of the rule in *Weldon v. Neill* [1887] 19 QBD 394 had been to the effect that an amendment would not be permitted if it would deprive the defendant of a defence under the statute of limitations. Keane J. observed that, where a plaintiff sought to add a new cause of action arising out of the same facts, or substantially the same facts, there was no reason why a court, even in the absence of a specific rule, should be precluded from permitting such an amendment. In *Smyth v. Tunney*, having referred with approval to *Krops v. Irish Forestry Board Limited*, Finnegan J. went on to point out that Order 28, Rule 1 had also been considered by this Court in *Croke v. Waterford Crystal Limited & Irish Pensions Trust Limited* [2005] 2 I.R. 383. This authority establishes that the first matter to be considered in an application to amend is whether the amendment sought is necessary for determining the real question in controversy in the litigation. The next issue to be considered is whether the amendment can be made without prejudice to the other party. A third criterion is whether any possible prejudice can be addressed or regulated by a suitable order as to costs. Finally, a very late application to amend is less likely to succeed, particularly if the amendment is on a purely technical

point. There are, of course, non-exclusive general statements of principle to be applied on the facts of a given case.

[The Supreme Court then recited the quote from Finnegan J. set out above]

In *Smyth v. Tunney* the amendments sought did not satisfy the requirements because the applicant both sought to add causes of action to the statement of claim and to plead a very substantial range of additional facts.

This is not the situation here. No effort is made to plead a large range of new facts. This application does not concern an endeavour to plead a new cause of action. What is in question here is purely the addition of facts, by amendment, to "clarify the original claim" (see paragraph 30 of *Smyth v. Tunney*)".

22. Quirke J. in *Lismore Homes Ltd v. Bank of Ireland Finance Ltd.* [2006] IEHC 212 stated as follows:-

> "The fact that the amendment sought will deprive the opposite party of a defence pursuant to the provisions of the Statute of Limitations will not, of itself, necessarily be fatal to the application. However it is a factor which may be taken into account by the court in considering whether or not the amendment should be permitted […] The court has jurisdiction to permit an amendment which is required in order to plead a cause of action which can be readily identified from the facts already pleaded. It may do so even if the amendment includes a cause of action which would otherwise be barred by the Statute of Limitations. However, an amendment should be permitted only where no injustice will be caused to the opposite party."

23. In Delaney & McGrath, at para. 5-235 it is stated, regarding *Lismore Homes*, that

*"*Although this line of authority was not considered, it is consistent with the approach adopted by the Supreme Court in *Smyth v. Tunney"*. This Court considers that this statement regarding *Lismore Homes* is also consistent with the view of *Smyth v. Tunney* as set out by the Supreme Court in *Moorehouse.* Each case is to be decided on its own facts.

24. There is no question here but that the real issue in controversy between the parties is whether there was a collateral contract between them. As demonstrated in *MacDonncha* and the other cases cited above, an amendment may be permitted on remittal from an appellate court if the purpose is to allow the real controversy between the parties to be litigated fairly between the parties. The amendment will be permitted notwithstanding that by the date of amendment the Statue of Limitations had run, if the facts already pleaded are sufficient to support the new cause of action – identifiable from the said facts – or the facts are substantially the same. The amendment will not be permitted where it is sought to plead a new cause of action and there is an attempt to plead a substantial range of additional facts (as in *Smyth v. Tunney*). In *Moorehouse* it was clarified that *Smyth v. Tunney* had approved of the decision in *Krops* to the effect that where the action arose out of the same facts, or substantially the same facts, there was no reason why a court in the absence of a specific rule should be precluded from permitting such an amendment.

25. It seems to this Court that the case law on permitting amendments has evolved over time and that in general amendments to pleadings should be allowed where necessary for determining the real issues in controversy between the parties. It is worth noting that the present case presents a different set of circumstances than in *Smyth v. Tunney* or *Moorehouse v. The Governor of Wheatfield*. In those cases, the terms of the proposed amendment were before the appellate court. Furthermore**,** the court at first

instance, and then on appeal, was in a position to adjudicate on whether the precise amendment of necessity raised additional facts. In the present case, the respondent has urged the Court to accept that an amendment can be made to add the cause of action on substantially the same facts as already made.

