THE COURT OF APPEAL

[2020] IECA 171

Record No: 2018/168

Donnelly J.
Faherty J.
Ní Raifeartaigh J.

BETWEEN/

MICHAEL BEGLEY

PLAINTIFF/RESPONDENT

-AND-

DAMESFIELD LIMITED, JOHN LALLY
AND THE JOLLY MANAGEMENT COMPANY LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered this 26th day of June, 2020

Introduction

1. Following her judgment delivered on the 23rd March, 2018, by order dated the 20th April, 2018, Baker J. awarded the plaintiff (hereinafter, "the respondent") €59,289.26 in damages against the first and second named defendants. This is the appeal of the second named defendant (hereinafter, "the appellant") against that order. The full background to the proceedings is set out in the judgment of the trial judge (*Begley v. Damesfield Ltd* [2018] IEHC 221).

2. The respondent brought a claim in respect of two berths at the Jolly Mariner Marina Village, Brick Island, Coulson Road, Athlone, Co Westmeath. The Jolly Mariner Marina Village was a development constructed by the first defendant, Damesfield Ltd. (hereinafter, "Damesfield") on property owned by the appellant. The appellant was the majority shareholder in, and director of, Damesfield. A company called Lalco Ltd. (hereinafter, "Lalco"), a company in the John Lally Group of companies (a group either owned or controlled at least partially by the appellant), was also involved in the development. The development was an apartment development with adjacent marina. The third defendant, Jolly Management Company Limited (hereinafter, "the management company") was set up by the appellant and Damesfield to manage the development when completed.

3. In about May 2015, the respondent agreed to purchase two apartments in the development together with marina berths, number 56 and 57. By combined building agreements and contracts for lease dated the 14th October, 2005 between Damesfield and the respondent, Damesfield contracted to construct the berths.

4. Special condition 19(G) of the contract provided that upon completion, leases of each berth would be handed over to the respondent duly signed by the appellant, Damesfield and the management company. Subsequently, by two leases dated the 20th September, 2007 between the appellant, Damesfield, the management company and the respondent, the berths were demised to the respondent for a term of 890 years from the 1st January, 2005 at a nominal rent.

5. After executing the contracts, but prior to their completion, the respondent visited the recently constructed berths and noticed the presence of rocks at the entrance thereto; therefore, the existence of the rocks in the vicinity of the berth were known to him when he entered into the leases. The respondent also gave evidence that he was given to understand by the appellant and Damesfield, that any access problem arising from the rocks would be "sorted out", and he completed the contracts in reliance on this understanding. The rocks were never removed. The respondent remained unable to navigate and/or moor in either berth and accordingly has received no value at all from the purchase. The finding that the berths were unusable was uncontested.

The Issues on this Appeal

6. The appellant filed a notice of appeal reciting eight substantive grounds. In oral submissions, these issues were narrowed down. The issues turn on the finding by the trial judge that the appellant was liable for breaching the terms of the collateral contract which arose on the basis of promises or assurances made to the respondent to the effect that the difficulties caused by the rocks would be rectified and which induced him to close the sale of the property.

7. In light of that finding, the appellant submitted that: -

    a) there was no claim of any such promise or assurances made by the respondent in the case pleaded by him;

    b) that the evidence adduced by the respondent was not sufficiently cogent to support the existence of collateral contract; and

    c) that the terms of the collateral contract identified by the learned trial judge were insufficient to fix the appellant with liability.

8. The respondent identifies the issues as being twofold:

    a) the trial judge erred in finding the appellant bound by such collateral contract; and

    b) that a claim for breach of collateral contract was not adequately pleaded by the respondent against the appellant.

9. The obvious difference between the two approaches is that of sequencing. The respondent's answer to the pleading point is bound up with the substantive findings of the trial judge. For that reason, I agree that it is better to approach that issue last. I consider that the issues and the order they should be dealt with are as follows:

a) whether the trial judge erred in finding that the evidence supported a collateral contract, in particular between the appellant and respondent; and

b) whether it was open to the trial judge to grant a remedy for a breach of a collateral contracts in these proceedings.

The High Court Judgment

The claims as pleaded

10. In the course of her judgment, Baker J. disposed of the pleaded claims of the respondent by rejecting them. None of her findings in those respects are at issue. The sole issue is her finding that there was a breach of a collateral contract. The findings of fact and law relevant to that issue will be discussed in detail below. It is nevertheless relevant to the understanding of her decision and of this judgment to record briefly some of the other findings she made.

11. The respondent had claimed that there was an implied term in the contracts for sale and the purchase leases which was necessary to give business efficacy to the contracts and to reflect the common intention of the parties. The implied term was that the berths would be accessible and suitable for the vessels for which they were built. Baker J. held at para. 36 of her judgment that "*the contract for sale and the building agreement are to be read as carrying an implication on the part of the vendor and the developer that the berths would be accessible.*" The contracts did not close for a period of about 2 years.

12. After signing the contract but prior to entering into the leases, the respondent became aware that access to the berths was not navigable. He gave evidence that he thought the rocks were rubble or bedrock which could be removed without difficulty. In those circumstances, Baker J. said that the respondent must be held to have taken the berths in the condition in which they were in at the time of the closing of the sale. The respondent could not therefore succeed in an argument that there was an implied term in the leases/agreements that the waterways would be navigable. The principle of *caveat emptor/caveat lessee* applied.

13. Baker J. also rejected the claim that the respondent could succeed on the basis that there was an implied easement of access and egress. He could not rely on an easement implied from necessity because of his knowledge of the rocks. She also rejected his claim to a remedy in nuisance. She held that no derogation by the lessor from his grant had been shown. She also held that there was no breach of the covenant in respect of quiet enjoyment, in particular, as such a covenant did not import a warranty as to the condition of the demised premises at the commencement of the term.

The evidence on which the trial judge found a breach of a collateral contract

14. The parties to the appeal helpfully extracted the most relevant evidence from the transcripts. In the respondent's evidence in chief, the transcript records the following:

"Q: You understand yourself to be getting a very particular portion of the river, or did you know exactly where the marina structure will be located or how far -- would it be 10 feet this way or 10 feet that way? Were you told these things?

A: No, there was no discussion. It was as it was, I just took it at face value, you know.

Q: Yes. So the reason I'm asking you this is one of -- the defendants are relying on this notion of caveat emptor. I think you're -- you know what the idea is?

A: Yes.

Q: You know, buyer beware. But was there means whereby you could, by inspection of the riverbed, come to a conclusion as to where they were likely to put the marina when they finished the development?

A: No, but there was always a discussion about a rock in the vicinity, but I mean that was clearly outlined from a very early stage that that was all going to be sorted out and was part of --

Q: It would be sorted out?

