THE HIGH COURT

[2015 No. 8047 P.]

BETWEEN

DANIEL McATEER

PLAINTIFF

AND

SENAN BURKE, MARK REGAN AND MILAN SCHUSTER PRACTISING UNDER THE STYLE AND TITLE OF ADAMS CORPORATE SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 26th day of April, 2017.

1. The within application is brought by the defendants by way of motion seeking to have these proceedings ("the 2015 proceedings") struck out on various grounds amounting to abuse of process.

Background

2. The background to these proceedings is best summarised by the following extract from a judgment of the Court of Appeal in closely related proceedings ("the 2009 proceedings") *McAteer v. Burke* [2015] IECA 215:

> "[3.] These proceedings were commenced in the High Court by the plaintiff on 29th October 2009 in which he sued the defendant solicitors for damages for breach of contract and for negligence. While the background to the dispute is a complex one, it may, in essence, be summarised as follows: the plaintiff, Mr. McAteer, is a businessman and accountant residing in Co. Derry. The plaintiff claims that the defendant's (sic) solicitors were retained by him and his fellow investors in the summer of 2006 to draft and execute a share subscription and shareholder's agreement. He contends that this agreement envisaged that two new companies would be established and that the plaintiff (or his nominee) would be a director of the companies. He further contends that 12 new shares would be allotted to each company and that he in turn would receive three such shares in each company.
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> [4.] The plaintiff then says that although these two companies (Ballinorig Developments Ltd. ("Developments") and Ballinorig Properties Ltd. ("Properties")) were duly incorporated, he later discovered that he had not been in fact appointed a director of the companies, nor had his shareholding been allocated to him. He further contends that the assets of both Developments and Properties were transferred to two other companies controlled by the defendants. He further contends that the first and second defendants appointed themselves as directors of both Developments and Properties.
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> [5.] It appears that Developments and Properties were involved in a plan to develop certain lands at Tralee, Co. Kerry for the purposes of development of a medical centre. Although the lands were re-zoned from agricultural purposes by Kerry County Council in early 2007, the plan never came to fruition. This, the plaintiff says, was because the first and second defendants wrongfully involved themselves personally in these companies; wrongfully excluded him from these companies and then so mis-managed the affairs of both Developments and Properties that the plan failed. All of these events culminated in what the plaintiff claims was considerable financial loss."

3. The 2009 proceedings were issued by way of plenary summons on the 29th October, 2009, and a statement of claim was delivered on the 29th April, 2010. The defendants raised a notice for particulars which they claimed was not properly or adequately replied to and they brought a motion seeking a stay of the proceedings pending the delivery of proper particulars. That motion was heard by McMenamin J. in the High Court and he delivered a reserved judgment on the 6th March, 2012, in which he formulated a number of questions which he considered had not been properly addressed by the plaintiff and he stayed the proceedings pending delivery of satisfactory replies and in that respect gave liberty to the plaintiff to apply to lift the stay following such delivery.

4. Such application was made by the plaintiff before O'Malley J. who delivered judgment on the 13th March, 2013, and lifted the stay. The defendants appealed against the judgment of O'Malley J. giving rise to the judgment of the Court of Appeal to which I have already referred. The effect of the latter judgment was to strike out substantial parts of the plaintiff's statement of claim and thereafter confine his claim to a narrow focused issue. In summary, Hogan J. delivering the judgment of the Court of Appeal held that a significant part of the plaintiff's claim represented an attempt by him as a shareholder in Ballinorig Developments Ltd and Ballinorig Properties Ltd ("the Companies") to make a claim on his own behalf in respect of losses allegedly suffered by the Companies which offended the rule in *Foss v. Harbottle* (1843) 2 Hare 461.

5. It should be noted that until June 2015, the plaintiff was at all times represented by solicitors and counsel until he discharged his legal team during the course of the hearing before the Court of Appeal.

