UNAPPROVED
NO REDACTIONS REQUIRED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2021/162

Neutral Citation No [2022] IECA 47

McCarthy J.

Ní Raifeartaigh J.

Collins J.

BETWEEN

JIM STAFFORD

(AS STATUTORY RECEIVER OF HOLLIOAKE LIMITED (IN RECEIVERSHIP))

Plaintiff/Respondent

AND

PETER RICE, SHEILA RICE, GREGORY RICE,

ANGELA RICE, MARK RICE AND KEN PATTULLO, IN HIS CAPACITY AS

TRUSTEE-IN-BANKRUPTCY OF LIAM J MALLON

Defendants/Appellants

Judgment of Mr Justice Maurice Collins delivered on 2 March 2022

BACKGROUND

1. The First to Fifth Defendants ("*the Appellants"*) appeal from the judgment and order of the High Court (Simons J) ([2021] IEHC 235) giving the Plaintiff leave to deliver an Amended Statement of Claim. The Appellants have also appealed the subsequent judgment and order of Simons J ([2021] IEHC 344) giving the Plaintiff two-thirds of the costs of the amendment application as well as the costs of the costs application. However, by agreement the costs appeal has been left over and this judgment addresses the issue of amendment only.

2. The proceedings have their origin in a contract for sale dated 24 September 2004 between the Appellants and one Liam Mallon as Vendors and Hollioake Ltd ("*the Company*") as Purchaser ("*the Contract"*) in respect of lands at Clonee, County Meath. More precisely, the Contract was for the sale of the 25 equal undivided one hundredth shares held by the Vendors in lands comprised in Folios 7460 and 8260 Co Meath, excluding a part of the lands in Folio 7460 which were to be retained by the Vendors. The purchase price was €4,600,000, payable in three parts. However in certain circumstances additional consideration might be payable (clause 16). The Company entered into a separate agreement (referred to as "*the Hughes Contract*") for the acquisition of the remaining 75% (undivided) interest in the lands in Folios 7460 and 8260.

3. The Contract identified four plots, each of which was to contain six sites for residential units (special condition 8(b)). What appears to have been contemplated by the Contract was that there would be a partitioning of the legal ownership of the lands in Folios 7460 and 8260 such that the Vendors (or some combination of them) would become sole beneficial owners of those four plots (special condition 8). The Company would develop those plots (as well as developing the lands the subject of the Hughes Contract) building a total of twenty four residential units, of which eight (two on each plot) would be *Designated Units* which would be delivered to the Vendors for an agreed price of €256,500 plus VAT (special condition 15) . The remaining units would be sold and the Contract made provision (in special condition 9) for the execution by the Vendors of deeds of assurance in favour of the Company or its nominee in respect of such units.

4. The Contract provided in special condition 6(a) for the payment of €1 million on signing which was to be held by the Vendors' solicitors as stakeholder. Special condition 6(b) provided that on the date two months from the date of execution and delivery of the deeds of partition pursuant to special condition 8 (i.e. the deeds of partition necessary to ensure that the Vendors became sole beneficial owners of the four plots identified in special condition 8(b)), that initial sum would be released to the Vendors and a further sum of €1,270,980 would be payable to the Vendors, which would be released to them and not held by their solicitor as stakeholder. A mortgage or charge was to be executed over the Vendors' interests in the Special Condition 8(b) plots (excluding the Designated Units) to give protection to the Company. The balance of €2,329,020 was to be payable upon completion of the Designated Units, subject to the deduction of the agreed cost of construction of those Units.

5. On the execution of the Contract the Company paid the initial sum of €1,000,000. In due course, a deed or deeds of partition were executed pursuant to special condition 8. In June 2006 the further sum of €1,271,000 was paid by the Company. Those payments are not in dispute and in fact the Defendants in their Defence acknowledge that a further sum of €291,127.50 was discharged by the Company (this represents the value of the Designated Unit constructed by the Company, rather than an actual payment made to the Vendors).

6. It appears that the Company constructed and sold a number of houses on the lands and constructed and delivered one of the Designated Units. However, it then ran into financial difficulties. In December 2010, the Company's loans with AIB were transferred to the National Asset Management Agency (NAMA) and in September 2012 NAMA appointed Mr Stafford (*"the Receiver*") as receiver over the Company's assets. In these circumstances, the Company was unable to perform its obligations under the Contract and it appears from the papers that in 2010, proceedings for breach of contract were brought by the Defendants and Mr Mallon against both the Company and AIB. Those proceedings do not seem to have been progressed.

7. One further matter should be noted as it gives rise to one of the disputed amendments. Special Condition 9 of the Contract provides that immediately following the effecting of the partition specified in Special Condition 8, and provided that the Purchaser had made the payment due to the Vendors on foot of special condition 6(b), *"the Vendor shall deliver to the Purchaser deeds of assurance of the plots of lands described in*

Special Condition 8(b), other than the Designated Sites". That was subject to the proviso that the Purchaser could notify the Vendor not to deliver a deed of assurance in respect of any part or parts of the lands specified by the Purchaser. That was in turn subject to the further provisions of Special Condition 9 which it is unnecessary to recite here.