A: Yes."

15. The respondent was cross-examined as to when he first became aware of the problem of the rocks in light of the statement in the replies to particulars. He confirmed that he was aware of the presence of the rock formation prior to the completion of the purchase. At one point the following exchange occurred:

"Q: So after you signed the agreement with Damesfield but before you completed the whole deal and paid over the money there is this discussion going on in the background at some level about rocks near the marina?

A: It was widely accepted there was a rock – a cluster out there and it was going to be sorted out.

Q: So you say it was "widely accepted" but you presumably knew about it somehow from people you spoke to or had dealings with, is that the case?

A: Yes.

Q: So you see the special condition that I've just been looking at, the general condition about the actual state of the property, that says in the law you're deemed to know the layout of the land before you buy a property and, in fairness to you, you say in fact, in relation to these rocks, not only are you deemed to know about them but you actually knew about them. You knew from speaking to people around you, you knew from -- it was generally accepted, you said, among everybody that there's a problem here because of these rocks?

A: Yes, but it was also widely accepted that this was going to be dealt with. I mean, it's like buying a house in a housing estate, you expect the road to be completed. I suppose I entered into this in the spirit of honesty and I thought everyone would live up to the promise."

16. Later the respondent offered further clarification in the following extract: -

> *"Q: Given that when you went down to snag the apartments you knew that there was a problem with the rocks and the berth because that was widely accepted, you said?*
>
> *A: Absolutely.*
>
> *Q: Did you go down to the berth and see where the berth had actually ended up in relation to the rocks . . . did it ever occur to you to go down and have a look at that?*
>
> *A: No, but as I say, I took it on face value that the rock situation was going to be resolved. And I was told that.*
>
> *Q: So the difficulty is that you bought the property knowing that the rocks were there and you knew more or less what the problem was?*
>
> *A: No, I bought the property on the basis, you know that I knew what I was buying but I knew the rock was going to be dealt with."*

17. At a later point in an exchange with counsel for the respondent, the trial judge summarised the evidence up to that point as follows:

> *"JUDGE . . . That he knew the rocks were there when he handed over his €40,000 for the berths or his €40,000 less the deposit. But he relied on an agreement that they would be moved or sorted"*
>
> *MR McDOWELL: When he closed the transaction he was aware that there were rocks there. But when he purchased, when he agreed to buy, there was nothing there. That's what I understand.*
>
> *WITNESS: That's correct, yes."*

18. In further cross-examination, the respondent stated in answer to questions about whether all the matters of which he complained of were in place in February 2007:

> *"In 2007 it was well acknowledged that there was a problem there. And it was also acknowledged by Lally and Damesfield that this was going to be sorted"*

19. He confirmed his belief as follows:

> *"Q: So you bought the berths, you signed the lease and you paid the money on the basis that you knew at that point in time that you couldn't use [the berths], is that correct? But you said it was all going to be sorted out in due course?*
>
> *A: I thought it was going to be resolved, yes."*

20. When asked to explain why the allegation that he had been assured that the rocks would be "sorted out" had not been put in his pleadings, the respondent offered the following explanation:

"A: It was well acknowledged that there was a rock. It was well acknowledged that it was going to be removed.

Q: It is not pleaded in your case anywhere that there was an agreement that the rocks would be sorted out or remedied . . . there's no mention anywhere of an agreement with anybody that the rocks would be sorted out. So that's something that you seem to be just putting today?

A: No, no, no. No it's not. There was – I said to you, at every AGM from 2008 it was acknowledged that the rocks were there. It was on the – it was on face value that, you know, I took that Lally and Damesfield would resolve the rock issue and we all live happily ever after. That was the basis. I mean I didn't seek legal advice at this stage."

21. The respondent was then asked by counsel for the appellant why he did not take any steps to address the issue until much later on:

"Q: So even after twelve months, leave aside the management company meeting for a minute, did you take any other steps to say: "there's a problem here. I've paid €80,000 for two berths and that I can't use, can someone sort this out?"

A: No, because the first year at the AGM we were told it was going to be resolved and then there's a letter sent out from the management company confirming it was going to be resolved. And the second year, again, now maybe after year 2009 I might have been getting a bit concerned about it, you know but certainly I took it at face value because I didn't interface at all with John Lally or with Damesfield. It was purely with the management company who had represented us from John Lally and from Damesfield on the board."

22. The evidence was that the first AGM of the management company took place on Monday, the 15th September, 2008, almost one year after the sale to the respondent had closed.

23. Under re-examination by his counsel, the respondent confirmed the position:

"Q: When Mr Burke said that at the 2008 AGM that there would be dredging done, you gave evidence that when you came to close the sale and handed over your money, that you believed that that would be done?

A: Absolutely.

Q: Can you tell the Court why you believed it would be done at that time?

A: *It was widely accepted that there were rocks out there and I believed – I had conversations with the management company and with other people in the marina that it was going to happen. I suppose I took it on face value.*

Q: *You are saying that it was widely believed. Who told you at the time you close the transaction in 2007 that it was going to happen, that there was going to be dredging done?*

A: *I suppose it was the Jolly M Management Company.*

Q: *I see, somebody did as far as you are concerned?*

A: *Yes. My only point of contact in all of this was the Jolly M Management Company."*

24. There was further evidence in the trial from witnesses on behalf of the defendants concerning inter alia, meetings of the management company. This evidence will be referred to below under the trial judge's findings.

The Trial Judge's Findings

25. The parties to the appeal disagree on the actual findings of fact made by the trial judge and the legal effect of those findings of fact. A major disagreement is the nature of the respondent's case made at the trial. Having rejected all his other claims, the trial judge noted that the respondent gave evidence that he closed the sale on foot of an agreement that the access be made navigable. She went on to deal with this issue under the heading "*Agreement to make navigable*" at para. 76 to 98 of her judgment.

26. At para. 76 of her judgment, Baker J. noted that the respondent had given evidence that before he closed the sales he was "assured" that the matter of poor accessibility would be resolved and that he was told that it was the intention of the developer or owner to dredge (meaning to carry out works to clear the waterway) the river abutting the two berths he had purchased. Baker J. noted he raised the matter in conversations and his evidence was not controverted. At para. 77, Baker J. found as follows: -

> *"Mr Begley's evidence of having been promised that the access will be improved might not be wholly credible if taken alone, especially as he is unclear regarding when and exactly by whom the promises were made, but subsequent actions by [Damesfield] and persons representing the [appellant] after the sales closed bear out his evidence."*

27. Baker J. went on to record the evidence from various people including Kevin Burke and Cyril Hessian from Lalco who attended the inaugural AGM of the management company on the 15th September, 2008. She said that although Lalco did not have any proprietary interest in any of the land or waterways and was not the direct developer, it played a role in the engagement between the respondent, the appellant and the developer in the years after the respondent closed the sales. She referred to the minutes of the AGM and at para. 82 held "*the fact that the 'dredging' of the waterway arose at the very first meeting of the AGM in my view supports the evidence of [the respondent] that he was given an*

assurance or promised that the waters around the berth purchased by him would be made navigable."