26. This Court must bear in mind that it is an appellate court and that primarily the issue is whether the amendment is necessary for the determination of the real issues between the parties and can be made without injustice. Undoubtedly the amendment is necessary to determine the real issue between the parties. If the amendment can be made on substantially the same facts as already before the Court then there is no injustice. The respondent urges the Court that he comes within this requirement. The facts he submits were substantially the same, and indeed the evidence was given and the trial proceeded on the basis of the facts.

27. This Court has concluded that the interests of justice require the remittal to the High Court, but on a particular basis, as described below. It rules in favour of remittal for the following reasons. First, the question of whether there was a collateral contract, and a breach of it, is the real issue of controversy between these parties. The appellant has placed a particular emphasis upon the pleading at para. 9 of the Statement of Claim that the plaintiff did not know if the transfer had happened and it was for that reason alone that the appellant was joined. This Court considers that this plea cannot be taken in isolation as a reason not to remit the matter. It is the facts pleaded as a whole in the statement of claim that must be substantially the same in order that the removal of the opportunity to plead Statute of Limitations will not give rise to an injustice. The Court notes that claims of breach of contract, breach of covenant and nuisance were made against the appellant at various points in the Statement of Claim.

28. Secondly, the appellant's main claim of prejudice was that this Court had given its opinion that there was sufficient evidence to establish a collateral contract; but that argument has been rejected above. Thirdly, the appellant in written submissions claimed that to remit would be a breach of requirement for finality in proceedings. That point is rejected as inconsistent with the views expressed in *MacDonncha*.

29. For the reasons set out above, the Court had adjudged it just to remit the matter to the High Court, admittedly without the precise details of the amendment to the pleadings the respondent proposes being before the Court. We are mindful, however, that even if the amendment were before the Court and the Court were to rule on it, the Court would be making what would essentially be a first instance decision without the possibility of an appeal. While this might be appropriate in some cases, especially if the issue was a very simple one, the Court considers that the most just way of proceeding with this case is to remit the matter to the High Court, permit the respondent to amend his pleadings to include a plea of breach of collateral contract and permit the appellant, should he so chose, to plead the Statute of Limitations. Any issue of whether this is an entirely new claim or one which arises from the facts or substantially the same facts as pleaded, can then be decided by the High Court as a preliminary issue or at trial as the High Court (at the motion of one or both parties) sees fit.

F. Costs

30. There are two aspects to the issue of costs:-

(i) The costs of the appeal; and

(ii) The costs of the High Court hearing.

(i) The Appeal Costs

31. The appellant seeks his costs in line with O. 99 rr. 1 and 4 of the Rules of the Superior Courts. He submits that costs follow the event. The respondent relies upon the relevant provisions of the Legal Services Regulations Act, 2015. The later provisions have been addressed by this Court in *Chubb European Group SC v. The Health Insurance Authority* [2020] IECA 183. Neither side submitted that there was any reason to argue for the pre-2015 situation to apply to this issue.

32. The appellant succeeded in his appeal insofar as the Court has found that the trial judge should not have ruled on a claim which was not before her. He has not succeeded in resisting remittal. In so far as he succeeded in the appeal, that would be considered the "event" under the pre-2105 and there would be a presumption in favour of granting costs. The 2015 Act states that a party who is entirely successful is entitled to their costs unless the court orders otherwise. As Murray J. observed in *Chubb*:-

> "Given that the law was that the term 'event' fell to be construed distributively so that there could be a number of events in a single case (*Kennedy v. Healy*), winning the 'event' and being 'entirely successful' may well not mean the same thing (although it will be observed that the phrase 'costs to follow the event' appears in the marginal note to, but not the text of, s.169)."

