THE HIGH COURT

[2013 No. 1768 P]

BETWEEN

GEORGE RAYMOND, RUTH RAYMOND AND

LAMWORTH DEVELOPMENTS LIMITED

PLAINTIFFS

AND.

EAMONN MOYLES, PHILIP YOUNG, IAN CAMPBELL

TRADING AS CONTRACT ACCOUNTING AND

GERARD FEEHILY

TRADING AS FEEHILY O'DWYER AND

CA LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 10th day of November, 2017.

1. This judgment is given in the motion of the first, second and third named defendants for an order that the claim against them be struck out on the grounds that they were wrongly joined as defendants, or that the proceedings against them are bound to fail, are frivolous and vexatious, and are an abuse of process.

2. Lamworth Developments Limited, the third plaintiff, was struck off the register of companies and dissolved in October, 2009 and following reinstatement, was struck off again and then dissolved in April, 2014. An application has been made to restore the company to the register of companies, and that part of the motion which seeks that third plaintiff be removed from the proceedings stands adjourned.

3. The first, second and third named defendants are accountants and trade as a limited liability company, CA Limited, the fifth defendant. They argue that no grounds or circumstances exist by which the plaintiffs could seek to pierce the corporate veil, and that as at all material times the plaintiffs dealt with the firm and not with them in their personal capacities, they should be removed as defendants.

The proceedings

4. The first and second plaintiffs are husband and wife who were partners in the business of the purchase of land for the construction of residential dwelling houses. and they incorporated the third plaintiff company to develop those lands. The claim is brought arising from the provision by the defendants of bookkeeping and accountancy services to the plaintiffs for the purposes of their business.

5. The fourth named defendant is pleaded as having at all material times acted as the taxation adviser to the plaintiffs in their business, and is not associated with the other defendants.

6. The plaintiffs issued a plenary summons on 21st February, 2013, delivered their statement of claim on 1st July, 2013, and a defence was delivered by the first, second and third defendants on 16th January, 2014, in which they denied that at any material time they contracted in their personal capacity to provide bookkeeping or accountancy services to the plaintiffs or any of them, and in which they made a positive plea that the relevant contractual party was CA Limited which had invoiced the plaintiffs for those services.

7. The plaintiffs did not deliver a reply to that defence but brought a motion to join CA Limited as co-defendant and an order was made on that motion on 4th April, 2014, by the Master of the High Court. Amended pleadings were then served.

8. The relevant part of the amended statement of claim (para. 5) pleads that the accounting and bookkeeping services were provided at all material times either by the company or in their personal capacity by the first, second and third named defendants. In correspondence, the solicitor for the first, second and third named defendants sought that their client be removed from the proceedings and argued that no rational or legal basis exists on which the proceedings could be maintained after the company, CA Limited, was joined.

9. The proceedings have advanced and discovery has been made in which certain documents relevant to the matter now argued have come to light.

10. A number of affidavits have been served in the motion. The grounding affidavit of the first defendant sworn on 2nd October, 2014 is made on his own behalf and on behalf of the second and third defendants.

11. The first replying affidavit of George Raymond made on his own behalf and on behalf of all of the plaintiffs was sworn on 13th November, 2014. He avers at para. 9 that he and his wife believed that they had contracted with or engaged the first, second and third defendants in their personal capacity and had joined the company on the advice of their legal advisers, but not on account of any concession that the contract was made with that entity.

12. Mr. Raymond exhibits a series of documents and correspondence including cash flow projections and draft accounts for Lamworth Developments Limited and he points to the fact that these documents do not mention that the first, second and third defendants traded as a limited liability company. He exhibits a chain of detailed correspondence commencing on 31st July, 2006, between himself and members of staff of "Contract Accounting". He points to the fact that the documentation and in particular the profit and loss accounts and other trading accounts of the plaintiffs, where the firm is described as "Contract Accounting", does not show that it traded as a limited liability company, and he is correct in this. The absence of such an identifying feature is argued to be a significant

pointer to the identity of the contracting parties.