28. Baker J. referred to further correspondence and meetings at which the issue of the proposed dredging of the harbour was brought up. At para. 88 she stated as follows:

> *"In giving his evidence, [the respondent] came across as mild-mannered and clear thinking. He was firm and not in any way elusive regarding promises which he says were made to him before he closed the sale. The fact that the issue was a live one in the development is clear from the memoranda of the minutes of the management company meetings, and it is also clear that it was 'accepted' that the problem would be resolved or required to be resolved and that resolution was not the responsibility of either the management company or the individual owners."*

29. The trial judge held that it was clear on the evidence that Lalco or persons claiming through the Lalco group of companies or acting on behalf of the appellant and/or Damesfield, at all material times assumed responsibility for dealing with the navigation difficulties in the waterway surrounding the berths. Importantly, the trial judge held that while the evidence with regard to the promises or assurances that the navigation issue would be rectified was difficult to fully quantify, it was much less difficult to accept that promises or assurances were made on behalf of either Damesfield or the appellant or both of them and were given with the intention that they would encourage the respondent to close his sale, or in the knowledge that it was likely that they would and did so encourage him.

30. The trial judge bore in mind that the respondent was an experienced mariner and came from the Athlone area although he was now living in Dublin. She was satisfied that he would not have purchased the berths had he not believed and been promised that the access problem would be resolved. He did not make more complete enquiries or carry out proper surveys to ascertain the extent to which the visible rocks would have impeded on the navigability of the river. Although he was obliged to carry out reasonable enquiries before he closed the sale, Baker J. stated that she was satisfied that the respondent closed the sale of the two berths on account of the promises made to him that the access issue would be resolved. She noted that "*no evidence was given by any person to throw doubt on [the respondent's] evidence and the contemporaneous or near contemporaneous records bear out the proposition he advances*".

31. Baker J. went on to hold that she was: -

> *"satisfied that the normal rule of caveat emptor has been displaced in the present case insofar as a promise was made, which was in my view actionable, that the navigable issue would be resolved to enable the berths to be used. Thus there exists a collateral contract as found by Geoghegan J. in Allied Irish Banks Plc v Galvin Developments (Killarney) Limited & Ors [2011] IEHC 314 which either acts to displace the express terms of the contract that no term as to navigability was to be implied, or is actionable in itself."*

Baker J. thereafter awarded damages for breach of contract.

Whether the trial judge erred in finding evidence to support a breach of a collateral contract

Collateral contracts

32. That Irish law permits a court to find the existence of a collateral contract was not at issue in this case. Indeed, it could not be at issue given its lineage in Irish case law (See: McDermott, *Contract Law* (2nd Edn., Bloomsbury, 2017)). In the present case, the parties referred to and relied upon the same case law.

33. In this appeal, the focus was on the cogency and sufficiency of the evidence upon which a collateral contract could be found. No issue was raised as to the admissibility of the evidence that was given at trial. The appellant asserted that a collateral contract will only be recognised in exceptional circumstances and where there is cogent evidence often comprised in written documents which are or were intended to induce a party to enter into a contract. The appellant accepted that "[g]eneral assertions of oral promises or assurances given by one party to another will not usually be sufficient to give rise to a collateral contract".

34. The respondent relying on the same case law, pointed to the origins of the collateral contract jurisprudence in submitting that oral evidence was sufficient to find a collateral contract. He submitted that "[w]hat has to be shown is that there was a promise, either oral or in writing, made collateral to contract, and that this promise was supported by consideration in the sense of entering into a transaction which the policy might not otherwise have been obliged to enter into and in fact would not have entered into but for this promise." The respondent also emphasised the "but for" requirement for a collateral contract to be found.

35. In light of the submissions by the parties, it is appropriate to start with a consideration of the leading case on collateral contracts in the United Kingdom, namely *City and Westminster Properties (1934) Ltd v. Mudd* [1959] Ch. 129 (hereinafter, "*Mudd*"). In that case, the draft of the new lease presented to the tenant contained a covenant restricting the use of the premises to business purposes only and the premises were not to be used as a sleeping quarters. The tenant objected to this covenant and the landlord gave him an oral assurance that if he signed the lease they would not enforce it against him. The tenant signed the lease but subsequently the landlord sought to forfeit the lease for breach of the covenant.

36. Harmon J. in *Mudd* held that the oral assurance constituted a separate collateral contract, stating that: -

> *"[i]f the defendant's evidence is to be accepted, as I hold it is, it is a case of a promise made to him before the execution of the lease that, if he would executed it in the form put before him, the landlord will not seek to enforce against him personally the covenant about using the property as a shop only. The defendant says that it was in reliance on this promise that he executed the lease and entered*

on the onerous obligations contained in it. He says, moreover, that but for the promise made he would not have executed the lease, but would have moved to other premises available to him at the time. If these be the facts, there was a clear contract acted upon by the defendant to his detriment and from which the plaintiffs cannot be allowed to resile."

37. In the present case, the appellant accepted that a promise or inducement did not have to be in writing but submitted that oral evidence could not contradict the terms of a written agreement. Three relatively recent Irish High Court decisions in respect of collateral contracts were opened to the Court. A further case, ultimately decided by the Court of Appeal, was also opened.

38. In *AIB v. Galvin Development (Killarney) Ltd* [2011] IEHC 314, Finlay Geoghegan J. held that a collateral agreement existed in written heads of agreement drawn up by the bank in advance of the main contract, according to which the bank agreed to limit its rights of recourse to 50% of the drawn debt. The representations were intended to induce the potential borrowers to continue in negotiations with the bank to obtain the facilities.

39. In *Ulster Bank Ireland Ltd. and Another v. Deane and Another* [2012] IEHC 248, McGovern J. indicated that, because of the parol evidence rule, an oral assurance would not be capable of giving rise to a collateral contract.

40. In *Tennants Building Products Ltd. v. O'Connell* [2013] IEHC 197, Hogan J. held: -

"The effect of this case law may be said to be that, while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving (as in Mudd and Galvin) written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in Deane."

