

THE HIGH COURT

[2012 No. 8487 P.]

BETWEEN

ARNAUD D. GAULTIER

PLAINTIFF

AND

THE REVENUE COMMISSIONERS, THE MINISTER FOR FINANCE, THE COURTS SERVICE, THE MINISTER FOR JUSTICE, IRELAND
AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 6th day of July, 2017

Introduction

1. There are three motions before the court in this matter which are as follows:

(1) An application by the plaintiff for interlocutory relief including an interlocutory injunction on foot of a notice of motion dated 6th October, 2016;

(2) A motion brought by the first defendant (the Revenue) seeking an order pursuant to O. 19 r. 28 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the court striking out the plaintiff's proceedings on the grounds that they disclose no reasonable cause of action against the Revenue, are frivolous and vexatious and are bound to fail, on foot of a notice of motion dated 21st December, 2016;

(3) A motion brought by the second to sixth defendants inclusive seeking the same reliefs as the first defendant and in addition an order striking the proceedings out on various delay grounds including failure to deliver a statement of claim and that the claim is statute barred, on foot of a notice of motion dated 9th January, 2017.

2. It was agreed at the outset between the parties that the second and third motions should proceed first on the basis that if successful, they would dispose of the entire proceedings including the first motion.

Factual and Procedural Background

3. The plaintiff is a director and the sole member of a company called Loire Valley Ltd (the Company) which was incorporated in the State on 15th June, 2005. The Company's business was concerned with the importation of wine into the State from France. In the course of 2006, the Company appears to have imported a quantity of wine which was lodged in a bonded warehouse. It would appear that a dispute arose between the Company and the Revenue arising from the closure of the warehouse which resulted in the Revenue detaining the wine on or about 25th August, 2006 and on 22nd September, 2006 serving a seizure notice upon the Company stating that the wine was seized on that date and was liable to forfeiture under s. 125 of the Finance Act, 2001. The plaintiff disputes the alleged date of seizure for reasons which are not material to these applications.

4. The Company claimed that the detention and seizure of the wine was effected unlawfully and this led to certain without prejudice discussions taking place between the plaintiff, on behalf of the Company, and the Revenue. This appears to have resulted in a payment of €25,000 by the Revenue to the Company and after further discussions including at a meeting between the parties on 6th August, 2008, a further sum of €80,000 being tendered on that date by the Revenue by way of cheque payable to the Company. The latter cheque was never cashed. By letter of 13th August, 2008 from the Revenue to the Company, the Revenue referred to these matters and noted in relation to the tendered cheque:

"This cheque, in addition to the €25,000 already paid to Loire Valley Ltd, was tendered as recompense for the full invoice value of the seized wine, interest due to creditors, gross profit on its potential sale, loss of profits and time and trouble reasonably incurred by Loire Valley Ltd arising from the seizure. The combined amounts were tendered in full and final settlement of any liability in the matter and Revenue now regards the matter as closed.

The action of detaining and seizing the wine was taken with the bona fide intent of protecting revenue that was perceived to be at risk. However, this action obviously had an adverse effect on the activities of Loire Valley Ltd for which, in addition to the recompense tendered, Revenue offers its sincere apologies."

5. On 6th April, 2012, the Company was dissolved having been struck off the Register of Companies for failing to file annual returns. Arising from this, the plaintiff brought judicial review proceedings in this court against the Registrar of Companies alleging misfeasance, malfeasance and breach of duty against the Registrar in relation to the manner in which the company was dissolved. In particular, the plaintiff alleged that because the effect of the dissolution was that the property of the Company vested in the Minister for Finance, the Registrar had colluded with the Minister to bring about this result. In her judgment delivered on 8th March, 2013 dismissing the application, Dunne J. described this allegation as one which was unsupported by any evidence and was disgraceful and scurrilous. At no time has the plaintiff sought to have the Company restored to the register and has not disputed that he could have done so.