13. Eamonn Moyles swore a second affidavit on 22nd January, 2015 in which he exhibits a series of documents which he says are determinative of the question of the identity of the contracting parties. These are as follows:

> (a) A printout from the CRO which shows that the business named "Contract Accounting" was owned by CA Limited.
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> (b) A series of invoices addressed to the third named plaintiff from "Contract Accounting" in each of which on the bottom right hand corner is identified the directors of the company, the registration number of CA Limited and its VAT number. These invoices date from 31st January, 2008 to 31st December, 2008.
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> (c) Company bank statements recording payments made by the third plaintiff directly to the bank account of CA Limited from the plaintiffs. The current account identifies unequivocally CA Limited and its registered address and the addressee as Philip Young, the second defendant. These payments were made on various dates from 25th January, 2008 to 24th December, 2008.
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> (d) A signed banker's order form/letter of authority signed by Mr. Raymond directing his bank to make payments of an identified monthly amount to the account of CA Limited, and this authority unequivocally identifies CA Limited as the intended payee. The date of that document is 6th June, 2006.
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> (e) A later banker's order form/letter of authority, the date of which is not clear to me, also identifies the company as intended payee and was for a different and larger monthly payment. It is clear however, that the payments specified in this banker's order form/letter of authority were to commence in June, 2006.

14. Mr. Raymond swore a second affidavit in reply on 12th February, 2015 in which he avers that no "terms of engagement" were furnished by the accounting firm to them, and that the three personal defendants do not have professional indemnity cover. This latter point may be reflective of the fact that the three personal defendants always intended to and believed that they traded through the corporate entity and did not need personal insurance cover in the circumstances. It is not determinative of the question.

15. The final affidavit in the chain is the third affidavit of Mr. Raymond, sworn on 14th July, 2017. He makes it clear that he does not dispute "the existence of CA Limited as an entity or its trading arrangements", but rather the identity of the party with whom he and the other plaintiffs contracted. Mr. Raymond then goes on to clarify the history of engagement between the parties. He says that he was introduced personally to the first defendant by the fourth defendant in April or May of 2006 and that at that time an agreement was made for the provision of financial services for the benefit of the plaintiffs. He says that neither at that time nor later was he informed that the contract was to be with a corporate entity. He says he understood that "Contract Accounting" was "a trading name for a group of individuals" and that at no stage was it "communicated or represented to me in writing or otherwise" that he was dealing with a corporate entity.

16. He says that there is "an extensive amount of correspondence" in the years 2006, 2007 and 2008 between himself and the offices of the first three defendants which makes no reference to the corporate entity. Mr. Raymond argues that these contain representations by the first defendant that the contract was with the three partners personally.

17. More critically, Mr. Raymond points to the fact that all invoices exhibited by Mr. Moyles in his affidavit date from 2008, and that the first engagement was had two years earlier.

18. Mr. Raymond also refers to the website of "Contract Accounting" which makes no mention of the fact that it is a corporate entity although it does make a reference to a company "TAB Payroll Services". No directors are listed on the website.

Discussion

19. The first, second and third defendants bring the motion under O. 15 of the Rules of the Superior Courts. That jurisdiction was explained by Henchy J. giving the judgment of the Supreme Court in *Fuller & Anor. v. Dublin County Council & Anor*. [1976] I.R. 20 where the court allowed the application of the second defendant that it be discharged from the action as its presence in the proceedings was not justifiable for the proper prosecution of the claim.

20. In *Sherry v. Primark Limited t/a Penneys & Anor*. [2010] IEHC 66, [2010] 1 I.R. 407, O'Neill J. set aside an order joining a co-defendant in personal injuries proceedings on the grounds that an authorisation from the Personal Injuries Assessment Board, required by the legislation establishing that body, had not been obtained prior to the bringing of the proceedings.

21. Neither judgment offers much assistance in the present case because both were given in the context of a statutory claim, *Fuller & Anor. v. Dublin County Council & Anor*. under the Housing Act 1966, and *Sherry v. Primark Limited t/a Penneys & Anor*., being a claim for damages for personal injuries, after the enactment of legislation regulating the mode of such proceedings.

22. Gilligan J. in *Redahan v. Minister for Education and Science & Ors*. [2005] IEHC 271, [2005] 3 I.R. 64, made an order striking out an arbitrator from proceedings which sought to remit or set aside an award. He did so because an arbitrator acts in a quasi-judicial capacity sufficient to attract immunity from suit at common law, and because it was conceded that the claim was not founded on any allegation of bad faith by the arbitrator.

23. The present action is one commenced by plenary summons and required to be determined on oral evidence at a trial. The claim is for professional negligence, and no procedural or reason arising from the form of proceedings or from any statutory provision offers a ready solution. A determination on the identity of the contracting parties will primarily focus on ascertaining and construing the terms of the contract, and the negotiations had between the first plaintiff and the first defendant regarding the terms of engagement.

24. While the first plaintiff has, albeit late in the affidavit evidence, now asserted that representations were made by the first defendant to the effect that the contract was made with three professional accountants, and that no corporate entity was identified, the claim is not one founded in representation, and at best, it seems to me, the argument is that the representations derive from an allegation that the first defendant "gave the impression" that the contractual parties were individuals trading in their personal capacity as partners. Actionable representation is not asserted or pleaded.

25. I do not consider that the jurisdiction under O. 15 by which a court may remove a party "improperly" joined, or a party who was not a necessary party, is one that may be engaged in the present case. It could not be said that the first, second and third defendants were improperly joined in the sense that they are not necessary parties. It may emerge in the course of the trial that

they were not the true contracting parties, but it could not be said that they are not necessary parties to the claim as pleaded.

26. Further, I consider that the provisions of O. 15 are more applicable to a case where it can readily be ascertained from the proceedings, from the nature of the relief claimed or the statutory or other basis of that relief that a party is not a necessary party in the true sense to the proceedings.

27. Accordingly, I consider that the application for relief under O. 15 is inappropriate.

Order 19 of the Rules of the Superior Courts

28. The application is also made to strike out the proceedings under O. 19, r. 27, that are "unnecessary or scandalous" or under O. 19, r. 28, that they discloses "no reasonable cause of action" against the first, second and third defendants, but rather that the claim is more properly brought against the company. The hearing of the motion and the affidavit evidence however was primarily focused on advancing an application that the claim be struck out pursuant to the inherent jurisdiction of the court. It was accepted for the purpose of the argument that no material difference is to be discerned in the test on an application to strike out pursuant to the inherent jurisdiction of the court and that under Order 19.

29. The parties agree that the leading judgment is that of Costello J. in *Barry v. Buckley* [1981] I.R. 306, where he emphasised that the jurisdiction was to be "exercised sparingly and only in clear cases". The jurisprudence is well established from a series of cases set out in the footnotes to para. 16.12 of Delaney and McGrath *Civil Procedure in the Superior Courts* (3rd Ed.).

30. This jurisdiction was recently considered by Irvine J. in *Fox v. McDonald & Ors*. [2017] IECA 189 where, giving the decision of the Court, she approved the approach of Costello J. in *Barry v. Buckley* and went on to say as follows:

> "When the court is asked to engage with this jurisdiction the court must take the plaintiff's case at its height giving him the benefit of any disputed facts. Further, before acceding to such an application the court must be confident that nothing could later arise on discovery or at the trial of the action which could possibly result in the plaintiff's claim succeeding." (para. 22)

31. Irvine J. quoted with approval the judgment of Murray C.J. in *Re Vantive Holdings* [2009] IESC 69, [2010] 2 I.R. that:

> "The courts have always had an inherent jurisdiction to stay or dismiss proceedings which abuse the due process of the administration of justice where to do otherwise would seriously undermine its effectiveness or integrity." (para. 20)

32. Irvine J. stressed that the jurisdiction to dismiss was one which should be exercised "only in exceptional circumstances" (para. 26).

33. It is clear that the jurisdiction cannot be exercised if the court must resolve a question of disputed fact from the affidavit evidence. As explained by Morris J. in *Doe v. Armour Pharmaceutical Inc. & Ors.* [1997] IEHC 139 it must be clear beyond doubt that the claim could not succeed, and that an amendment of the pleadings could not save a claim or that evidence might not emerge at a trial that might support a claim.

34. As Clarke J. pointed out in *Salthill Properties Limited & Anor. v. Royal Bank of Scotland & Ors.* [2009] IEHC 207, an application to dismiss on the grounds that it is bound to fail is particularly suitable to a case involving the existence or construction of documents. That observation is significant in the present case as there is no written contract of engagement to record the terms of the agreement which might form the basis of the analysis.

35. There are, however, a number of documents which support the proposition that the plaintiffs did deal with a limited company, including the invoices from 2008 on, and the fact that the direct debit mandates provided for payment to the bank of the company. To a large extent, the plaintiffs rely on the absence of documents which might have identified to them that they were dealing with a limited company.

36. The documentation exhibited by the first, second and third defendants in the form of invoices date from 2008 to my mind shows that at that stage the services were being provided by a corporate entity.

37. The difficulty with the application is apparent from the narrative above. The plaintiffs assert a representation was made. Albeit the claim of a misrepresentation or representation is somewhat vague, the factual context identified in the course of lengthy affidavit evidence leads me to the conclusion that it is not safe to accede to the application of the first, second and third defendants that they be removed from the proceedings. The statements of account date from 2008, some two years after the services were engaged. Other documents are capable of supporting either argument. The documents first exhibited by the first, second and third defendants did seem to support their argument, but the lengthy affidavit evidence has led to a body of evidence which needs to be tested further at trial and needs to be cross-examined.

38. Accordingly, it seems to me that as the threshold test is low I cannot make the order sought.

39. I therefore refuse the relief sought on the motion.