41. In *AIB Mortgage Bank v. Hayes* [2018] IECA 152, the Court of Appeal found that the pre-contractual documentation was a critical factor in the defendant's decision to enter into the main contract "*so that the 'cogent evidence' required in Tennants Building Products is satisfied in the present case.*"

42. The respondent submitted that the decision in *Ulster Bank v. Deane* ignored the genesis of the principle in *Mudd*, which involved an oral collateral insurance, and the widespread recognition in the United Kingdom (*e.g.* the current editions of Chitty, *Contract law* and Treitel, *Law of Contract*) that an oral collateral contract constitutes an exception to the parol evidence rule. In the present case, the main disagreement between the parties on the issue of collateral contracts concerned the cogency of the evidence required to prove such a contract. Both Hogan J. in *Mudd* and McGovern J. in *Ulster Bank v. Deane* make

clear however that generalised assertions of oral agreements will usually not be acceptable to establish a collateral contract.

43. A valuable working definition of a collateral contract was provided by Finlay Geoghegan J. in *AIB v. Galvin* as follows: -

> *"I am using 'collateral contract' in the sense explained by Cooke J., in the Supreme Court of New Zealand in Industrial Steel Plant Ltd. v. Smith [1980] 1 N.Z.L.R. 545, at p. 555, quoting with approval from Cheshire and Fifoot on Contracts (5th N.Z. Ed. 1979, 53-54):*
>
> > *"'The name is not, perhaps, altogether fortunate. The word 'collateral' suggests something that stands side by side with the main contract, springing out of it and fortifying it. But, as will be seen from the examples that follow, the purpose of the device usually is to enforce a promise given prior to the main contract and but for which this main contract would not have been made. It is rather a preliminary than a collateral contract. But it would be pedantic to quarrel with the name if the invention itself is salutary and successful.'"*

44. The appellant's submission was that a collateral contract was one which but for the promise, the main contract would not have been concluded. He relied upon Finlay Geoghegan J. in *AIB v. Galvin* at para. 46. The respondent agreed that a collateral contract was not *simply* an oral agreement varying the meaning of a contract. It was a self-standing agreement that if a person entered into a contract, certain consequences would follow. The respondent urged upon the Court, the view that the finding of a collateral contract is often a policy one in cases where justice is promoted by finding such a contract. (Finlay Geoghegan J. in *AIB v. Galvin* at para. 98 quoting McDermott, *Contract Law*, which in turn cited an article by Lord Wedderburn).

45. It is often questioned if the parol evidence rule has any application to collateral contracts in those circumstances. For an interesting discussion on the parol evidence rule and the law on establishing collateral contracts, see the judgment of Ní Raifeartaigh J. in *Danske Bank v Shortt* [2020] IECA 137. For present purposes it is sufficient to say that oral evidence may be received with a view to establishing a collateral contract, but what will usually be at issue is the cogency of the evidence that has been presented. If the collateral contract is found to exist, the effect of it may be to vary the overall contractual obligations of the parties and the end result of that variation may be that the party seeking to rely upon particular terms of the written contract will no longer be able to do so. It is however an important aspect of public policy that the certainty inherent in reducing contracts to writing should not easily be set aside by an assertion of a collateral contract. It is for that reason that only cogent evidence of the existence of a collateral contract is acceptable.

46. I note that the trial judge made her decision on the basis that the terms of the collateral contract "acts to displace the express terms of the contract that no term as to navigability

was to be implied, *or* is actionable in itself" (*emphasis* added). There was little discussion in the course of the appeal on the precise meaning of the trial judge's distinction. The submissions of both parties accepted however that the collateral contract was separate from the main contract.

47. As with any contract, there must be consideration for a collateral contract to be found. In the present case, the nature of the consideration being asserted is the entering into the main contract. Thus, in this case and indeed perhaps in most if not all cases where a collateral contract is asserted between two parties who subsequently enter into a main contract, the consideration will be that accession to the contract. If accession to the contract is the consideration, the party seeking to establish the collateral contract must be in a position to establish that "but for" the collateral contract they would not have entered into the main contract.

48. The finding of a collateral contract therefore may at the level of principle be more properly understood as an intervention promoting justice. The likelihood is that in most situations, a collateral contract may only be found where the evidence clearly and cogently supports the contention that but for the representation of one party, the other party would not have entered into the main contract.

49. As I have set out, a finding of a collateral contract can be based upon an oral agreement between the parties. What is clear however, is that because a collateral contract is related to, but outside of, the main contract, there must be clear and cogent evidence before such a collateral contract can be found to exist by a court. This is because the main contract will, generally, have been reduced to writing and is capable of being construed and applied without parol evidence (and in most cases must be so construed). The collateral contract, will, if found to exist, have an impact on the overall state of the contractual relations between the parties. In promoting justice and indeed in the interest of the administration of justice, it is necessary to restrict the finding of such a contract to situations where the evidence leads cogently in that direction.

50. Therefore, where evidence is given of a collateral oral agreement, a court must be particularly careful to ensure that it is not acting on the oral evidence of a party (or agent) alone. Such evidence would not generally, without more, reach the cogency required in the interests of justice to find such a contract exists. What is required is evidence which supports in a material sense, the oral evidence from a party on the issue of the collateral contract. That evidence may include the course of dealings between the parties up to the time and beyond the signing of the main contract. It is also permissible for a judge to take into account when assessing whether a collateral contract exists, the absence of evidence to the contrary. The judge must bear in mind however, that a mere or generalised assertion of an oral agreement is insufficient to found the collateral contract.

Was there sufficiently cogent evidence before the trial judge of a collateral contract?

51. Before embarking on an analysis of whether there was sufficient evidence before the trial judge to justify her finding of a collateral contract, it is important to recall the function of an appellate court in respect of findings of fact. In *Leopardstown Club Ltd. v. Templeville Developments Ltd.* [2017] 3 I.R. 707, Denham C.J. gave an overview of the principles identified in the *Hay v. O'Grady* [1992] 1 I.R. 210 line of authorities:-

> *"The principles identified by the Hay v. O'Grady jurisprudence include the following:-*
>
> - *An appellate court does not proceed by way of a full re-hearing of a case.*
> - *An appellate court is bound by the findings of fact of a trial judge which are supported by credible evidence.*
> - *In general, an appellate court proceeds on the findings of fact of a trial judge.*
> - *The fact that there is contrary evidence does not alter the position.*
> - *An appellate court should be slow to substitute its own inferences of fact where such depends upon oral evidence, and a different inference has been drawn by the trial judge.*
> - *The fact that there is some evidence before a trial judge which may lead to a different conclusion does not alter the fundamental principle.*
> - *A finding of the credibility, or not, of a witness is a primary finding of fact."*

52. The Supreme Court in the cases of *Doyle v. Banville* [2018] 1 I.R. 505, and *Wright & Anor. v. AIB Finance and Leasing and Others* [2013] IESC 55, had also clarified that *Hay v. O'Grady* was concerned specifically with the assessment of the facts by a trial judge where the trial judge was required either to weigh conflicting evidence or assess the credibility or reliability of testimony. Findings of fact can be disturbed where there is a material and significant error in the assessment of the evidence or a failure to engage with a significant element of the evidence put forward.

