

## THE HIGH COURT

[2014 No. 9932P]

BETWEEN

JOHN O'MEARA

PLAINTIFF

AND  
**GOODBODY STOCKBROKERS**  
 AND  
**PERSHING SECURITIES INTERNATIONAL LIMITED**  
 AND  
**BANK OF NEW YORK MELLON (IRELAND) LIMITED**  
**TRADING AS BNY MELLON**

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 29th July, 2016.

## Part 1

## Facts

1. In January, 2008, Mr O'Meara acquired some shares in Anheuser-Busch. He claims that, as a result of the actions of one or more of the defendants, he missed out on a rights offer that was thereafter extended to existing Anheuser-Busch shareholders. He has, in consequence, instituted the within proceedings, claiming that one or more of the defendants is or are liable to him for losses that he has sustained by virtue of alleged breach of contract, breach of fiduciary duty, negligence, breach of duty of care, misrepresentation, loss of opportunity and unjust enrichment.

2. In the particulars section of Mr O'Meara's statement of claim, it is claimed that after he learned of the (by then lapsed) rights offer: he placed phone calls with Goodbody Stockbrokers on a number of occasions; and, to borrow a colloquialism, 'got the run around' in terms of discovering how he had missed out on the offer. It is further claimed that, in one phone call, mention was made by Goodbody Stockbrokers that Bank of New York Mellon (BoNY) had made a standard payment to Anheuser-Busch shareholders who had not availed of the rights offer. It is also claimed that in another phone call, and later in writing, Goodbody Stockbrokers indicated themselves to have instructed Pershing, which the court understands is a so-called 'back-office' services provider, and BoNY, to sell Mr O'Meara's rights, presumably, though this is not stated, having previously acquired those rights themselves. It is indicated too that Mr O'Meara, in advancing his claim, will invoke (1) the EU Unfair Commercial Practices Directive (*i.e.* Directive 2005/29/EC of the European Parliament and of the Council of 11th May, 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, which directive was implemented in Ireland by way of the Consumer Protection Act 2007) and (2) the Markets in Financial Instruments Directive ('MiFID') Regulations (so, presumably, some or all of the European Communities (Markets in Financial Instruments) Regulations 2007, the European Communities (Markets in Financial Instruments) (Amendment) Regulations 2007, the European Communities (Markets in Financial Instruments) (Amendment) Regulations (No. 2) 2007, and the European Communities (Markets in Financial Instruments) (Amendment) Regulations 2012). As to particulars of special damage, none are provided, beyond the details of the initial purchase-price that Mr O'Meara appears, at least by his own account, to have paid for his shares in Anheuser-Busch.

3. There is nothing wrong with the statement of claim, and Mr O'Meara is perfectly entitled to make his various claims, provided that he proceeds in accordance with applicable law and rules of court. To the extent that the statement of claim is light on detail, and it is light on certain detail, it is precisely the type of detail that one would expect largely to be fleshed out by way of replies to particulars. But there is the rub. As part of the pre-trial proceedings, Goodbody Stockbrokers served a notice seeking particulars on 13th January last. On 19th January, the solicitors for Mr O'Meara responded with replies. Goodbody Stockbrokers maintain that the replies received are inadequate and have brought this application for further and better particulars. It is perhaps helpful before proceeding further to summarise (a) those particulars that were originally sought last January, and (b) the impugned replies received. These are set out in the table below

Particular No.	Summary of Particulars Sought (13th January)	Reply Received (19th January)
1	Full and detailed particulars of the relationship alleged to exist between Mr O'Meara and Pershing, stating whether such is said to give rise to a duty of care or a contractual claim.	The Plaintiff will deal with particulars relevant and necessary to the defence of Goodbody Stockbrokers only. In that context, he repeats the contents of the statement of claim.
2	Full and detailed particulars of the relationship alleged to exist between Mr O'Meara and BoNY, stating whether such is said to give rise to a duty of care or a contractual claim.	The Plaintiff will deal with particulars relevant and necessary to the defence of Goodbody Stockbrokers only. In that context, he repeats the contents of the statement of claim.
5	Full and detailed particulars of each and every breach of statutory duty alleged, identifying the section or subsection of statute relied upon.	Not matters for particulars.
6	Whether it is alleged that Mr O'Meara would have exercised the option to buy and whether he has since bought or sold Anheuser-Busch shares.	Not matters for particulars.