8. On 19 May 2017 Hayes solicitors (who act for the Receiver in these proceedings) wrote to the solicitors for the Defendants, O' Hagan Ward & Co, referring to Special Condition 9 and asserting that, in light of the fact that the payment required to be made under Special Condition 6(b) had been made and given that the partition specified in Special Condition 8 had been effected (and Hayes noted that the Defendants had in their Defence in the proceedings specifically pleaded that the partition had been effected) the Defendants were required to deliver *"deeds of assurance pursuant to Special Condition 9 of the contract."*

THE PROCEEDINGS

9. The Receiver instituted these proceedings in November 2013. The summons sought an order pursuant to section 31 of the Land and Conveyancing Law Reform Act 2009 for the partition of the lands in Folios 7460 and 8260 as more particularly described in the Contact. In the alternative, it sought an order pursuant to section 31 for the sale of the lands and the distribution of the proceeds of sale. It also sought such further or other order relating to the lands as might appear to be "*just and equitable in the circumstances of the case".* In April 2014, a Statement of Claim was delivered seeking the same reliefs. The Statement of Claim refers to the Contract, pleads the payment by the Company of the sums referred to above and asserts that, pursuant to section 52(1) of the 2009 Act, the entire beneficial interests in the lands had passed to the Company on the making of the Contract. Having referred to the financing of the purchase by AIB and the transfer of the facilities to NAMA, it then pleads that the Defendants remain in possession of the lands and pleads that by virtue of his appointment as receiver, the Receiver has an interest in the lands.

10. A Defence was delivered on behalf of the Defendants (including Mr Mallon) in November 2014. It admits the Contract and the payments made by the Company but denies that any interest in the lands had passed to the Company, takes issue with the suggestion that section 52(1) of the 2009 Act governed the Contract and disputes the Receiver's entitlement to rely on section 31 of that Act. It pleads that the Company had failed to perform its obligations under the Contract and that it had effectively abandoned the Contract so that it could have no interest in the lands. As to the claim for partition,

the Defence pleads that a deed of partition had been executed on 1 December 2006, which had led to the creation of four new folios which are identified in the Defence.

THE APPLICATION TO AMEND

11. The application to amend issued in August 2019. In December 2019 a slightly different draft of the proposed Amended Statement of Claim was produced by the Receiver and a different draft again was produced in July 2020. It was that July 2020 draft that the High Court considered gave leave to deliver.

12. Some of the amendments proposed were technical in character and were intended to address the fact that lands had been partitioned and, as a result, that new folios had been created. Others arose from the fact that Mr Mallon had been adjudicated a bankrupt in Northern Ireland, had subsequently died and that an order had been made substituting his trustee-in-bankruptcy as defendant. There was no issue about any of those amendments. A further amendment appears to have been prompted by a concern as to the application of section 52(1) of the 2009 Act to a contract made in 2004 and sought to plead in the alternative that, upon making the payments it did, the Company acquired a beneficial interest in the land *"commensurate with the amount of the purchase price"*. As the Judge noted, that pleading appears to rely on *Tempany v Hynes* [1976] IR 101. Again, there was no controversy about that amendment.

13. That left two groups of amendments which were vehemently opposed by the Appellants. The first advanced a contractual claim, founded on Special Condition 9. Having referred to that provision, the draft Amended Statement of Claim sought to plead that *"wrongfully and in breach of contract, despite request, the Defendants and*

each of them, have failed, refused or neglected to execute the said Deeds of Assurance" (at para 25). A claim for damages for breach of contract was also sought to be added.

14. The other amendments sought to make a claim in unjust enrichment. The relevant pleading is in the following terms:

> *"26. Without prejudice to the foregoing, in circumstances where Hollioake paid to the Defendants the sums of at least €2,271,000 pursuant to the Contract of Sale and where the Defendants remain in possession of the lands comprised in the New Folios, there has been a total failure of consideration on the part of the Defendants, and each of them, and a consequent obligation upon the Defendants, and each of them, to repay the said sums to the Plaintiff and/or to disgorge all benefits received by the Defendants, and each of them, as a result of the advancement of said monies, whether by way of resulting trust and/or constructive trust.*
>
> *27. Further and/or in the alternative, any such benefits received by the Defendants, and each of them, as a result of the payment of the said monies pursuant to the Contract of Sale are held on trust for the benefit of the Plaintiff in his capacity as statutory receiver for Hollioake*
>
> *28. Further and/or in the alternative, the Plaintiff claims from the Defendants, and each of them, the monies received by the Defendants, and each of them, pursuant to the Contract of Sale, as monies had and received to the use of the*

Defendants, and each of them, and/or on foot of the Defendants' unjust enrichment, at the expense of Hollioake."

On foot of those pleas, the draft Amended Statement of Claim sought to add claims for damages for breach of trust and/or breach of fiduciary duty, a claim for equitable compensation and a claim for the taking of accounts and inquiries.