53. In careful submissions, taking into account the principles set out in *Hay v. O'Grady*, counsel for the appellant skilfully argued that in the present case, the evidence was not sufficient to allow the High Court to conclude as it did. Counsel referred to a number of passages from the transcript of evidence which he submitted, demonstrated that there was anything but clarity on the part of the respondent when he gave evidence. Moreover, counsel submitted that as a result of this lack of clarity in the evidence, there was a consequential lack of certainty and cogency in the findings of the trial judge with the result that the finding of a collateral contract could not be sustained.

54. Counsel for the appellant made reference to the pleadings in which the respondent had never claimed that any representation, promise or assurance was made to the respondent by or on behalf of anybody that the rocks would be removed prior to closing the sale. In

the respondent's replies to particulars, he had asserted that he had no knowledge of the rocks prior to entering into the lease. This latter plea was manifestly incorrect given his evidence at trial.

55. Arising from the submissions, three matters require to be determined under this heading. The first is whether the trial judge made a clear finding that the respondent had been given an assurance by or on behalf of the appellant prior to the conclusion of the contract, that the rocks would be removed so as to facilitate mooring. The second is whether there was evidence to support that finding. The third is whether the evidence was sufficiently cogent to support a finding of a collateral contract.

56. I am satisfied that the trial judge made clear that the assurance had been given by the appellant. In the relevant parts of her judgment, she explained the role of Lalco in great detail, having repeatedly said that this was a company owned, controlled or at least partially controlled by the appellant. Although Lalco was not the direct developer, it played a role in the engagement between the appellant, respondent and the developer, including in the minutes of the AGM as being treated as the developer. In those minutes, it was recorded that a representative of Lalco had said it was Lalco's intention to dredge the area in question and that they were in the process of duly submitting a planning application.

57. Although the trial judge referred at para. 94 to the promises or assurances being made on behalf of either Damesfield or the appellant or both of them, this reference was in the context of commenting adversely that there had been no evidence put forward as to whether Damesfield or the appellant was the owner of the beneficial interest in the common areas or in the reversion. There is also no doubt but that at para. 77, Baker J. was clear that the promises relating to the assurance was evidenced by the subsequent actions of Damesfield and persons representing the appellant. It is also necessary to understand the nature of the agreements at issue. Although the initial contract was between the respondent and Damesfield, the relationship between the appellant, respondent and Damesfield was highly intertwined in the context of the development and demise of the berths at issue.

58. As for the appellant's argument that there was no clarity or cogency to the respondent's evidence of the assurance, the relevant parts of the transcript of the evidence set out above, demonstrates that in the course of his evidence, the respondent consistently set out that clear indications had been given that the situation with the rocks would be "sorted out". He said it in his evidence in chief and in cross-examination and again in re-examination. He had said it was widely accepted that the problem would be sorted out and he knew this because of the people he spoke to. In particular, the respondent gave evidence that "it was also acknowledged by Lally and Damesfield that this was going to be sorted out." He may not have given the time and place of those assurances, but he was firm and clear in his evidence that they had been given.

59. The respondent's evidence as to the agreement was not contradicted by evidence from the appellant or from Damesfield. Moreover, the trial judge made specific findings of fact

in relation to the respondent. He was mild mannered and clear thinking in giving evidence. He was firm and not elusive regarding the promises that were made before the close of the sale. This finding as to credibility is a primary finding of fact. This finding of credibility was made even in circumstances where the trial judge was aware of the discrepancy in the evidence at trial and the information contained in the reply to particulars.

60. In light of all the foregoing, I am satisfied that there is no basis to sustain the appellant's argument that there was no evidence before the trial judge upon which she could find that the appellant had assured the respondent prior to signing the lease for the berths that the problem with the rocks would be resolved so as to ensure navigability.

61. The separate and more difficult question is whether the evidence before the trial judge was sufficient to establish a collateral contract. Of crucial importance is that the trial judge did not act upon the oral evidence of the respondent alone. She acted on other evidence which she said supported that evidence. She relied upon written evidence in the form of memoranda from the minutes of the management company meetings where it was "accepted" that the problem would be resolved or required to be resolved and that resolution was <u>not</u> the responsibility of either the management company or the individual owners. She refers in particular in the course of her judgment to Mr. Hession, who attended an AGM as a proxy for the appellant and who stated "that they are doing the best they can to accommodate owners who have berths that they cannot access".

62. The appellant pointed out that these minutes post-date the completion of the contract and the signing of the leases for the berths. That is factually correct but the minutes of those meetings support the evidence of the respondent that the promise had been made and that the responsibility for correcting the navigability issue lay not with the individual owners/management company but with Damesfield and the appellant. The behaviour of the parties after the contract was signed therefore supported the finding that the contract had only been signed because of the collateral contract to remove the rocks and make access to the berths navigable. It is also apparent that no evidence was given to contradict his evidence.

63. The appellant has also argued that in the circumstances where the respondent was contractually obliged to enter into the leases, he cannot fulfil the requirement of establishing that "but for" the promise regarding navigability, he would not have entered into the leases. That argument cannot succeed in the particular circumstances of this case where a close analysis of the trial judge's findings demonstrate that she held that the contract for sale and the building agreement were to be read as carrying an implication that the berths would be accessible. The fact that the berths were not accessible would have permitted the respondent to refuse to complete the sale on the breach of the implied obligation in the contracts to provide accessible berths. Of course, the trial judge held that he was not entitled to sue on the implied term as he had been aware of the lack of access when he signed the contract. This does not prevent him from

establishing, on cogent evidence, that the reason he signed the contract was because of a collateral contract to make the berths accessible.

64. Although mere or generalised assertions are not acceptable to establish a collateral contract, I am satisfied that the evidence here went beyond such type of assertions. There was proof of the assurances in the subsequent documentation and behaviour of the other defendants. The fact that the dates, places and timing of those assurances were not given precisely was understandable given the nature of the relationships. In the specific circumstances of this case, the time, date and place of the assurance was not essential to the finding that such assurances had in fact been given. The most important aspect for purposes such as the Statute of Limitations, 1957 (as amended) was that the date of the collateral contract could be identified by the consideration for the contract *i.e.* the completion of the contracts.

65. Overall, I am satisfied that although the evidence from the respondent as to the collateral contract was by way of oral assertions, there was sufficiently cogent evidence of that contract by virtue of the subsequent evidence, including written minutes emanating from a source other than the respondent, which supported the collateral contract. Therefore, any question of such oral assertions being generalised was overcome by the subsequent proof as aforesaid.

