

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

**QUEEN'S BENCH DIVISION (COMMERCIAL)**

**BETWEEN:**

**STEPHEN KENNEDY**

**Plaintiff**

**v**

**NIALL SMALL, LEONARD MARKEN and GRAINNE O'HAGEN**

**practising as SMALL and MARKEN**

**Defendants**

**WEATHERUP J**

[1] This is an application to join Aideen Kennedy, the wife of the plaintiff, as a second plaintiff in this action. Mr Coyle appeared on behalf of the plaintiff and moving party and Mr Millar on behalf of the defendant.

[2] The Statement of Claim pleads that the plaintiff is a property developer who on 5 April 2006 purchased lands in Crumlin in Folio 139824 Co Antrim. The site had planning permission for the construction of a dwelling house. The defendants acted for the plaintiff in the conveyance of the Crumlin lands.

[3] The plaintiff approached his architect in September 2007 to secure approval for various reserved matters in respect of the planning permission. It was then discovered that there were discrepancies in the title to the lands. Only one third of the lands transferred to the plaintiff was within the site for which planning permission had been granted and the remainder of the site was in the ownership of a third party. Attempts were made to adjust the planning permission to correspond with the lands actually transferred to the plaintiff but this was refused by Planning Service. Eventually a varied planning permission was granted in respect of the

lands transferred to the plaintiff. However the dwelling approved for the lands was smaller than that originally approved for the larger site. The plaintiff had also intended to sell his current home in Antrim, redeem the mortgage and use the equity to build the dwelling on the Crumlin lands as a new home. The project has had to be abandoned because the Crumlin lands are not suitable.

[4] The plaintiff claims damages against the defendants for loss and damage sustained by the negligence and breach of contract of the defendants in the conduct of the transactions. He claims the professional fees expended, the reduced value of the Crumlin lands and the costs of the Antrim mortgage that has not been redeemed.

[5] The affidavit grounding this application of Gary Haughey the plaintiff's solicitor states that the Crumlin lands were purchased in the name of the plaintiff and the matrimonial home in Antrim is held in the joint names of the plaintiff and his wife, the intended plaintiff, Aideen Kennedy. The plaintiff contends that there is no new or different allegation being made against the defendants by the proposed addition of Mrs Kennedy as a second plaintiff and that the amendments to the parties and to the pleadings will merely reflect the co-ownership of Mr and Mrs Kennedy in the matrimonial home.

[6] The defendants object to the application for leave to add the second plaintiff and to make consequential amendments to the Statement of Claim on the basis that the limitation period has expired. It is common case that the six year limitation period has expired.

[7] The plaintiff relied on order 73 of the Limitation (Northern Ireland) Order 1989 and Order 15 Rule 6(5) and (6) of the Rules of the Court of Judicature. The 1989 Order -

Article 73 deals with new claims in pending actions and for this purpose a new claim includes any claim where there is the addition of a new party.

Article 73(1) provides that any new claim is to be treated as a separate action and as having been commenced on the date of the original action. Thus if leave is given to add a new plaintiff the limitation period will not apply as the joinder of the new plaintiff will commence at the date of commencement of the original action. The present action commenced within the limitation period.

Article 73(2) provides that, except as provided by Article 50 or rules of court neither the High Court nor any County Court may allow a claim for a new party after the expiry of any time limit. Article 50 is not relevant in the present case so the addition of a new party must accord with the relevant rules of court.

Article 73(3) provides that rules of court may provide for adding a new party but only if the conditions specified in paragraph (4) are satisfied and subject to any further restrictions the rules may impose.

Article 73(4) provides (a) in respect of a new cause of action that it arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action and (b) in respect of a new party that the addition or substitution of the new party is “necessary for the determination of the original action”.

Article 73(5) states that the new party will only be “necessary for the determination of the original action” if (a) the new party is substituted for a party whose name was given by mistake in the first place; [not applicable] or (b) any claim already made in the original action “cannot be maintained by or against the existing party” unless the new party is joined.

[8] The Rules of the Court of Judicature –

Order 15 Rule 6(5) provides that no person shall be added or substituted as a party after the expiry of any relevant period of limitation unless the relevant period was current at the date when proceedings commenced and it is “necessary for the determination of the action” that the new party be added (thus corresponding with article 73(5)).

Order 15 Rule 6(6) provides that the addition or substitution of a new party shall not be regarded as necessary unless the court is satisfied of one of the specified matters. The second specified matter is relevant, namely, “(b) the relevant cause of action is vested in the new party and the plaintiff jointly but not severally”.

[9] In a further affidavit sworn by Mr Haughey on behalf of the plaintiff he states that the Antrim house is unregistered land and he has conducted a search in the Registry of Deeds which shows that the property was acquired by Stephen and Aideen Kennedy on 18 December 2002. The plaintiff has confirmed to Mr Haughey that the property is held as joint tenants and not as a tenancy in common. The position is based on the assertion of the solicitor that he was told by the client that the property is held as joint tenants but I do not have anything to contradict that position. Mr Millar emphasises that it is the cause of action rather than the property that must be vested in the parties jointly and not severally.