33. The respondent has argued that the appellant spent the majority of his written and oral submissions on a point that was rejected by this Court; that there was no evidence to support a finding of collateral contract. Although the appellant won on the second point, namely that he had not been given a full and fair opportunity to make submissions on whether there was a collateral contract, the respondent argues there should be no order as to the costs of the appeal. The respondent also relied upon the point that he had not contributed to the finding of the trial judge.

34. We do not consider that we have to make a finding as to whether there is a difference between "costs follow the event" and a party who is "entirely successful" being entitled to costs. This is because pursuant to s. 168 (1) and (2) the Court is entitled to make an order for costs at any stage in proceedings and in particular relating to particular steps in proceedings or where someone is partially successful. In this case, the appellant has won the appeal in so far as he has successfully overturned the finding of breach of collateral contract and the award of damages made against him. While the majority of the argument concerned an item on which the Court held against him, it was, as indicated above, a necessary part of the consideration of the appeal. Importantly, it did not add to the costs. The fact that a remittal is to be made does not affect the fact that he has succeeded in the event. Furthermore, we do not think it relevant that the decision was made by the trial judge without submissions on the point. If there was merit in that point it would only have been if the respondent had indicated at the earliest stage that he was not going to oppose the appeal.

35. Therefore, we are of the view that the appellant should succeed in being awarded the costs of the appeal. We have considered whether this should include the additional costs of the written and oral submissions in relation to the remittal and costs and we conclude that it does so. This was a necessary part of the overall determination of the appeal in the slightly unusual circumstances of this case. It is appropriate that the appellant is entitled to the costs thereof.

(ii) The High Court Costs

36. The respondent submits that this should be left over to the High Court to determine. At the oral hearing the appellant appeared to accept that to be the position should the Court decide to remit the matter. On further query from the Court he clarified that he

was seeking his costs, or at least part of them, as he had won so comprehensively on most of the claims of the respondent.

37. We consider that the general rule "in actions for damages where a retrial has been ordered is that costs follow the event in relation to both trials, and the question of the costs of the first trial are dependent on the outcome of the retrial" as identified in *MK v. JPK (No 3) (Divorce: Currency)* [2006] IESC 4, [2006] 1 I.R. 283 applies. As the Court of Appeal (Collins J.) has recently stated *McDonald v. Conroy & Ors.* [2020] IECA 336 at para. 34: "The rationale for such a rule appears reasonably clear. The ultimate winner in litigation should recover their costs, including the costs of any previous trial, because the ultimate outcome establishes that that party was entitled to succeed all along. That is so whether that party succeeded in the first trial or not."

38. There is no reason here to disapply that general rule. It may well be that if the respondent is successful, he may not be entitled to all his costs on the basis that he has not been "entirely successful" but that will be a matter for the High Court to determine. It is not necessary or appropriate in the present case, that this Court should parse and analyse the time spent at trial on each aspect of the claim. When the High Court has heard and determined the matter, it will be in a better position to address the issue from the knowledge it gains in hearing the evidence in the proceedings.

39. The Court will therefore reserve the issue of the High Court costs for determination by the High Court at the conclusion of those proceedings.

G. Conclusion

40. In light of the above this Court will make the following Orders:-

(a) Allow the appeal;

(b) Remit the proceedings to the High Court for the purpose of determining the issue of whether there was a collateral contract between the appellant and respondent and whether the appellant was in breach of same, subject to (c);

(c) Permit the respondent to amend his statement of claim to plead the breach of a collateral contract and to permit the appellant to make amendment to his defence as he sees fit in light of the amended plea;

(d) Make an order for the costs of the appeal to be made in favour of the appellant; and

(e) Reserve the issue of the costs of the first trial in the High Court for determination by the High Court at the conclusion of the High Court proceedings.

41. The issue of a stay was not addressed by the parties. It is the view of the Court that there should be a stay of execution on the award of costs until the determination of the proceedings.