66. In all the circumstances, I am satisfied that there was cogent evidence before the trial judge to permit her to find that a collateral contract existed.

Was it open to the trial judge to make a finding of breach of the collateral contract in the proceedings?

67. The appellant's primary submission was that at no stage prior to judgment was there a case made that there was a collateral contract between himself (or his representative) and the respondent that caused the respondent to close the sale. In the course of the appeal, it was common case that it was not a position that had been argued for in written or in oral submissions and that it was "a surprise" that it appeared in the judgment. The respondent submitted that the justice of the case demanded that the finding be made and that the appeal be dismissed. The respondent also made a submission that the claim for breach of covenant was sufficient to incorporate the breach of the collateral contract.

68. An examination of the pleadings is required. The respondent's statement of claim referred to an agreement dated the 3rd June, 2005 between Damesfield, the appellant and the management company, that Damesfield and the appellant would transfer the marina to the management company on completion of the development. The statement of claim then went on specifically to plead: "To the knowledge of the [respondent] this transfer has not yet occurred and <u>it is for this reason the [appellant] is joined as party to the proceedings</u>" (<u>emphasis</u> added).

69. The pleadings referred to various claims including that it was an express or implied term in the agreement/contract for lease or the leases as to navigability and suitability for mooring. The statement of claim went on to plead that the inaccessibility of the berths constituted a breach of the contracts by Damesfield, and "a breach by [Damesfield, the

appellant and the management company] of their obligations under the Leases (including without prejudice the covenant for quiet enjoyment) and of the aforesaid easement of access implied thereby and a nuisance."

70. In his claim for relief, the respondent sought the following relief against the appellant: "...damages against [Damesfield] for breach of contract and damages against the [Damesfield, the appellant and the management company] for breach of covenant and nuisance." (Emphasis added)

71. The appellant also made the point that in his replies to particulars, the respondent claimed that he had no knowledge of the existence of the rocks prior to entering into the lease. Even in the light of the evidence that was given to contradict that statement, at no point in the hearing was there an application to amend the pleadings to include a claim for breach of contract and in particular, for breach of the collateral contract.

72. For the sake of completeness, I note that there was some comment in the appellant's High Court submissions to the evidence that the respondent claimed that it was widely accepted or understood that the problem would be sorted out. Those submissions went on to state that it was not part of the respondent's case that he closed the sale or took the leases on any kind of conditional or qualified basis. It is accepted by the parties that at no stage therefore, during the hearing or before judgment, had the respondent urged the High Court to make a finding in respect of a breach of a collateral contract.

The requirement to plead the case

73. Although it was a significant aspect of the appeal, the Court was referred to little in the way of legal authority on the issue of the requirement to plead one's case. Part of the explanation is that it is an accepted and obvious requirement, but the second reason may be that on the precise issue of a trial judge "fashioning a remedy" on the basis of the facts as she found them, there is little to no case law. In general, the legal authorities focus on the specific relief sought by a party, the ability to amend pleadings and the stage at which the amendment may be sought.

74. As to the rules regarding pleading the case, it is sufficient to refer to the following provisions of Order 19 of the Rules of the Superior Courts ("RSC"). Under the provisions of O.19, r.1 (a rule which has been amended since the relevant date but not in any material respect), a plaintiff is required, subject to the provisions of Order 20, to deliver to the defendant a statement of his or her claim, and of the relief or remedy to which he or she claims to be entitled. Order 19, rule 3 provides: "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved…"

75. With respect to a plea in relation to a contract, O.19, r.24 states: "Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters,

conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative."

76. Order 20, rules 7 and 8 RSC provides:

> "Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always be given, as the Court may think just, to the same extent as if it had been asked for. The same rule shall apply to any counterclaim made or relief claimed by the defendant in his defence.
>
> Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly. The same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counterclaim, founded upon separate and distinct facts."

77. Order 28, rule 1 RSC as amended, provides as follows:

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

78. In *Irish Bank Resolution Corporation v. Morrissey* [2013] IEHC 208, Finlay Geoghegan J. was asked to imply a term into a contract. She stated as follows: -

> *"No such implied term was pleaded, or referred to in replies to particulars or in the outline written submissions in advance of the hearing. They were only referred to in the closing written submissions. In my judgment, it would be an unfair procedure if the Court were now to permit Mr. Morrissey to seek to rely upon such a term. I would add that I am also of the view that on the evidence there is no basis for implying such a term into the 2009 Agreement."*

79. The foregoing *dicta* points to the unfairness of permitting a party to rely in submissions before the trial court on a claim not pleaded. The procedural unfairness in a trial judge finding for a party on a claim not pleaded without giving the other party a chance to address the issue is even greater. Whether it is permissible to do so is at the heart of this appeal. It is important therefore to consider the purpose of pleadings.

80. The Supreme Court in the case of *Wildgust v. Bank of Ireland* [2000] IESC 10 stated as follows at para. 18:

"At the outset it was correctly (and not surprisingly) agreed by Counsel that the purpose and function of pleadings was as set out in the following passage from Mahon v Celbridge Spinning Company Limited [1967] IR 1, which had been cited with approval by Keane J. (as he then was) in McGee v O'Reilly [1996]2 IR 229:

> *'The whole purpose of a pleading, be it a statement of claim, a defence or reply, is to define the issues between the parties, to confine the evidence of the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at the trial.'"*

81. The Supreme Court also confirmed the requirement to plead one's case in *Reynolds v. Blanchfield* [2016] 2 I.R. 268. In that case the trial judge awarded payment on a quantum meruit basis even though they had not been pleaded and despite the issue being raised in the course of the hearing, there was no application to amend the pleadings. Laffoy J. stated: -

> *"On an examination of the statement of claim, as elaborated on by the replies to notice for particulars, it is beyond question that the Respondent did not claim relief on a quantum meruit basis and did not plead the factual and legal foundation for entitlement to such relief. That failure, in my view, should have been totally fatal to the advancement of a claim for such relief at the trial, unless the Respondent had applied for leave to amend the pleadings, the application had been acceded to, and the Appellant had been afforded an opportunity to answer and to adduce the evidence necessary to address the amended claim. That did not happen. Therefore, the Respondent's claim should not have been determined on the basis of a quantum meruit claim."*

82. Thus, the purpose behind the requirement to plead one's case is so that the real questions of controversy between the parties will be determined in the litigation and the other party will know and will have the opportunity to meet the case against them. Identifying the real issues assists in the pre-trial marshalling of the case in terms of discovery, interrogatories, inspection, preserving evidence, obtaining witness statements and expert evidence. At trial, it ensures that all parties are focussed on the presentation of the evidence for or against a plaintiff's plea. It will also ensure that trials are not elongated through the exploration of irrelevant evidence. There will also be a focused attention in legal submissions as to the law at issue in the proceedings. Thus, the requirement for the issues in controversy to be pleaded serves both the interests of the particular parties in ensuring fair procedures and also more generally, the interest of the administration of justice in ensuring that court time is not wasted.