6. It is also of relevance to note that throughout the course of the 2009 proceedings, which are ongoing, the plaintiff has maintained the position that he does not seek to recover any losses suffered by the Companies. In his replies to particulars of the 30th May, 2012, the plaintiff said:

> "For the avoidance of doubt, the plaintiff does not seek to recover losses that may or may not have been incurred by or on behalf of Ballinorig Properties Ltd or Ballinorig Developments Ltd."

7. In the same replies, the plaintiff again said:

> "Further and again for the avoidance of doubt, the plaintiff does not seek to recover damages for any mischief or damage that may have been suffered by or on behalf of Ballinorig Properties Ltd and Ballinorig Developments Ltd."

8. In her judgment of the 13th March, 2013, O'Malley J. noted (at para. 7):

> "It is now stated that the plaintiff claims a loss on his own account and does not (as it is contended he cannot) claim in

his capacity as a shareholder."

9. The plaintiff's position in this regard was clearly noted by the Court of Appeal with Hogan J. stating (at p. 5):

> "For the avoidance of doubt, the plaintiff does not seek to recover losses that may or may not have been incurred by or on behalf Ballinorig Properties Limited or Ballinorig Developments Limited."

10. Hogan J. re-emphasised this statement at p. 6 of the judgment.

The 2015 Proceedings

11. The plaintiff issued a second plenary summons on the 7th October, 2015. It names precisely the same parties as the 2009 proceedings. The plaintiff, Mr. McAteer, is the sole plaintiff. The general endorsement of claim in the 2015 proceedings is identical to that in the 2009 proceedings with the exception that it omits a claim for damages for conspiracy and a claim for an injunction. In all other respects, it repeats the same claim verbatim. The summons was issued by the plaintiff as a litigant in person. He delivered a statement of claim on the 8th of December, 2015. Of note in relation to the statement of claim, it purports to add the Companies as co-plaintiffs to the proceedings, no order of the court having been made or applied for in that regard.

12. The statement of claim in the 2015 proceedings comprises 26 paragraphs followed by particulars of loss and the prayer for relief. The first 25 paragraphs are in substance identical to the 2009 statement of claim. The first part of paragraph 26 is also identical to the 2009 statement of claim despite the fact that this was struck out by the Court of Appeal. The same goes for the last part of para. 26.

13. Under the heading "Particulars of Loss" the claim of negligence/fraud in relation to the Companies' shares is repeated save that the original claim of €45 million is substituted by a claim of €18 million. The second item of claim in the 2009 proceedings is a claim of negligence/fraud in relation to the hospital contract (the loss of potential profits) and the 2009 proceedings claim a sum of €17 million under this heading. The calculation of this claim is based on 25% of the profits the plaintiff says the Companies would have made from the venture being €68 million, the plaintiff being a 25% shareholder. This claim was struck out by the Court of Appeal clearly on the basis that it was in direct contravention of the rule in *Foss v. Harbottle* and instead, the plaintiff has substituted in the 2015 statement of claim a claim for loss of development profit of €68 million, being 100% of the Companies' alleged loss. The third and final head of loss is a claim for €50,000 being an estimate of architect's fees and professional fees incurred in relation to the project.

The Issues Arising in this Motion

1. The purported addition of the Companies as plaintiffs in the statement of claim:

14. The 2015 proceedings were commenced by the issue of a plenary summons naming Mr. McAteer as the sole plaintiff. A party to litigation has no right of his own motion to join further parties to that litigation once commenced. The court has wide powers to do so under O. 15 of the Rules of the Superior Courts on the making of an appropriate application. None has been made here. The plaintiff has sought to characterise the failure to join the Companies as plaintiffs to both the 2015 and the 2009 proceedings as a mere oversight. Whether that is so or not is immaterial. Accordingly the purported addition of the Companies in the statement of claim is of no legal effect and Mr. McAteer remains the sole plaintiff in the 2015 proceedings.

15. He suggested in submissions that this was a mere technicality and the court should now proceed to join the Companies and the Court of Appeal had now determined that they were appropriate plaintiffs. The plaintiff seeks to interpret the Court of Appeal judgment as being a mere "decoupling" of the claims as between himself personally and the Companies, and suggests that the Court of Appeal indicated that it was now appropriate for the Companies to bring their own claim. I do not find anything in the Court of Appeal judgment which supports this interpretation. It seems to me that the court made clear that the claims in the 2009 proceedings which the plaintiff was seeking to maintain could not be maintained by him because they were claims of other parties i.e. the Companies. The court was not in any sense suggesting that the Companies should now bring these claims, less still permitting them to do so.

16. Of course were an application now to be made to join the Companies, it would clearly face significant difficulties, not least on account of the Statute of Limitations upon which the defendants would seek to rely in opposing any such application. However, it is not necessary for me to express any concluded view on this issue unless and until an appropriate application is before the court.

2. Concurrent causes of action:

17. As I have already noted, it is clear from a side by side comparison of the 2009 and 2015 statements of claim that they are all but identical, raise the same issues, plead the same causes of action and seek broadly the same reliefs, albeit with some numerical modification. It is thus clear that the plaintiff seeks to relitigate in the 2015 proceedings the issues that are already before the court in the 2009 proceedings. A similar situation arose in *McHugh v. Allied Irish Bank* [2009] IEHC 340 where the plaintiff having issued one set of proceedings and subsequently issued fresh proceedings concerning substantially the same subject matter. In her judgment, Dunne J. said (at p. 6):

> "The complaint made by the first named defendant herein is that it is an abuse of process for the plaintiffs to issue two sets of proceedings against them in relation to the same cause or causes of action. In particular, it was emphasised on behalf of the first named defendant that where it is clear that the motivation in issuing the second set of proceedings is effectively to go behind court orders in the first set of proceedings, that this is all the more obvious an abuse of process.
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> Counsel on behalf of the first named defendant opened a number of authorities to the court in support of his contention that to issue two sets of proceedings in respect of the same cause of action against the same defendant is an abuse of process. I think that that proposition is so self evidently clear that it is not necessary at this point to refer to those authorities."

18. Later in the judgment, Dunne J. referred to *Royal Bank of Scotland v. Citrusdal Investments Ltd* [1971] 1 WLR 1469 in which Plowman J. referred in turn with approval to the earlier dicta of Buckley J. in *Thames Launches Ltd v. Trinity House Corporation (Deptford Strand)* [1961] Ch 197 where the latter judge said (at p. 209):

> "Mr. Naisby says that the principle is that a man should not pursue a remedy in respect of the same matter in more than one court. In my judgment, the principle is rather wider than that. I think it is that no man should be allowed to institute proceedings in any court if the circumstances are such that to do so would really be vexatious. In my judgment, it is vexatious if somebody institutes proceedings to obtain relief in respect of a particular subject matter where exactly the

> same issue is raised by his opponent in proceedings already instituted in another court in which he is not the plaintiff but the defendant."

19. Dunne J. went on to reach the following conclusion (at p. 10):

> "The issue of a set of proceedings by a party in respect of a cause or causes of action against another party in circumstances where the party issuing the proceedings has already issued proceedings against the same party in respect of the same or substantially the same cause or causes of action is in my view conduct which may be viewed as oppressive and vexatious. It is conduct which requires the defendant or defendants to such proceedings to incur unnecessary costs and expenses in dealing with the further proceedings. No additional benefit or remedy can be obtained by a party in issuing a further set of proceedings in respect of the same cause or causes of action."

20. This neatly encapsulates the position that arises in this case. It is clear to my mind that the 2015 proceedings constitute a clear repetition of the substance of the 2009 proceedings and as such are an abuse of process.

3. Res judicata /collateral attack on Court of Appeal judgment in 2009 proceedings:

21. As the judgment of the Court of Appeal and indeed the earlier judgments of the High Court make clear, the plaintiff sought in the 2009 proceedings to advance claims qua shareholder in the Companies which only the Companies themselves could maintain under the rule in *Foss v. Harbottle*. Despite that being evident from his own pleadings, the plaintiff nonetheless represented his position as being that he sought only to recover losses personal to him and not the company. This is noted twice in the judgment of the Court of Appeal. Those parts of his claim which offended the rule in *Foss v. Harbottle* were struck out by the Court of Appeal. Accordingly, that issue has been conclusively determined against the plaintiff. Despite that, he seeks to raise it again in the 2015 proceedings. As noted by Costello J. in *D v. C* [1984] ILRM 173:

> "A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue has been solemnly and with certainty determined against him."

22. Even if it could be said that the strict doctrine of res judicata does not apply here, the attempt to re-litigate issues already decided by the Court of Appeal in the 2009 proceedings constitutes a clear attempt to avoid the consequences of that court's judgment and as such amounts to an abuse of process. The plaintiff cannot seek to avoid the consequences of rulings made against him in earlier proceedings by the simple expedient of issuing subsequent proceedings.

4. The rule in *Henderson v. Henderson*:

23. Even if it could be said that the plaintiff has raised any new issues in his 2015 proceedings that were not already part of his 2009 proceedings, that cannot avail him by virtue of the rule in *Henderson v. Henderson* (1843) 3 Hare 100 which, although of some antiquity, has been repeatedly approved and applied in this jurisdiction in modern times. It was set out by Sir James Wigram VC in the following terms:

> "Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter[s] which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time….it is plain that litigation would be interminable if such a rule did not prevail…"

24. In *Taylor v. Lawrence* [2003] QB 528, Lord Woolf summarised the rule thus:

> "Parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation. If they do not, they will not normally be permitted to have a second bite at the cherry."

In commenting on the rule in *Carroll v. Ryan*, [2003] 1 I.R. 309, Hardiman J. observed:

> "An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter". This harassment, in my view, may arise whether or not a set of proceedings is pursued to judgment or settlement. None of the first plaintiff's proceedings have reached this stage but that does not prevent the defendant from having to deal with them."

Accordingly, even if it could be said that there is any new issue in the 2015 proceedings which is not already in the 2009 proceedings, the plaintiff is precluded from raising it now.

5. The Statute of Limitations:

25. By letter of the 5th June, 2009, the plaintiff wrote to the defendants enclosing a statement detailing the grievances which form the subject matter of both the 2009 and the 2015 proceedings. The issues identified in that letter and statement are the same ones as ventilated by the plaintiff in his replying affidavits to this motion. This letter was followed up by a preliminary letter of claim from his solicitors of the 6th July, 2009. It is clear from these documents that as of June, 2009 at the latest, the plaintiff had available to him all the facts and information necessary to constitute the causes of action which he seeks to pursue in both the 2009 and the 2015 proceedings. The 2015 proceedings were however issued more than six years later and insofar as they comprise of wrongs in law, are statute barred. The plaintiff attempts to surmount this obstacle by arguing that the 2009 proceedings were issued in October 2009 whereas he only became a shareholder in the Companies in November 2009 and thus it was only on the latter date that he was in a position to sue for his losses as a shareholder. Of course that brings us full circle back to the rule in *Foss v. Harbottle*, by virtue of which the Court of Appeal has determined that the plaintiff may not pursue a claim. Accordingly, the date of his registration as a shareholder is of no materiality to any claim he may now legitimately pursue.

26. Insofar as the plaintiff's claim is based on any equitable grounds, it is now well settled that equity follows the law by analogy with the Statute of Limitations so that the same limitation period is deemed to apply to a claim in equity as in law – see *Komady Ltd. v.*

Ulster Bank [2014] IEHC 325. I am therefore satisfied that any legitimate cause of action that the plaintiff seeks to pursue in the 2015 proceedings is statute barred and bound to fail.

Conclusion

27. The 2015 proceedings constitute an abuse of process and are further frivolous and vexatious. They are also significantly oppressive to the defendants as representing an attempt to perpetuate a claim against professional defendants over a decade after the events complained of, the majority of which have already been conclusively determined against the plaintiff and the balance of which are the subject of the 2009 proceedings. I will accordingly strike out these proceedings.