THE HIGH COURT JUDGMENT

15. The Judge noted that the principal objection to the amendments was that they involved the introduction of new causes of action necessitating the pleading of new facts. That was said to be impermissible, by reference to the observations of Finnegan J for the Supreme Court in *Smyth v Tunney* [2009] IESC 5, [2009] 3 IR 322 (at paras 29 and 30). The Judge rejected that objection, considering that it was predicated on a misreading of *Smyth v Tunney,* which was concerned with the introduction by way of an amendment of a claim that would otherwise be statute-barred (Judgment, para 16). That issue did not arise here, the Judge noted, because, on the Defendants' analysis, any breach of contract claim was barred by the time the proceedings were instituted, on the basis that any obligation to deliver deeds of assurance arose in 2006 when the lands were partitioned. In any event, the amendments could not be said to involve any "*new"* facts in the strict sense. They arose out of "*substantially the same facts*" as those pleaded in the Statement of Claim (language from *Krops v Irish Forestry Board* [1995] 2 IR 113) and/or fell within the "*ambit of the original grievance*" (language from *Rossmore Properties Ltd v Electricity Supply Board* [2014] IEHC 159). According to the Judge:

> *"The breach of contract claim is predicated on the contract for sale of the lands. The existence of this contract has been pleaded in the initial statement of claim and the new claim is rooted in that contract. Put otherwise, it arises out of facts already pleaded."*

16. The Judge then considered the amendments advancing an unjust enrichment claim. The specific objection to those amendments was that the claim was bound to fail. Referring to *Woori Bank v KDB Ireland* [2006] IEHC 156, the Judge considered that the court should not enter into the merits of the claim, save to the extent of asking itself "*whether the issue which would be required to be tried as a result of the amended pleading is one which must 'necessarily fail'"* (Judgment, para 25). In his view, it could not properly be said that the unjust enrichment claim must "*necessarily fail*". He also rejected an argument to the effect that the unjust enrichment claim involved a claim of "*wrongdoing*" against the Defendants analogous to the claims of fraud and conspiracy which the Supreme Court in *Croke v Waterford Crystal Ltd* [2004] IESC 97, [2005] 2 IR 383 had not permitted to be added by way of amendment against the second defendant. The Judge considered the amendments here to be "*entirely distinguishable*". They did not involve allegations akin to fraud and, unlike the position in *Croke* (where the Supreme Court had held that the amendments would "*radically alter*" the claim against the second defendant) the unjust enrichment claim was referable to facts which had already been pleaded (Judgment, para 28).

17. Finally, the Judge addressed and rejected an objection based on delay. While there had been delay on both sides, the relevant question was whether the delay in making the amendment application had caused prejudice to the Defendants. Given the stage which the proceedings had reached (discovery had yet to be addressed), the Judge was of the view that no such prejudice arose (Judgment, para 31).

18. The Judge accordingly gave the Receiver leave to deliver an Amended Statement of Claim in the terms sought. He also gave directions for the delivery of subsequent pleadings. In accordance with those directions the Appellants delivered an Amended Defence on 30 June 2021. It will be necessary to refer to certain aspects of the Amended Defence below.

APPEAL

19. Before this Court Counsel for the Appellants, Mr Banim SC, made essentially the same arguments in opposition to the disputed amendments as had been advanced unsuccessfully in the High Court. That approach was criticised by Counsel for the Receiver, Mr Doherty SC. It was, he said, inappropriate for the appellants to treat the appeal as a rerun of the High Court hearing. The correct position was that the order made by Simons J was a discretionary order and the decision of this Court in *Lawless v Aer Lingus Group plc* [2016] IECA 235 indicated that significant deference should be given to the High Court decision and that its decision should be interfered with only if some clear error on the part of the Judge could be established or if it could otherwise be shown that the justice of the case required this Court to intervene. Unsurprisingly, Mr Doherty submitted that no such error had been identified and that the grounds of appeal did not otherwise disclose any basis for intervention by this Court.

20. In *T.A.O v Minister for Justice and Equality* [2021] IECA 293 I considered the appellate jurisdiction of this Court in the context of appeals from costs orders made by the High Court. In my view, the same principles apply to appeals from orders of the High Court under Order 28 RSC. While they may be discretionary, this Court nonetheless has full appellate jurisdiction in respect of such orders. As a matter of principle, it may substitute its discretion for that of the High Court and the exercise of that jurisdiction is not dependent on any error of law being established. Nonetheless, in an appeal such as this, the Court does not begin with a *tabula rasa.* The starting point must be the

decision of the High Court. Where the High Court has applied the appropriate legal principles and properly explained how, in its view, the application of those principles leads to the result arrived at (whether that is to allow or refuse the amendment(s) sought) this Court will be slow to interfere with its decision. The High Court is entitled to some margin of appreciation and some material error of assessment will normally have to be demonstrated if this Court is to intervene . No such error has been demonstrated here.

21. The detailed submissions made by the parties are sufficiently identified in the discussion below and so I shall not set them out separately.

DISCUSSION

General

22. There is a large body of authority discussing the appropriate approach to applications under Order 28 RSC and many of the principal authorities were referred to in argument. One of those authorities, the decision of the High Court (Birmingham J as he then was) in *Rossmore Properties Ltd v Electricity Supply Board* [2014] IEHC 159, contains at para 19 a very succinct and helpful summary of the relevant principles. What follows is somewhat more detailed, without attempting an exhaustive exposition.