83. Parties are free to plead their cases broadly, subject of course to rules on scandalous pleas or those which are vexatious or amount to an abuse of process. Parties are entitled to apply to amend pleadings and "*the principal consideration in an amendment application*

was to the effect that pleadings should be amended so as to ensure that the real questions of controversy between the parties should be determined in the litigation." (per Clarke J. in *Woori Bank v. KDB Ireland* [2006] IEHC 156). As Clarke J. indicated in *Woori*, *"[t]hat principle is, of course, subject to the limitation that amendments should not be made where to allow same would cause prejudice to the other party. This latter fact is, in turn, subject to the limitation that where it is possible to deal with the prejudice in a fair and just manner by means other than excluding the party from relying upon the matters sought to be pleaded (such as by an appropriate order for costs) then the amendment should be allowed and the prejudice dealt with in the appropriate way."*

84. Clarke J. identified two types of prejudice, the first being where by virtue of the absent plea, steps were taken which now make it impossible or significantly more difficult to deal with the case. The second is where there was logistical prejudice, such that there will be significant disruption to the intended proceedings necessitating for example, a significant adjournment.

Determination

85. In the appeal, the appellant submitted that he was not making a "mere" pleading point. Counsel submitted that this was a case where there was a significant error on the part of the trial judge in going beyond the pleadings. He had no opportunity to address the trial judge. He submitted that the High Court did not have the jurisdiction to go outside the pleadings and formulate a claim that was not made.

86. The respondent urged on this Court that it was an entirely meritorious finding by the trial judge. It had been brought about to achieve justice between the parties. This was in a situation where the respondent had been induced to enter into the leases and he deserved to be compensated for that breach of collateral contract. The respondent made the point that a breach of covenant (as pleaded in the statement of claim) was a claim for a breach of contract as landlord and tenant law was based upon contract under Deasy's Act. Therefore, the breach of a contract collateral to the lease was sufficiently pleaded or at the very least the promotion of justice demanded a remedy; the interests of justice being an important consideration generally in the finding of a breach of a collateral contract. He also urged on the court that no prejudice had been claimed by the appellant.

87. What occurred in the High Court in the present case was unusual. There seems to be little doubt that this was a remedy that was identified by the trial judge arising from the evidence she had heard and the findings of fact that she had made. In light of the evidence before her, it may have seemed like the justice of the case would be promoted by such a remedy.

88. The finding of the breach of a collateral contract was made where there had been no plea of breach of a collateral contract. Instead, the pleadings expressly stated the reason that the appellant had been joined to the proceedings; to ensure that the transfer of the marina to the management company would be completed. While there had been a claim of breach of covenant, on the pleadings that claim was clearly related to the lease/contract itself. As discussed above, the collateral contract was a standalone

contract and preliminary to the main contract. Therefore, a breach of a collateral contract is not a breach of a covenant within the lease. Moreover, the trial judge expressly rejected all claims related to breach of the terms of the lease or contract. In my view, this was a claim that was separate from the claims that had been made in the proceedings.

89. Of particular note is that a party attempting to set up a claim of breach of contract is obliged to particularise the contract and the breach thereof in the pleadings. That did not happen in the present case. On the contrary, the pleadings clearly indicated that the respondent's case, confirmed in replies to particulars, was that he had not known of the existence of the rocks. The position is therefore, that it is not possible to find that any such claim was implicitly made in his pleadings.

90. He gave evidence that could and was construed as a collateral contract. That is not the same as saying that he made a claim for breach of a collateral contract. While the respondent submitted that the appellant was on notice from the start of the evidence that the respondent was making the assertion that the rock issue would "be sorted", I do not accept that this is relevant or determinative of the issue. The fact of the matter is that despite this evidence there was never any indication made by or on behalf of the respondent that his claim included a breach of the collateral contract.

91. It has to be recognised that sometimes, for various reasons, a case made by one party on pleadings can change in the course of evidence. The change may require a new claim to be added to the proceedings. Order 28, rule 1 and the case-law referred to above, caters for that situation subject to the consideration of any prejudice that will result. In *Wildgust*, the mid-trial amendment to pleadings was permitted, but the Supreme Court emphasised that this was not a desirable practice nor should it be allowed frequently.

92. It is important to note that the rule is directed towards the parties to the pleadings; it is for the parties to request amendment. The rule therefore reflects the *inter partes* nature of our common law system. In general, legal proceedings before our courts are party led proceedings

93. The respondent made the case that the promotion of justice was central to a finding of a breach of a collateral contract and thus the trial judge was entitled to find such a breach even where it was not pleaded. In my view, to accede to this argument would bring the law on collateral contracts to what might amount to a unique place within the law. It would permit a court to set aside longstanding procedural rules on pleadings which are grounded in principles variously identified as constitutional and natural justice, constitutional fairness of procedures, *audi alteram partem* and/or equality of arms. Put simply, a party is entitled to know the case that they have to meet. I am however conscious that to make an absolute statement that a trial judge could never grant an unpleaded/unclaimed remedy based upon the evidence she has heard may not be appropriate. Situations may always arise where the justice of a case demands that such a remedy be found. The clearly egregious behaviour of one party in respect of a fundamental, but not pleaded, right may well be such an occasion. Even then it may be

appropriate for the trial judge to give that party the opportunity to address the issue. The present case was not one involving evidence of a breach of a fundamental right but evidence of a breach of contract (collateral). A breach of contract claim is quintessentially a claim that must be pleaded and particularised so that the defendant knows the case to be met.

94. I am satisfied that no breach of the collateral contract was pleaded and no such claim could have been implied into the pleadings based upon the clear statements contained therein as set out above. Furthermore, the issue had not been addressed by both parties in submissions to the trial judge at the close of the evidence. On the contrary, in a case such as this, where the evidence was less than wholly clear cut (as acknowledged by the trial judge) as to the precise dates on which the assurances had been given and to the particular people who had made these assurances, the absence of an opportunity for the appellant to address directly the issue of whether a breach of a collateral contract had been established on the evidence introduced an unfairness in the procedures.