[10] Article 73 provides that a new party can only be joined where it is necessary for the determination of the original action. Necessity is defined as arising where the original action cannot be maintained unless the new party is joined. This is subject to any further restrictions the rules may impose. The rules rather seem to relax the statutory requirement of necessity than impose restrictions. However the statute must prevail and Order 15 Rule 6(6) must be read subject to the statute. Thus the

instances where it is necessary for the determination of the original action that the new party be added must be restricted to those specified in the rules and in applying each of those specified instances the new party must only be joined where it is necessary for the determination of the original action in that the original action cannot be maintained without the new party being added.

[11] Merrett v Babb [2001] EWCA 214 deals with the equivalent English statutory provisions and rules which also adopt the necessity test that any claim already made cannot be maintained unless the new party is joined. At paragraph 53 May LJ stated that the rules may impose further restrictions but cannot relax the statutory requirements. The English legislation is the same as the 1989 Order but the English equivalent of Order 15 Rule(6)(6)(b) is CPR 19.(5)(3)(b) which reads “the claim cannot properly be carried on by or against the original party unless the new party is added....” The expression used in the rules was to be taken as meaning the same as the expression used in the statute. The same may be said of the Northern Ireland rules to the extent set out in the paragraph above.

[12] The question is whether the new plaintiff is necessary for the determination of the original claim. It will be necessary if the original action cannot be maintained unless the new party is added. That will arise in the present case if the cause of action is vested jointly in the plaintiff and his wife and not severally. The original claim was for damages for breach of contract and negligence of the defendants in relation to the purchase of the Antrim lands and the sale of the matrimonial home in Crumlin. While these were two transactions they were, it is said, to the knowledge of the defendants, inter-related. The matrimonial home is owned jointly by the plaintiff and his wife. The Crumlin lands were purchased by the plaintiff on his own behalf and on behalf of his wife.

[13] Can the plaintiff’s claim in the original action be determined without the addition of the new plaintiff? In Merrett v Babb, the defendant was a surveyor who carried out a negligent valuation for a building society proposing to provide a mortgage for a house purchase by the plaintiff and her mother jointly. However, the action was commenced in the name of the plaintiff only and she was awarded the full value of the loss. On appeal it was contended on behalf of the defendant that the plaintiff was only entitled to one half of the damages to reflect her joint interest with her mother. The plaintiff applied to join the mother as an additional plaintiff although the limitation period had expired. The Court of Appeal in England and Wales concluded that the defendant owed a duty of care to the plaintiff and her mother as the purchase of the property was a joint venture resulting in joint ownership. The claim made in the original action was for the full amount of the loss. May LJ concluded that the claim was or included a joint claim and could not be properly maintained or carried on unless the mother was a party. Accordingly the mother was found to be a necessary party. Thus the Court had power to order the mother to be joined as a plaintiff. The Court exercised its discretion in favour of adding the mother. Wilson J agreed on the basis that the claim made in the original action was for all the loss sustained as a result of the purchase and as the loss was

sustained by the plaintiff and her mother in equal shares that part related to the mother could not be claimed without her being a party. Aldous LJ disagreed and concluded that the addition of the mother was not necessary for the determination of the plaintiff's claim. The plaintiff and her mother were said to have separate causes of action and the plaintiff's claim could have been maintained by her without the addition of her mother. I prefer the approach of the majority to the effect that the original claim was for the full loss and was or included a joint claim which could not be maintained without the addition of the mother.

[14] In Northern Ireland, as in England, the statute requires that the original claim cannot be maintained unless the new party is joined but the Northern Ireland rules require, not that the claim cannot properly be carried on by the plaintiff, as in England, but that the relevant cause of action is vested in the new party and the plaintiff jointly. It is not in dispute that the matrimonial home is owned by the plaintiff and his wife as joint tenants. The defendants submit that the cause of action is vested severally and not jointly. The defendants further submit that the plaintiff's original claim can be determined without the new plaintiff, although the defendants do concede that the plaintiff would not be entitled to recover the full amount of any loss.

[15] I proceed on the basis that the plaintiff would not be entitled to recover the full amount of the original claim. In that event, preferring the approach of May LJ and Wilson J to that of Aldous LJ in Merritt v Babb and following the persuasive authority of the decision of the Court of Appeal in England and Wales, albeit in the different setting of the respective land law systems, I find that it is necessary for the determination of the original claim that the new plaintiff be joined to enable the full amount of any loss to be recovered in this action. The plaintiff cannot maintain the claim in the original action, namely for recovery of the whole of any loss on the transactions, if, as the defendants concede, the plaintiff can only recover his share of any loss. Accordingly, the Court has power to add the new plaintiff.

[16] Should the discretion be exercised to join the new plaintiff? Adding the new plaintiff does not add to what the original plaintiff purported to claim nor does it add to the facts and circumstances that require investigation. The failure to join the new plaintiff in the first place was due to the joint interest of the plaintiff's wife in the Crumlin lands not having been uncovered, although it should have been. Once the joint interest was discovered the limitation period had expired and the plaintiff made the application to join the new plaintiff. In the circumstances I propose to exercise my discretion to add the new plaintiff.

[17] I give leave for the new plaintiff to be added and the Statement of Claim to be amended in the terms of the draft amended Statement provided with this application.