23. The terms of Order 28 and the authorities on it suggest the following:

> (1) The power of amendment is a broad one. That is evident from the terms of Order 28 Rule 1 itself, which provides that the Court may allow either party *"to alter or amend his indorsement or pleading in such manner and on such terms as may be just*".
>
> (2) In principle, any claim, cause of action or defence that could have been pleaded *ab initio* can be added by way of amendment, even if that has the effect of materially – even radically - altering the nature and/or scope of the existing proceedings: see (*inter alia*) *Wolfe v Wolfe* [2001] 1 IR 313, per Herbert J at 135; *Shell E & P Ireland Ltd v McGrath* [2006] IEHC 99, [2006] 2 ILRM 299, per Laffoy J at 311 and *Rossmore Properties Limited* , at para 19.6. *Rossmore*

Properties Limited usefully illustrates the breadth of the amendment power, involving as it did the deletion of the entirety of the existing statement of claim and the substitution for it of a completely new pleading. Reference should also be made in this context to the judgment of Donnelly J in this Court (Baker and Costello JJ agreeing) in *Persona Digital Telephony Limited v Minister for Public Enterprise* [2019] IECA 360, at para 15.

(3) Order 28, Rule 1 is "*intended to be a liberal rule*" (*Croke v Waterford Crystal Ltd* [2004] IESC 97, [2005] 2 IR 383, per Geoghegan J at para 36). Again, that is evident from its express terms, providing as it does that *"[a]ll such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties"* (my emphasis).

(4) The requirement that the amendment is necessary for the purpose of determining "*the real questions in controversy between the parties"* – the language used in Order 28, Rule 1 - "*simply means that the amendment must raise or relate to an issue between the parties arising from the subject matter of the proceedings*": *Delany & McGrath on Civil Procedure* (4th ed; 2018) (para 5-200). It does not mean that the amendment is necessary for the purpose of determining the "*existing"* questions in controversy.

(5) Where an amendment can be made without prejudice to the other party, or where any prejudice can be addressed by the imposition of appropriate terms

(such as terms as to costs), the amendment should be allowed: per Geoghegan J in *Croke v Waterford Crystal Ltd,* at para 25, citing *O' Leary v Minister for Transport* [2001] 1 ILRM 132; *Moorehouse v Governor of Wheatfield Prison* [2015] IESC 21, per MacMenamin J at para 42.

(6) Where a party seeks to rely on prejudice as a basis for resisting an amendment, they must be able to identify some prejudice that stems "*from the fact of the belated alteration in the pleadings rather than the presence (if allowed) of the amendment itself*" (per Clarke J in *Woori Bank and Hanvit LSP Finance Ltd v KDB Ireland Limited* [2006] IEHC 156, para 3.2)

(7) Prejudice can arise in different ways. It may be substantive, in the sense that, by virtue of the fact that the amended plea was not made in the proceedings as originally constituted, the other party is or may be disadvantaged in answering that plea. *Delany & McGrath on Civil Procedure* identifies as "*obvious examples*" of this category of prejudice a situation where a material witness has died or is unavailable or where other evidence has been lost (para 5-217). More generally, a material change of circumstances may have occurred in the period between the institution of the proceedings and the application to amend such that the amendment would give rise to unfairness to the other party.

(8) Prejudice may be practical or, in the language of Clarke J in *Woori Bank, "logistical".* Where the effect of allowing an amendment would be to significantly disrupt the management and determination of proceedings, that

will weigh – and in some circumstances may weigh decisively – against allowing the amendment. Historically, it may have been thought that this form of prejudice can be adequately addressed by the making of an appropriate order for costs. However, as Clarke J observed in *Woori Bank*, contemporary ideas of appropriate case management and the increasing emphasis on the need for the efficient use of court resources suggest that this form of prejudice *"may loom large in the considerations of the court*" (at para 4.2).

(9) Particular considerations apply where it is said that the effect of permitting an amendment would be to deprive a defendant of a limitation defence that would otherwise be available to it. In contrast to the position where a new defendant is joined to proceedings (where, by virtue of Order 15, Rule 13 RSC, the proceedings against that party are deemed to have begun only on the making of the joinder order[1]), where a new claim is added by way of amendment of existing proceedings pursuant to Order 28, that claim is deemed to have been made from the date of the commencement of the proceedings: *Mangan v Murphy* [2006] IEHC 317, at pages 4-5. As *Mangan v Murphy* illustrates, the addition of a new claim by way of amendment thus has the potential to cause

[1] And where, accordingly, the joinder of a party does not prejudice the position of that party in terms of any limitation defence they may have. It is on that basis that a court hearing a joinder application will normally leave any limitation issue over for later determination and it is only where the limitation issue is so clear that joinder would be "*futile*" that joinder should be refused: see the discussion in my judgment in *Cawley v Dun Laoghaire Rathdown County Council* [2021] IECA 266.

serious prejudice to a defendant if that defendant would have a basis for pleading a limitation defence if that new claim were advanced by way of separate proceedings rather than amendment of the existing proceedings. .