6. It would appear that on or about 22nd August, 2012, the plaintiff sought to commence the within proceedings as a litigant in person. He appears to have prepared a plenary summons naming himself and the Company as plaintiffs and the Revenue, the Minister for Finance, Ireland and the Attorney General defendants. It would seem that the plaintiff may have attended at the Central Office on that date for the purpose of issuing the summons when it was pointed out to him that as a litigant in person, he was not entitled to issue proceedings on behalf of a company.

7. This is of course entirely aside from the fact that the Company was at this stage dissolved. As a result, the plaintiff redrafted the summons naming himself as sole plaintiff but with the addition of the Courts Service and the Minister for Justice as new defendants on the presumed basis that these latter parties were in some way responsible for the refusal to allow him to issue proceedings in the name of the Company. In the title to this plenary summons, the plaintiff also added the Comptroller and Auditor General and the Company as what are described as "notice parties".

8. The summons was accompanied by an affidavit sworn by the plaintiff and entitled "Affidavit of Arnold D. Gaultier Setting Ground of

Plenary Summons". This appears to have been sworn by the plaintiff in the erroneous belief that it was required for the purpose of issuing the summons.

9. On 7th September, 2012, an appearance was entered on behalf of the Revenue by its solicitor and on 17th October, 2012, the Chief State Solicitor (C.S.S.) entered an appearance for the second, fourth, fifth and sixth defendants. On 22nd October, 2012, the plaintiff served a statement of claim on the Revenue but not on any other defendant. No statement of claim has since been served on the other defendants. On 16th January, 2013, the C.S.S. entered an appearance for the third defendant. Thereafter, the C.S.S. repeatedly called for the delivery of a statement of claim until eventually bringing a motion on behalf of the second to sixth defendants seeking to strike out the plaintiff's claim for failure to deliver a statement of claim.

10. That motion came on for hearing before the Master of the High Court on 20th November, 2013 when the Master granted an extension of time to the plaintiff until 20th January, 2014 to serve the statement of claim. Meanwhile, in two separate ex parte applications made by the plaintiff on 7th and 21st November, 2013 respectively to the Master of the High Court, the Master gave liberty to the plaintiff to amend the plenary summons. The costs of the motion brought by the second to sixth defendants were awarded in their favour and against that award of costs the plaintiff appealed to this court. That appeal was dismissed on 21st February, 2014.

11. Subsequently, the within three motions were issued and thereafter, on 9th February, 2017 the plaintiff issued a notice of motion against the second to sixth defendants by which he sought an order from this court to amend the title of his original affidavit of 22nd August, 2015 so that it read "Statement of Claim". This application appears to have been brought by the plaintiff to surmount the difficulty in which he now finds himself by virtue of having never served the statement of claim on the second to the sixth defendants. The motion was dismissed by this court (O'Connor J.) on 3rd April, 2017.

The Claim as Pledged

12. The plaintiff's claim as set out in the original plenary summons prior to amendment was clearly intended to be a claim made by the plaintiff and the company in the circumstances I have outlined. Despite subsequent amendment, that remains the position. There are repeated complaints concerning the stock of the second named notice party, the Company. There is a complaint of failing to provide redress to the Company. It is clear that all of the plaintiff's claims, save those hereinafter referred to, relate directly and solely to the allegedly wrongful detention and seizure of the Company's wine. The only claims that do not appear to relate to the Company's property are those contained at para. 2A of the amended summons. These are claims for relief arising apparently out of the refusal of the Central Office to permit the plaintiff to issue proceedings in the name of the Company.

13. The statement of claim delivered on 22nd October, 2012 was, as already indicated, served on the first defendant only. The other defendants have never been served with a statement of claim. Here again, it is evident from a reading of the statement of claim, issued before the summons was amended, that it is solely and entirely concerned with the property of the Company. It includes complaints about the manner in which the without prejudice negotiations between the Company and the Revenue were conducted. Paragraph 8 of the statement of claim commences with the following words:

"The plaintiff further claims towards its property, the second named notice party ..."

Although it is not entirely clear, this appears to suggest that the plaintiff's claim is based on the fact that he owns the company and wrongs done to the company are wrongs done to him. This is further borne out by the first item claimed at para. 8 which is the cost of the seized wine. There are further claims for loss of business and again, this is clearly the business of the Company. The statement of claim identifies no claim against any party other than the Revenue.

Discussion

14. By any objective analysis of both the original and amended plenary summons and the statement of claim, the claim being maintained by the plaintiff in these proceedings is clearly a claim that could only have been maintained by the Company if it existed, but of course it had ceased to exist before these proceedings were ever instituted as the plaintiff must have known. Indeed even after the judgment of Dunne J., the plaintiff persisted in seeking to amend pleadings which continued to assert by implication the existence of the company.

15. It is of course settled law since the middle of 19th century that a member or director of a company cannot maintain a claim on behalf of the company. This is the rule in *Foss v. Harbottle* (1843) 2 Hare 461. Its application has never since been doubted and it continues to be applied in our courts – see for example *McAteer v. Burke* [2015] IECA 215. The rationale for the rule is straightforward. A party cannot bring proceedings in respect of a wrong suffered by another party.

16. Even if the pleadings could be interpreted as a claim by the plaintiff for losses suffered personally by him as a result of the damage to the company, such as a diminution in the value of his interest therein, such a derivative claim is equally one that cannot be maintained in law and is bound to fail – see *O'Neill v. Ryan* [1993] ILRM 557 and *Flanagan v. Kelly* [1999] IEHC 116.

17. In the course of his submissions both oral and written to the court, the plaintiff sought to argue that in 2008, after the events the subject matter of the proceedings, he became the owner of the wine in question and this was an answer to the defendant's motions. As I understand his argument, the wine was originally supplied subject to a retention of title clause in favour of the French supplier. The wine was not paid for by the Company and thus title to it continued to vest in the supplier. The plaintiff alleges that the supplier transferred title to part or all of the wine to the plaintiff in 2008.

18. If that were so, it is surprising to say the least that the plaintiff issued proceedings four years later in which he pleaded, and indeed swore on affidavit, that the wine belonged to the Company. It also fails to explain how the Company accepted a payment from the Revenue in respect of the wine. However this allegation is immaterial to the issue with which I am concerned which is whether the case as pleaded discloses a cause of action against any of the defendants. Insofar as a claim in respect of the seizure of the wine is concerned, I am satisfied that no sustainable cause of action has been made out on the pleadings. Insofar as this is the only claim extant against the Revenue, it is clearly frivolous and vexatious and bound to fail.

19. There are, as the parties point out, many judicial dicta to the effect that this jurisdiction should be exercised sparingly and only in clear cases. The present case to my mind is such a case. Where that has been shown, the court is required to strike the proceedings out since to do otherwise would be to impose a considerable injustice on the defendants who have to date had to expend considerable time, effort and money on defending vexatious claims by the plaintiff now some eleven years after the events complained of.

20. The only outstanding claim is one apparently against the second to sixth defendants arising from the plaintiff's alleged inability to

institute proceedings on behalf of the company. In this regard, it is well settled since the decision of the Supreme Court in *Battle v. Irish Art Promotion Centre Ltd* [1968] I.R. 252 that a member or director of a company cannot purport to act on the company's behalf in relation to proceedings in court. This was explained in the judgment of Ó'Dálaigh C.J. in the following terms at p. 254:

"This survey of the cases indicates clearly that the law is, as we apprehended it to be when this application was first made to us, viz. that, in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant. This is an infirmity of the company which derives from its own very nature. The creation of the company is the act of its subscribers; the subscribers, in discarding their own *personae* for the *persona* of the company, doubtless did so for the advantages which incorporation offers to traders. In seeking incorporation they thereby lose the right of audience which they would have as individuals; but the choice has been their own."

21. That this still represents the law is clear from the recent judgment of the Court of Appeal delivered by McKechnie J. in *Allied Irish Banks Plc v. Aqua Fresh Fish Ltd* [2017] IECA 77.

22. Of course even if there were any substance in the plaintiff's complaint concerning his inability to issue proceedings on behalf of the company, it immediately falls away when it becomes evident that the company was dissolved and thus did not exist at the time the plaintiff complains he was not permitted to represent it.

23. In the case of the second to the sixth defendants, an additional ground of relief is claimed by them on the basis of failure to serve a statement of claim. As these defendants point out, these proceedings were issued some six years after the events initially giving rise to them. A further five years has now passed without these defendants ever receiving a statement of claim from the plaintiff. This is despite the fact that from the moment these defendants entered an appearance, they have been seeking a statement of claim both in correspondence and by way of the motion already referred to where the court granted an extension of time of two months to enable the plaintiff to serve a statement of claim.

24. The plaintiff has never complied with that order nor has he offered any explanation whatsoever for his failure to do so. No excuse of any colour has been offered by the plaintiff for not serving a statement of claim. Instead he appears to have pursued an entirely misconceived and ultimately unsuccessful application to have his so called affidavit Setting Ground of Plenary Summons converted into a statement of claim. It could not be argued that the delay that has occurred is other than inordinate nor has the plaintiff sought to so argue. The delay is self evidently inexcusable as no excuse has been offered. Indeed in the course of his submissions to this court, the plaintiff did not seek a further extension of time to deliver a statement of claim even at this late stage. Instead he argued that the order of this court (O'Connor J.) was wrong and I should set it aside, even though it is the subject matter of an appeal by the plaintiff.

25. Given that I have found that the delay was both inordinate and inexcusable, I must consider whether the balance of justice favours dismissal of the proceedings. There are many authorities for the proposition that delays of considerably less than those that have occurred in this case can be assumed to give rise to prejudice by the mere passage of time. Even if this case were now to proceed to trial, it would be at least twelve years from the events complained of before that trial could take place.

26. Further, the manner in which the plaintiff has sought to litigate this matter without the involvement of the company, which would have been a proper party had it existed, has prevented these defendants from being in a position to seek security for their costs against the company. That is an additional potential prejudice that the court is entitled to take into account. Therefore, even apart from the reasons I have already explained why these proceedings should be dismissed, I am satisfied that the balance of justice would in any event require such dismissal as against the second to sixth defendants.

Conclusion

27. For all the reasons identified above, I am of the view that these proceedings must be dismissed. This results in the plaintiff's injunction application falling also. However were it necessary to do so, I propose to consider briefly that application. It is an application by which the plaintiff seeks to injunct the Revenue sheriff from collecting unpaid taxes from the plaintiff. It has no connection whatsoever to the subject matter of these proceedings. There is no suggestion that the taxes due by the plaintiff are in any way related to the events described in the pleadings. Accordingly the application is entirely misconceived and would have to be dismissed even in the absence of the findings I have already arrived at in relation to the proceedings as a whole.

28. Finally, I wish to comment briefly on the plaintiff's submissions to this court both in writing and orally. Before dealing in any way with the substance of these applications, the plaintiff made a lengthy submission concerning the impartiality of the Irish judiciary towards litigants in person in general and towards him in particular. He purported to analyse four previous orders of this court made by different judges and suggested some or all of them had been made for improper reasons and partially by those judges.

29. He even went so far as to suggest that all judges in this jurisdiction dealing with his cases should be required to take an oath in terms drafted by him and included in his written submission. All of these submissions by the plaintiff were in my view scandalous, gratuitously offensive to the judiciary of the State and constituted a contempt of court. It became necessary during the course of the plaintiff's submissions for me to warn him that his behaviour was contemptuous and I would have to hold him in contempt if he did not desist.

30. Only then did the plaintiff cease this behaviour and because he offered an apology to the court, I determined to take no further action. This should not be interpreted by the plaintiff as an unwillingness on the court's part to respond appropriately if the behaviour identified is repeated in the future.

31. For the reasons already given, I will strike these proceedings out.