95. The respondent pointed out that there had been no assertion of prejudice in the appellant's written submissions. At the appeal hearing, the appellant asserted that there was no jurisdiction to proceed to make that finding in the absence of a plea. In making his submissions, the appellant pointed to the fact that he never had the chance to address the judge on it. The issue of jurisdiction has been addressed by the Court of Appeal in the case of *R.L. v. Heneghan* [2014] IEHC 664. In that case, the Circuit Court judge had awarded custody of the child to one parent when no issue of primary care had been raised on the pleadings before her. The Court of Appeal having held that in those circumstances, the Circuit Court had no jurisdiction to make an order of this kind which lay outside the scope of the pleadings and having referred to the purpose of pleading in defining the issues between the parties, stated: *"[t]his principle is fractured when the court makes an order which was not sought by either party and where that order cannot be regarded as consequential or ancillary to the issues which were before the court.*" In those circumstances, the Court held that the Circuit Court had lacked jurisdiction to make the order because as it stated: *"[t]he Court obtains its jurisdiction from the issue that is brought before it by the litigants for decision by means of originating summons or notice or pleadings.*"

96. For completeness, I will refer to O.20, r.7 wherein it states that "it shall not be necessary to ask for general or other relief, which may always be given, as the Court may think just, to the same extent as if it had been asked for". No submission was made, correctly so in my view, that the effect of this rule was that the Court was at liberty to fashion a remedy for a claim that was not pleaded. That aspect of the rule was not meant to set aside the requirements to plead the case but to permit the Court to grant the relief which is appropriate to its findings on the case as pleaded. In *Reynolds v. Blanchfield*, the respondent had submitted that the relief was one which could be granted without being pleaded. In McGrath & Delaney, 3rd Edn., it was stated that some reliefs could be granted without being claimed and made specific reference to the relief of damages where specific performance had been claimed. Having quoted from the Supreme Court authority

relied upon, Laffoy J. rejected it saying: "*That passage demonstrates that the exception to the general rule which arises where there is no express claim for damages in addition to or in lieu of specific performance has a clear statutory basis.*"

97. In my view, therefore the question of whether a judge may grant relief in respect of a claim that was not made in the course of pleadings is a matter which goes to jurisdiction. It is a jurisdictional issue not least because it has at its heart the issue of procedural fairness.

98. The situation here is entirely different to that where it may be appropriate for a judge to ask the parties to assist in the precise form of order to be made consequent upon the findings in a judgment which themselves arise from the pleadings. In the present case, albeit based upon the evidence before her, the trial judge went beyond the pleadings and gave relief in respect of a claim that had never been made and thus had never been addressed by the defendant. There were no exceptional circumstances here which might have justified such a departure, in particular where no notice to the parties of that intention had been signalled in advance. In the absence of exceptional circumstances, I do not consider that a trial judge has a residual discretion to grant relief or "fashion a remedy" which has not been claimed or relied upon at the hearing.

99. In my view, there was no jurisdiction to proceed to a finding of breach of a collateral contract where that had not been pleaded. It was simply not at issue at the hearing. There had consequentially been no opportunity for the appellant to address the issue of a collateral contract in particular by way of legal submissions. At the trial, the appellant could have made similar types of argument to those that were made in the appeal as to the extent of the evidence required and the legal basis for the finding of a collateral contract.

100. This is particularly important in a case where, as is demonstrable in the transcript excerpts above, the evidence on the collateral contract was finely balanced. It is important not to confuse a finding by an appellate court that there was evidence upon which the trial judge was entitled to find as she did, with a finding that a trial judge was <u>obliged to make the</u> particular finding she did on the evidence before her. One of the purposes of advocacy is to persuade a decision maker of the correctness of the advocate's position. The appellant was denied that opportunity in the present case. It may have been that his submissions as to the vagueness of the evidence, could have persuaded the trial judge that the evidence had not reached the standard required to make a finding of a collateral contract. Thus, even though sitting as an appellate judge, I am satisfied that there was sufficiently cogent evidence from which the trial judge could have been satisfied to find there was a breach of a collateral contract, that finding does not meet the appropriate standard of fairness. A party is entitled to the opportunity to make submissions on the weight of the evidence before the trial court and to have a decision at first instance. That party cannot be restricted to a response to a claim which requires the party to demonstrate that there was no evidence or even no cogent evidence on which the trial judge could have found a collateral contract. To deny a party that opportunity to

persuade a judge of first instance as to the weight of the evidence, all the more so where cogency of evidence is required, is unfair.

101. The appellant did not make the case before this Court that his cross-examination might have been approached differently if there had been an awareness that a claim for breach of a collateral contract was being made. It is nonetheless interesting that much of the respondent's evidence of the collateral contract came from cross-examination of the respondent himself. As the appellant did not make this point or the point that he may have called different witnesses, that does not form part of my decision. Nonetheless, it demonstrates one reason why a party should be entitled to know the case against them.

102. In light of the findings I have made, I am satisfied that the only appropriate remedy for the procedural unfairness is to allow the appeal. This is not a matter that is within the discretion of the trial judge, instead it is a matter which goes to jurisdiction. In a system of *inter partes* justice which has procedural fairness at its core, a party must be given the opportunity to address each and every claim made against it.

103. An issue arises however as to whether having allowed the appeal the Court should exercise its discretion to remit the matter to the High Court pursuant to O.86A, r.3(1) RSC which provides that "[f]ollowing the hearing of an appeal, the Court of Appeal may remit proceedings to the High Court with such directions as it considers just." The present case can be distinguished from *Reynolds v. Blanchfield* above, where the Supreme Court held that there was no evidence from which a *quantum meruit* entitlement could be established and having stated that this was attributable to the lack of pleading said that it would not be appropriate to remit the matter to the High Court. As the question of remittal was neither raised in the respondent's notice nor at the hearing, I am of the view that it is appropriate to seek further submissions from the parties on this aspect of the case.

Conclusion

104. In the course of this judgment, I have held that the trial judge made clear findings of a breach of a collateral contract on the part of the appellant. There was evidence before her which was sufficiently cogent to permit her to make that finding on the evidence. However, a breach of a collateral contract had never been pleaded, there was no application to amend the pleadings and there were no legal submissions at the end of the evidence squarely addressing the issue. In those circumstances, there was a procedural unfairness to the appellant of such significance that it is necessary to allow the appeal. I propose to ask the parties for further submissions on the question of whether this issue should be remitted to the High Court for the sole purpose of addressing the issue of collateral contract and, if so, how this might be dealt with in the High Court upon remittal.

105. I would therefore propose that the appellant should have three weeks from the date of this judgment in which to file submissions and the respondent should have three weeks from the date of the receipt of those submissions in which to file his submissions. The submissions should also address the issue of the costs of this appeal and of the High Court.

106. As this judgment is being delivered electronically, I record that Faherty J. and Ní Raifeartaigh J. agree with this judgment and with the orders proposed.