(10) Accordingly, as a "*general rule*", an amendment setting up a new claim will not be permitted where that claim would (or might) be statute-barred if made in proceedings issued at the time of the amendment: *Weldon v Neal* (1887) 19 QBD 394. It is not necessary for a defendant to establish as a matter of probability that the new claim is statute-barred: a real possibility that the claim is barred will suffice: see, e.g., *Mangan v Murphy* at page 6 (it is *"clear that there is a possibility that allowing the amendment would cause prejudice to the defendants by excluding them from reliance upon the Statute of Limitations*") and *Smyth v Tunney* [2009] IESC 5, [2009] 3 IR 322, per Finnegan J at para 30 (the "*Statute of Limitations may well have run and the defendants would be prejudiced by the amendments sought as to additional publication*")

(11) However, that rule is not an absolute one and ought not to be applied overly rigidly. Where a plaintiff seeks to amend their pleadings to add a new cause of action arising out of *"the same facts or substantially the same facts*" as have already been pleaded, the amendment may be permitted: *Krops*, per Keane J at 121. The "*addition of a new cause of action by amendment will be permitted notwithstanding that by the date of the amendment the Statute of Limitations had run if the facts pleaded are sufficient to support the new cause of action. Facts may be added by amendment if they serve only to clarify the original claim*

but not if they are new facts": *Smyth v Tunney*, per Finnegan J at para 29. In such circumstances – neatly illustrated by the facts of *Krops* – permitting a new claim to be made by way of amendment causes no material prejudice to the defendant because they are already on notice of a claim(s) arising from the same facts, which they will have had an opportunity to investigate. The new claim cannot therefore be characterised as a "*stale claim*" or one which unfairly re-opens a past transaction(s) which the defendant might otherwise have legitimately regarded as closed.

(12) There is some suggestion in the authorities that the power of the High Court under Order 28 to permit an amendment *"on such terms as may be just"* would allow the court to permit a new claim to be added by way of amendment expressly on terms that the amendment will take effect only from the date of the amendment order. The judgment of Birmingham J in *Rossmore Properties Limited* can be read as indicating that he intended that the order made by him in that case should have that effect. The issue was also considered by the High Court (Barniville J) in *Microsoft Ireland Operations Limited v Arabic Computer Systems* [2021] IEHC 538, at para 82. While expressing a tentative view that the terms of Order 28 gave such a power, it was not necessary for Barniville J to reach any concluded view in the circumstances of that case: para 109. The issue was not argued in this appeal and its resolution must await a case in which it properly falls for determination. I therefore express no view on the point.

(13) The court is not generally concerned with the merits of any proposed amendment or its prospects of success at trial: see the discussion in *Delany & McGrath on Civil Procedure* (at para 5-206) and following, citing (*inter alia*) *Woori Bank v KDB Ireland*. Where, however, it is manifest that an amended claim is doomed to fail, the amendment should not be permitted. Requiring a defendant to plead to and defend such a claim may be seen as a form of prejudice.

(14) Lastly, there appears to be no rule of law precluding the amendment of proceedings to add a claim that has accrued since the commencement of the proceedings: *Delany & McGrath on Civil Procedure* (at para 5-266), citing *Moorview Developments Ltd v First Active plc* [2008] IEHC 274, [2009] 2 ILRM 262.

The breach of contract claim

24. At the start of the oral argument, Mr Banim made it clear that the Appellants were *not* contending that the amendment of the Statement of Claim by the inclusion of a breach of contract claim would cause them prejudice by depriving them of a limitation defence they would otherwise have had. On the Appellants' case, any such claim had arisen in December 2006 and was thus statute-barred by the time the proceedings were instituted. On the other hand, if (as the Receiver contends) the breach of contract claim arose only in May 2017, when the request for the deeds of assurance was made, then the claim is not statute-barred and no prejudice arises from the amendment in any event.

25. In their written submissions, the Appellants argued that the Judge had erred in not making an order of the type said to have been made in *Rossmore Properties Ltd v Electricity Supply Board*, "*where the defendant's entitlement to reply on the Statute was preserved notwithstanding amendment"* and it was suggested that the amendment as granted permitted the Receiver to avoid a defence under the Statute. However, consistent with counsel's acceptance that the amendment did not give rise to any prejudice on this basis, this argument was not advanced at the hearing. Accordingly, it was not necessary to enter into the question of whether the Court could or should make an order in the terms suggested to have been made in *Rossmore Properties Ltd.*

26. Instead, the main battleground on appeal – as it was before the High Court – was whether the amendment should be permitted in circumstances which (according to the Appellants) involved the pleading of new facts and the making of a new claim and where, accordingly (so it was said), the amendment was not "*necessary for the purpose of determining the real questions in controversy between the parties."* Particular reliance was placed in this context on the Supreme Court's decisions in *Croke v Waterford Crystal* and *Smyth v Tunney.*

27. While *Croke* is undoubtedly a decision of broader significance (not least because of the emphasis placed by the Supreme Court on the liberal character of the rule in Order 28, Rule 1 and its statement that there had been an overemphasis on an obligation to give good reasons for having to amend in some of the High Court decisions), the decision cannot be read in isolation from its particular facts. It is not, as the Appellants suggest,

authority for any general principle that new claims cannot be made by way of amendment or that new facts cannot be pleaded in support of such claims. True it is that in *Croke* the Supreme Court refused leave to amend as against the second defendant, Irish Pensions Trust. That was because the amendments sought to be made would make a radically different case against that defendant, involving allegations of fraud and deliberate misconduct, in circumstances where the plaintiff had not put forward "*any factual basis whatsoever to support a fraud or any kind of deliberate misconduct claim against the second defendant*" (per Geoghegan J at para 37). It was the fact that "*as against the second defendant no factual basis has been given to support any allegation against it other than the negative one of breach of duty*" that led the Court to conclude that issues of fraud and deliberate wrongdoing did not form part of the "*real issues*" as between the plaintiff and the second defendant and that therefore the plaintiff should not be permitted to amend his statement of claim as against the second defendant (at para 38). Earlier in his judgment, Geoghegan J had examined in some detail the existing pleadings as against the second defendant, including the plaintiff's replies to particulars. He characterised those replies as "*hopelessly unsatisfactory*" and observed that the allegation of deliberate concealment was "*nothing more than a piece of legalistic pleading*" (at para 24). While the proposed amended statement of claim more clearly alleged fraud and deliberate misconduct against the second defendant (unlike the original statement of claim) no additional basis for such pleas was provided. There was therefore no real issue of fraud or deliberate wrongdoing that required determination as between the plaintiff and the second defendant.

28. *Smyth v Tunney* does not assist the Appellants either. The discussion in the judgment of Finnegan J of the addition of new causes of action and the pleading of new facts by way of amendment was in the context where it was said that the new claims were statute-barred and that the amendments would therefore prejudice the defendant. It was in that context that Finnegan J made the observations that he did to the effect that a party will not be permitted to plead *"new facts*" if they are relied on to support "*a new cause of action*" that would otherwise be statute-barred: see para 29. That was also the context for the observations of Clarke J at pages 5-6 of his judgment in *Mangan v Murphy*, the observations of MacMenamin J at page 20 of his judgment in *Moorehouse v Governor of Wheatfield Prison* and those of Barniville J at para 76 of his judgment in *Microsoft Ireland Operations Limited v Arabic Computer Systems* on which Mr Banim sought to rely. None of these authorities provides any support for the contention that, even where no issue of limitation-related prejudice arises (and the Appellants accept that no such issue arises here), the court's power to permit an amendment involving new facts is constrained or excluded. That is not the law.

29. Of course, the court must consider whether it is appropriate to permit the amendment. There may be circumstances in which it will not be appropriate to allow a wholly new claim, based on entirely new and distinct facts, to be added by way of amendment, even in the absence of any limitation argument. An obvious example is where the effect of permitting an amendment would be to significantly delay the resolution of the existing proceedings or give rise to some other form of practical prejudice. But that is not at all the same thing as suggesting that as a matter of principle the court cannot permit such an amendment.

30. Here, there is no doubt but that the breach of contract claim depends on a "*new fact*", namely the request/demand made in May 2019 for the delivery of deeds of assurance. No point is taken by the Appellants about the fact that this demand was made (and that, therefore, on the Receiver's case, the cause of action arose) after the institution of the proceedings. Furthermore, as the Judge observed at para 21 of his Judgment, the breach of contract claim is rooted in the Contract that has already been pleaded in the Statement of Claim. In that sense, there is nothing radically new about the breach of contract claim. The rights and obligations of the parties under the Contract are already the subject of dispute and will be the subject of inquiry at trial in any event. It clearly makes sense to have the breach of contract claim heard and determined at the same time and in the same action as the existing claims, rather than requiring that claim to be pursued by way of separate action. Permitting the amendment will not delay the resolution of the proceedings.

31. In these circumstances, the Judge was clearly correct to allow the breach of contract amendment.

32. Before leaving this aspect of the appeal, I should make it clear, as the Judge did, that I express no view on whether the breach of contract claim is statute-barred. The Appellants' contention is that any obligation to deliver deeds of assurance arose on the execution of deeds of partition in December 2006 and that any alleged breach occurred then. On that basis, their Amended Defence pleads that the breach of contract claim is statute-barred. On the other hand, the Receiver maintains that the obligation to deliver

the deeds did not lapse in December 2006 and that, when Hayes demanded the delivery of the deeds in May 2017, that triggered an obligation on the part of the Vendors to do so. The Vendors did not do so and it is that refusal – the refusal to deliver the deeds in response to the May 2017 demand – that is said to constitute a breach of Special Condition 9 and, on the Receiver's case, time began to run only at that point and this the breach of contract claim is not statute-barred. The meaning and effect of Special Condition 9 is not for determination in this appeal. Whether the Appellants' limitation defence is a good one is a matter for trial (assuming that the Appellants do not seek to have the issue determined by way of preliminary issue). The point for present purposes is that the amendment of the Statement of Claim to include the breach of contract claim does not foreclose a limitation defence that would otherwise be available to the Appellants had that claim been made by way of separate proceedings. Therefore, as Mr Banim expressly accepted, the amendment does not give rise to the kind of prejudice that has been held to warrant refusal of leave to amend. Equally, I express no view on the merits of the breach of contract claim. No doubt there will be significant dispute as to whether, in circumstances where (as the Receiver appears to accept) the Company failed to perform its obligations under the Contract, it had any entitlement to look for the deeds of assurance. Again, however, that is a matter for trial.