7	Whether Mr O'Meara received any payment by reference to the non-exercise of the rights issue...and the difference in value between the applicable share value and the amount received.	Not matters for particulars.
10	Full and detailed particulars of the claim made by Mr O'Meara in respect of funds, profits, dividends, interest payments, commission, and other rights generated with the shares.	Unknown pending discovery.
11	The nature of any rights attaching to the Anheuser-Busch shares which give rise to any loss beyond share value plus dividend loss.	Unknown pending discovery.
12	Full and detailed particulars of the loss and damage alleged by Mr O'Meara.	Unknown pending discovery.
13	Full and detailed particulars of the facts alleged to entitle Mr O'Meara to aggravated or exemplary damages.	See the Statement of Claim.
14	Full and detailed particulars of the claim for misrepresentation.	See the Statement of Claim.
15	(By reference to the statement of claim), whether it is being suggested that one or other of the defendants acquired Mr O'Meara's rights issues themselves.	Unknown pending discovery. See the Statement of Claim.
16	The period for which Mr O'Meara held his existing shareholding in Anheuser-Busch (and if disposed of, when and for what price).	Not matters for particulars.

4. It is difficult to see in any of the above-mentioned categories of particulars anything other than a legitimate and reasonable attempt by Goodbody Stockbrokers to get an appropriately informed sense of the case that they will have to meet. The court does not see in the categories of particulars sought an attempt to interrogate aggressively Mr O'Meara's case by raising wide-ranging, standardised or irrelevant particulars. Each of the categories is focused and seeks to elicit information that will yield in broad outline the case that Goodbody Stockbrokers will have to meet. The phrase "*broad outline*", in this regard, derives from the decision of the Supreme Court in *Mahon* (considered below) and does not mean so broad as to leave a defendant in real doubt as to what has been claimed, which is the case so far here, but broad enough that he knows what has been claimed, having regard to the fact that the dispute between the parties will ultimately be decided by reference to whatever evidence is adduced at trial. The effect of Mr O'Meara's statement of claim, coupled with the above replies to particulars, is that Goodbody Stockbrokers are left at this time with a 'dot to dot' impression of the case that is being made against them; it behoves Mr O'Meara now to draw the lines between those dots, so that the broad outline of the case he seeks to make is clear, with the full colour of that case to be sketched at the court of trial.

## Part 2

### Applicable Case-Law

i. Aranwell.

5. In the course of argument, the court was referred to two cases. The first is the judgment of Herbert J. in *Aranwell Limited v. Pura Food Products Limited and anor* (Unreported, High Court, Herbert J., 23rd April, 2004). In his judgment, Herbert J. recalls that O.19, r.3 of the Rules of the Superior Courts provides (and it still provides) that "*Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies...but not the evidence by which they are to be proved.*" Herbert J. further recalls that O.19, r.7(1) provides (and it still provides) that "*A further and better statement of the nature of the claim...or further and better particulars of any matter stated in any pleading...may, in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.*". And he recalls the well-known, since-approved, oft relied upon, and still pertinent observations of FitzGerald J. in *Mahon v. Celbridge Spinning Co. Ltd.* [1967] I.R. 1,3 as to the purpose of pleadings:

*"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 it will have to meet at the trial."*

6. Even applying this basic but compendious dictum to the facts at hand, one can immediately see difficulties arising as regards the above-mentioned replies. In a case featuring three defendants, Mr O'Meara indicates that he will confine his replies to his case insofar as it relates to one defendant only; the balance of his case, even though joint and several liability is alleged, is to be kept secret. (Replies 1, 2). He declines to indicate what breaches of statute he is alleging to arise. (Reply 5). He declines to indicate some of what he is alleging. (Reply 6). He declines to indicate the basis for the loss suffered. (Reply 7). In a claim that he himself has brought, consequent, presumably, on perceived damage suffered, Mr O'Meara indicates that he does not even know what loss he is claiming until he has obtained discovery. (Replies 10, 11, 12). He declines to indicate the basis for his claim of aggravated and exemplary damages. (Reply 13). In breach of O.19, r. 5(2) of the Rules of the Superior Courts, which requires that "*In all cases alleging misrepresentation...particulars...shall be set out in the pleadings*", he declines to detail his claim for misrepresentation – a most serious charge to level at a regulated financial service provider. Mr O'Meara cannot even indicate what he is suggesting about the defendants having acquired, and it does appear that he is making some claim as to the defendants having acquired, the rights issues

themselves. (Reply 15). Even the most basic of information relevant to the damages sought (the period for which he held his shares and the price for which they were disposed) is to be kept from Goodbody Stockbrokers. (Reply 16). In Mr O'Meara's refusal to divulge multiple pertinent facts is a failure to let Goodbody Stockbrokers know in advance, in broad outline, the case it will have to meet at trial, and so a failure to meet the basic standard established in *Mahon* and rightly and repeatedly demanded by our courts in the years since.

7. In his judgment in *Aranwell*, Herbert J. proceeds carefully to indicate where he considers that the statement of claim before him has set out matters with sufficient particularity and where further particulars are to be ordered, so as (at 3) "to prevent the defendants from being taken by surprise at the hearing of the case by the introduction of matters not fairly to be ascertained from the pleadings, to save time at the hearing, or to save costs". Though the court will return in greater detail below to the specific particulars sought in the within applications, suffice it to note at this point that it considers that the statement of claim, coupled with the replies to particulars received by Goodbody Stockbrokers at this time, will, if matters are allowed to proceed uncorrected, undoubtedly yield a situation in which Goodbody Stockbrokers stand to be surprised on a number of fronts in the court of trial. This will yield a consequent waste of time at hearing and needless expenditure of client monies, even though matters can be resolved simply and swiftly through the ordering of further and better particulars at this time.

8. Herbert J.'s judgment is also of interest when it comes to the issue of particulars of damage. Thus, in the course of his judgment, Herbert J. adopts, at 18, as "the rule in this Jurisdiction also", certain observations of Lord Donovan in *Perestrello é Companhia Limitada v. United Paint Company Limited* [1969] 3 All E.R. 479, as to the need to plead and particularise damage claimed. In *Perestrello*, Lord Donovan refers, at 486, to:

*"...the plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses and loss of earnings incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded.*

*The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim on a precise calculation must give the defendant access to the facts which make such calculation possible.*

*The matter is clearly stated in Mayne and MacGregor on Damages (12th edition, 1961) in paragraph 970 where the learned editors write:*

*'Special damage consists in all items of loss which must be specified by [the plaintiff] before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence or of the specific amount of claim which he will be confronted with at the trial.'*

9. Mr O'Meara has failed completely at this time to apprise Goodbody Stockbrokers of the type of information to which Lord Donovan refers and of which he must be in possession: why, after all, would he commence proceedings claiming a loss if he did not know, at least with some degree of accuracy, what loss of the type referred to above he had suffered?

ii. Quinn Insurance.

10. In *Quinn Insurance Limited and ors v. Tribune Newspapers plc and ors* [2009] IEHC 229, Dunne J. had to grapple with the issue of the proper place of particulars in pleadings. After referring to the above-quoted dictum of FitzGerald J. in *Mahon*, Dunne J. makes a couple of supplementary points.

11. First, she refers with approval to the following observations of Finnegan P. in *ASI Sugar Ltd. v. Greencore Group plc* (Unreported, High Court, Finnegan P., 11th February, 2003), a case which itself relied on the leading decision of the Supreme Court in *McGee v. O'Reilly* [1996] 2 I.R. 229:

*"The function of pleadings is to define with clarity and precision the issues of fact and law between the parties. Where issues are so defined, each party will have given fair and proper notice to his opponent of the case he has to meet and each party will be enabled to prepare his own case for trial. Discovery can be directed to the issues and the delay and expense thereby incurred, minimised: this is particularly important in a case such as the present where discovery, even with the issues so defined, will be expensive. Further, this will enable the court to be aware of the issues before it and the trial judge will thereby be better enabled to control the hearing and confine the same within the limits of the pleadings. See McGee v. O'Reilly".*

12. Perhaps three points of especial note arise from the above-quoted text. First, whereas FitzGerald J. had referred to knowing a plaintiff's case "in broad outline", Finnegan P., drawing on *McGee*, appears, though ultimately it is the Supreme Court precedent that prevails, to pitch the threshold slightly higher, stating the need to "define with clarity and precision" the issues of fact and law between the parties. Second, Finnegan P. draws a link between proper pleadings and efficient discovery, a point of especial importance in an age when discovery so often has the potential to be so burdensome. Third, