Neutral Citation: [2014] IEHC 185

THE HIGH COURT

[2010 No.103 COS]

IN THE MATTER OF VECTONE IRELAND LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012

BETWEEN

OTE INTERNATIONAL SOLUTIONS S.A. T/A OTE GLOBE S.A.

APPLICANT

AND

1. BASKARAN ALLIRAJAH,

2. ICRON HOLDING LIMITED (formerly VECTONE HOLDING LIMITED),

3. VECTONE GROUP HOLDING LIMITED,

4. PAUL NICHOLAS,

5. RAJSHANKAR BALASINGHAM,

6. MARC SEJOURNE,

7. VIJEEYAKUMAR MAHALINGHAM,

8. DANIEL WILSON,

9. CHILLITALK LIMITED (formerly BARABLU LIMITED),

10. MUNDIO INVESTMENT HOLDING LIMITED,

11. MUNDIO MOBILE HOLDING LIMITED,

12. PC2CALL LIMITED,

13. SWITCHLAB LIMITED,

14. VECTONE DISTRIBUTION GMBH,

15. VECTONE MOBILE BV,

16. VECTONE MOBILE GMBH,

17. VECTONE MOBILE LIMITED,

18. ICRON SERVICES LIMITED (formerly VECTONE SERVICES LIMITED), AND

19. VECTONE TRAVEL LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Barrett delivered on the 1st day of April, 2014

Facts

1. OTE International Solutions S.A., trading as OTE Globe S.A., is a limited liability company incorporated in Greece. It has commenced proceedings against a large number of parties, alleging that there were fraudulent dispositions of property within a group of companies, that there has been reckless trading to which certain directors were knowingly party, that there has been misfeasance and/or breach of duty, including breach of fiduciary duty by certain named directors, and a failure to maintain proper books of account. OTE has sought a variety of reliefs under the Companies Acts, including but not limited to orders under section 297A of the Companies Act 1963 and section 204 of the Companies Act 1990, that various directors are personally liable for the debts of a company of which they were director. The allegations made by OTE are clearly very serious allegations for any party to make. Moreover, the orders sought have potentially ruinous financial and other consequences for the directors against whom OTE has made its allegations.

Pleadings

2. OTE's notice of motion issued in February 2013 and its points of claim were delivered on 2nd August, 2013. An appearance for the first to third, ninth to thirteenth, and fifteenth to nineteenth respondents was entered on 7th June, 2013. A notice for particulars was delivered by the same respondents to OTE on 28th August, 2013. OTE issued its replies to the notice for particulars on 23rd September, 2013. The points of defence of the eighth respondent were delivered on 18th October, 2013. The first to third, ninth to thirteenth, and fifteenth to nineteenth respondents issued a rejoinder to OTE's replies to particulars on 31st October, 2013. OTE delivered further replies to particulars on 31st October, 2013. An appearance for the fourth, fifth and seventh respondents was entered on 11th November, 2013. On 21st November, 2013, the first to third, ninth to thirteenth, and fifteenth to nineteenth respondents issued a notice of motion seeking, *inter alia*, an order of the court pursuant to O. 19, r. 7 of the Rules of the Superior Courts directing OTE to provide the further and better particulars of pleadings sought in certain paragraphs of the said respondents'

notice for particulars of 28th August, 2013. On 2nd December, 2013, the eighth respondent issued a notice of motion seeking, *inter alia*, an order of the court pursuant to O. 19, r. 7 of the Rules of the Superior Courts compelling OTE to furnish the particulars of its claim sought at specified paragraphs of the eighth respondent's request for particulars dated 11th September, 2013. It is these two motions that fall to this Court to adjudicate upon.

Relevant principles

3. The classic statement as to the purpose of pleadings remains that of Fitzgerald J. in *Mahon v. Celbridge Spinning Co. Ltd* [1967] I.R. 1 at 3 where he stated that:

> *"The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at 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 trial."*

4. Order 19, rule 3 of the Rules of the Superior Courts establishes the golden rule of pleading, *viz*. that:

> *"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 ..."*

As will be seen hereafter, the dispute arising between the parties to these proceedings largely focuses on whether certain details sought by way of particulars are in fact evidence by which OTE's pleadings are to be proved.

5. Hamilton J., in *Cooney v. Browne* (1985] I.R. 185 at 188, stated that the purpose of particulars is "*to define the issues between parties to any action or proceeding and thereby to prevent either party being taken by surprise and incidentally to limit as much as possible the length and expense of trials*." Thus particulars serve the general purpose of pleadings by further refining the issues arising between the parties.

6. Order 19, rule 5(2) of the Rules of the Superior Courts requires that:

> *"In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings."*

Obviously care has to be taken in the application of this rule: applied too strenuously it would, for example, in the context of fraud, require particulars of such exactitude as to frustrate the bringing of effective proceedings; applied too loosely it would allow fishing expeditions to be conducted under the guise of discovery.

7. In *McGee v. O'Reilly* [1996] 2 I.R. 229, a Supreme Court case concerning whether particulars should be ordered, Keane J. had regard to the judgment of Fitzgerald J. in Mahon before continuing, at 234:

> *"[S]o far as this part of the case is concerned, the issues are defined between the parties, which will be confined at the trial to the matters relevant to those issues. There is no ground on which it could be suggested that the trial of this action could conclude with the plaintiff having been taken at a disadvantage by the introduction of matters which could not be fairly ascertained from the defence.*
>
> *At the very least, the plaintiff knows in broad outline what is going to be said ....In our system of civil litigation, the case is ultimately decided having regard to the oral evidence adduced at the trial. The machinery of pleadings and particulars, while of critical importance in ensuring that the parties know the case that is being advanced against them and that matters extraneous to the issues as thus defined will not be introduced at the trial, is not a substitute for the oral evidence of witnesses and their cross-examination before the trial judge."*

8. Though not a case in which an allegation of fraud was made, *McGee* is nonetheless of interest as regards the question of whether and when further particulars should be ordered by the court. In his judgment, Keane J. suggests that a key consideration in this regard is that there should not be any ground upon which it could be claimed that the plaintiff was disadvantaged by the introduction of matters which could not be fairly ascertained from the defence. Notably, however, Keane J. also emphasises in effect that in our system of justice the trial of an action takes place in a court of trial, not via pre-trial pleadings and particulars, a point that will be returned to hereafter.

9. In *In the Goods of John Rutledge, Deceased* [1981] I.L.R.M. 198, the plaintiff made an application for an order directing that the defendant deliver particulars of a plea of undue influence made in the defence. Giving judgment for the plaintiffs, Barrington J., at 202, stated:

> *"The defendant in the present case has not raised any special difficulty which prevents him delivering particulars. He has taken his stand on the submission that the law does not require him to deliver such particulars. Undue influence is a plea similar to fraud and it appears to me that it would be quite unfair to require a party against whom a plea of undue influence is made to go into court without any inkling of the allegations of fact on which the plea of undue influence rests. Because of the seriousness of the plea counsel will not lightly put his name to a pleading containing a plea of undue influence so that his solicitor will usually have in his possession some allegations of fact which justify the raising of the plea or at least excuse the plea from being irresponsible."*

10. In his judgment, Barrington J. appears to set the bar relatively low in terms of what will suffice by way of to what extent a party should be apprised of the case against him, indicating that it is undesirable that one go into court "*without any inkling of the allegations of fact*" and that counsel putting his name to pleadings containing a plea of undue influence "*will usually have in his possession some allegations of fact*". So it would seem, certainly on Barrington J.'s reckoning, that even some inkling of the allegations of fact suffices for matters to reach the courtroom. This perhaps should be seen as the baseline threshold that is required to be met as regards apprising a party of the case against him.

11. Perhaps the most comprehensive recent consideration of the purpose and place of pleadings and particulars is in *National Educational Welfare Board v. Ryan and Others* [2008] 2 I.R. 816, a case which raised issues that are strikingly similar to those arising in the present case. In that case the plaintiff had pleaded with some particularity that a former employee had received bribes or secret commission from the second defendant, allegations that the second defendant strenuously denied. Among other issues raised

in the proceedings, the second defendant contended that the plaintiff had failed to set out its allegations of fraud with sufficient particularity and had also failed to answer what it contended were reasonable particulars. Following a consideration of relevant Irish and English authorities, Clarke J., at 824, observed as follows:

> *"[I]f a plaintiff is not able to have the benefit of discovery before defining the precise parameters of his claim, it is likely in cases of fraud or other clandestine activity, to place very great limits on the benefit of discovery .... The other side of the coin requires that care be taken not to allow a party, by the mere invocation of an allegation of fraud, to become entitled to engage in a widespread trawl of the alleged fraudster 's confidential documentation in the hope of being able to make his case ....A balance between these two competing considerations needs to be struck. The balance must be struck on a case by case basis but having regard to the following principles. Firstly, no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party in its pleadings, specifies, in sufficient, albeit general, terms the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and thus, prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended/or, and establishes a prima facie case to that effect, the defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial ....This latter point must, of course, be subject to the caveat that the defendant must always be entitled to sufficient detail to enable him to plead in his defence ....The reason why I have taken the view which I have identified in the next preceding paragraphs is that to do otherwise would, in my view, be to strike an inappropriate balance against the legitimate requirements of persons who can make out a stateable case in fraud. It is in the very nature of fraud (or other unconscionable wrongdoing) that the party who is on the receiving end will not have the means of knowing the precise extent of what has been done to them until they have obtained discovery. To require them to narrow their case prior to defence (and, thus, discovery) would be to create a classic Catch-22. The case will be narrowed. Discovery will be directed only towards the case as narrowed. Undiscovered aspects of the fraud or the consequences of the fraud will, as a natural result, never be revealed. This would, in my view, be apt to lead to an unjust situation."*

12. There is perhaps a degree of overlap in the various criteria identified by Clarke J. in the above extract. However, it appears to the court that his observations can be reduced to a number of key questions that can usefully be applied in a case such as that now before the court where a plaintiff alleges fraud or other wrongdoing:

> (1) is this a case where more than a bare allegation of fraud has been made?
>
> (2) has the plaintiff gone into some detail as to how the alleged fraud took place?
>
> (3) has the plaintiff specified in sufficient, albeit general, terms the nature of the alleged fraud?
>
> (4) has the plaintiff identified the alleged consequences of the fraud?
>
> (5) is there adequate evidence to support a *prima facie* or stateable case of fraud?

13. If the answer to each of these questions is 'yes', then the judgment in *National Educational Welfare Board* suggests that a defending party should be required to put in a defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case and then pursue more detailed particulars prior to trial, subject to the caveat that in all instances a defending party must always receive sufficient, but only sufficient, detail to be able to plead its defence.

14. The particular attraction of Clarke J.'s judgment is that it is consistent with all of the case-law considered above. However, it might perhaps be contended that Clarke J. sets the bar too high as regards the substance of pleadings, certainly when viewed in the context of decisions such as *McGee* and *Rutledge*. At the least it seems to the court that the litmus test applied by Clarke J. in *National Educational Welfare Board* needs always to be viewed in the context of the over-arching point made by Keane J. in *McGee* as to the primacy of the courtroom as the forum of trial in our system of justice.

15. In addition to the above-mentioned case-law, the court is cognisant of the concern sounded by Charleton J. in *IBB Internet Services Limited (trading as Imagine Networks) v. Motorola Limited* [2013] IEHC 541, echoing an earlier warning sounded by Hogan J. in *Armstrong v. Moffatt* [2013] IEHC 148, that the timely progression of complex cases through the courts has in recent times been impeded by an over-concentration on what are ultimately peripheral orders relating to discovery and particulars. Thus, per Charleton J., at para. 3:

> *"The parties to any proceeding are expected by the court to cooperate to bring the case to trial. Central to that fundamental obligation is defining what the cause is about. Increasingly, in complex cases issues are being lost sight through concentration on peripheral orders as an end in themselves. The spectre of Jarndyce v Jarndyce is one that no court should forget. Discovery motions seem to be increasingly self-justifying rather than an aid to litigation; this despite the repeated warnings of the Supreme Court against oppressive discovery. Yet, nothing has changed. Statements of claim now increasingly plead evidence and defences can be read with mystification as to what the answer to a claim is beyond denial. Hogan J has rightly, in Armstrong v. Moffatt [2013] IEHC 148, expressed frustration at the futility and waste of costs occasioned by endless notices for particulars in personal injury cases. In the commercial list, issues central to the disposal of the cause are to be identified by clear and precise pleadings and the proper use of pre-trial procedures in aid of appropriate notice as to facts."*

Conclusion

16. In the present case all of the applicant's allegations concern fraudulent or otherwise wrongful behaviour. Having regard to the criteria propounded in *National Educational Welfare Board* and, in particular, the five questions mentioned above, the answer to each of the questions posed appears in the present context to be 'yes'. Thus this is a case in which more than a bare allegation of fraud or other wrongdoing has already been made. The plaintiff has already gone into some detail as to how the alleged fraud or other wrongdoing took place, specified the elements of the alleged fraud or other wrongdoing in some detail, identified the alleged consequences of the fraud or other wrongdoing, and made out a stateable case of alleged fraud or other wrongdoing. To borrow from the phraseology of Keane J. in *McGee*, it does not appear to the court, having regard to the applicant's points of claim, that there is scope in these proceedings for a respondent to be taken at a disadvantage by the introduction of matters which could not be fairly

ascertained from the points of claim. The court is of course aware that the consequences of the claims brought by OTE may be potentially ruinous for the respondents, certainly the individual respondents. Because of this the court has had careful regard to whether, notwithstanding the foregoing conclusions, the principles of natural justice and fairness require that the applications now before the court should in any event succeed. There are three reasons why the court considers that this is not appropriate: first, to require particulars of the exactitude sought by the respondents in these proceedings would, in the court's opinion, have the potential of frustrating altogether the instant proceedings notwithstanding that, *inter alia*, a stateable case of alleged fraud has been made out by the applicant; second, to borrow again from the reasoning of Keane J. in *McGee*, to require such detailed particulars is not appropriate in a system of justice that has at its heart the trial-court and the giving and testing of evidence therein; third, and this is perhaps more of an ancillary point, this Court in deciding the instant proceedings is conscious of the quite proper concern raised in the *IBB* and *Moffat* cases at the potential for unnecessary delay to occur in the adjudication of the key issues arising in proceedings such as those now before the court were the respondents' applications to be successful.

17. For the reasons stated above, the court declines to give the direction and order sought in these proceedings.