The unjust enrichment claim

33. The Appellants object to this amendment on the basis that the unjust enrichment claim is bound to fail.

34. It was not argued in the High Court, or in this Court on appeal, that the unjust enrichment claim was statute-barred and that the amendment ought to be refused on that basis. The Amended Defence subsequently delivered by the Appellants does not plead that the unjust enrichment claim is statute-barred though it does plead *laches*, delay and acquiescence and says that it would be inequitable and unconscionable for any equitable relief to be granted to the Receiver.

35. In response to a query it raised in the course of the oral hearing, the Court was told by counsel that the view had been taken that the unjust enrichment claim was an equitable claim which therefore fell outside the scope of the Statute of Limitations Act 1957. That is not necessarily correct and certainly over-simplifies what is a complex issue. Canny, *Limitation of Actions* (2nd ed, 2016) contains a useful discussion of the topic in chapter 11. Some forms of unjust enrichment claims are common-law claims and are subject to the provisions of the 1957 Act, particularly section 11(1)(b) which provides for a limitation period of six years from the date on which the cause of action accrued in respect of "*actions founded on quasi-contract*." As Canny also notes, where a plaintiff seeks equitable relief, such a claim will fall outside the scope of section 11 by virtue of section 11(9)(a) (though subject to the possibility of applying any provision of section 11 by analogy).

36. In any event, Mr Banim fairly accepted that the issue of whether the unjust enrichment claim was or might be statute-barred was not an issue in the appeal. No plea that the claim is statute-barred is made in the Amended Defence. It is therefore unnecessary to consider whether the claim sought to be advanced constitutes an action founded on

quasi-contract and is thus subject to the provisions of section 11(1)(b) of the 1957 Act. It is also unnecessary to consider whether, if so, the limitation period has expired or whether, even if that was the case, the amendment ought nonetheless to be permitted on the basis of the *Krops* jurisprudence.

37. As regards the argument that the unjust enrichment claim is bound to fail, that argument has not been made out in my view. It is said that the amendment involves a new relief only and that there is no plea that the Defendants have been enriched at the expense of the Plaintiff and/or that such enrichment is unjust (Appellants' written submissions, page 16). Those are, it is said, essential ingredients for any claim for unjust enrichment, having regard to the decision of this Court in *Persona Digital Telephony Limited v Minister for Public Enterprise* in which it cited with approval the following statement of the High Court (McDonald J) in *HKR Middle East Architects Engineering LV v English* [2019] IEHC 306 as to the contours of the unjust enrichment action:

> *"394. It is clear from the decisions of the Supreme Court in East Cork Foods Ltd v. O' Dwyer Steel Co. [1978] IR 103, O'Rourke v. Revenue Commissioners [1996] 2 IR 1 and Corporation of Dublin v. Building and Allied Trade Union [1996] 1 IR 468 that Irish law recognises unjust enrichment as a cause of action where a defendant has received money or some other property of a plaintiff in circumstances where it would be unjust for him to retain it. In order to avoid the development of what Keane J. (as he then was) described as* '*palm tree justice' in O'Rourke v. Revenue Commissioners, the courts have generally confined the cause of action to a number of clearly defined categories*

of case. These have been very usefully summarised by Barton J. in Vanguard Auto Finance Ltd v. Browne [2014] IEHC 465 at pp 22-23. In summary, these are:-

(a) Where money has been paid under a mistake either of fact or law;

(b) Where the plaintiff seeks to recover a benefit that was to be conferred on him under the terms of a contract which has been discharged either by breach or frustration;

(c) Where a plaintiff seeks to recover a benefit provided by him to the defendant under a transaction which becomes unenforceable in law;

(d) Claims where a plaintiff has discharged a debt of the defendant; and

(e) A restitution for ' wrongs'. *At p. 22, Barton J. explained that the wrong in question can be tortious, a breach of contract, a breach of fiduciary duty or a breach of confidence. That does not appear to me to be an exhaustive list. On the same page, Barton J. explained that there can be unjust enrichment by wrongdoing in circumstances where the enrichment of the defendant arises ' by virtue of the commission of legal or actionable wrong against the plaintiff'.*

395. On p. 24 of his judgment, Barton J. identified that there are two essential preconditions to the unjust enrichment remedy. These are:-

(a) enrichment of the defendant at the expense of the plaintiff; and

(b) that the enrichment in question is unjust.

This second precondition does not give the court a licence to apply some subjective notion of injustice. Barton J. cited in this context, the observation of Keane J. in Dublin Corporation v. Building and Allied Trade Union that total failure of consideration is one of the circumstances in which courts will accept that an injustice has arisen."

38. Insofar as the Appellant's objection is premised on the alleged inadequacy of the pleading in the Amended Statement of Claim, it is without merit in my view. It is clear from paragraphs 26, 27 and 28 of the Amended Statement of Claim that the Receiver is alleging that the Defendants have been enriched to the extent of the monies paid by the Company and that, in circumstances where the Defendants remain in the possession of the lands in the New Folios (i.e. the four plots identified in special condition 8(b)), there has been a total failure of consideration such that it would be unjust to allow the Defendants to retain those monies. It is on that basis that it is said that the Defendants are obliged "*to disgorge all benefits received*" (para 26) and it is the retention of the monies by the Defendants that is said to amount to *"the Defendants' unjust enrichment at the expense of [the Company]"* (para 28). The suggestion that the amendment should not be permitted because no or no sufficient "*new facts*" have been alleged to sustain the additional reliefs being sought is therefore unfounded.

39. I also note in this context that we were told by Mr Doherty that the Appellants had sought further particulars of the unjust enrichment claim but that these had been refused

by the High Court (Simons J) who took the view that the claim was adequately pleaded. That decision has not been appealed. That is a further barrier to the Appellants' argument that the unjust enrichment claim is doomed to fail because it has not been adequately pleaded.

40. As to the substantive merits of the unjust enrichment claim, the Court is simply not in a position to form a view as to its prospects of success. The law in this area is complex and continues to develop. Unsurprisingly, there was only a very limited discussion of the jurisprudence in argument. No doubt, there is force in the Appellants' point that they complied with and/or were at all times ready to comply with their obligations under the Contract and that it was the Company, rather than the Vendors, that failed to perform. On the Appellants' case, the only breach of contract here was on the part of the Company. However, that may not *necessarily* exclude the Receiver from asserting that, in the particular circumstances here, it would be unjust to permit the Appellants to retain the monies paid to them, or retain the entirety of the sums that were paid. There was undoubtedly a significant transfer of value from the Company to the Appellants (and Mr Mallon). No corresponding transfer of value from the Appellants (and Mr Mallon) to the Company appears to have taken place but that may be due entirely to the Company's failure to perform. Adjudicating on the unjust enrichment claim will necessitate a close analysis of the Contract (and of the related transactions) and a detailed inquiry into the facts. This Court is not in a position to make any prediction as to the ultimate outcome of that exercise. Difficult issues may arise as to whether the Contract has been discharged or not and as to whether the fact that some sites were apparently developed and sold by the Company precludes any claim premised on a total

failure of consideration (also referred to as "*failure of basis*"). None of these issues were addressed in detail in argument. Again, that is unsurprising, given the limited issues before the court. It may well be that the High Court will conclude that, in the circumstances here, the Company carried all of the risk of non-performance under the Contract and that accordingly there is nothing unjust in the Appellants retaining the amounts paid, while also retaining the lands in the New Folios (or the remaining lands, given that some sites appear to have been developed and sold). But even if it can be said that the unjust enrichment claim faces significant obstacles, in my opinion the Court cannot, on the basis of the limited material before it on this appeal, conclude that the claim must necessarily fail, which is the threshold test identified in *Woori Bank*.

41. In the circumstances, this ground of objection fails.

42. The Appellants also rely on delay as a ground for opposing the unjust enrichment amendment. There is no doubt that there has been delay but that is not *per se* a basis for refusing leave to amend. The question is whether the delay gives rise to any prejudice. While the unjust enrichment claim is new, it is premised on facts and circumstances already pleaded in the Statement of Claim. As Mr Doherty aptly put it in argument, the claim is in a sense the "*flipside*" of the existing claims in the Statement of Claim. Those claims assert that, by reason of the payments made by the Company, the Receiver has an interest in the lands whereas the unjust enrichment claim says that, if the Appellants are entitled to remain in possession of the lands, it would be unjust to permit them to retain the sums paid to them (or all those sums). According to Mr Doherty, the "*battleground*" is the same. I agree. The delay does not give rise to any prejudice. The

unjust enrichment claim is based on the facts set out in the Statement of Claim and the addition of the claim does not materially expand the scope of the proceedings and there is no reason to believe that it will delay their resolution.

43. That is true also of the breach of contract claim. Although based on a "*new fact*" (the demand of May 2017). The addition of the breach of contract claim does not materially expand the scope of the proceedings and will not delay their resolution. The Receiver's amended claim remains *"within the ambit of the original grievance".*

44. A more general delay/prejudice argument was made in respect of both contested amendments. It was rejected by the Judge and correctly so in my view. Even though the proceedings were commenced in 2013, by the time the amendment application came before the High Court, they were a long way from trial. Discovery had not yet been made (and still remains to be addressed). This was far from an eve of trial amendment.

45. The delay in bringing the amendment application may, of course, be relevant to the issue of costs but, as already indicated, that has been left over for later argument.

46. One other point made by the Appellants remains to be addressed. It was argued on their behalf that the unjust enrichment claim effectively involves a claim of moral turpitude/deliberate wrongdoing analogous to the claims of fraud/deliberate concealment which the plaintiff was not permitted to add by way of amendment against the second defendant in *Croke*. There is no such analogy in my view. The assertion that, in the circumstances here, the retention by the Appellants of the monies paid to them

under the Contract would be "*unjust*" does not involve any allegation of impropriety or deliberate wrongdoing on their part.

CONCLUSION

47. It follows that no error on the part of the Judge has been demonstrated and no basis for interfering with the order made by him has been established.

48. The Appellants' costs appeal remains to be addressed, as does the issue of the costs of this appeal. The Court will schedule a brief hearing to deal with these outstanding issues and the parties will be notified of the hearing date in due course.

McCarthy and Ní Raifeartaigh JJ have authorised me to record their agreement with this judgment.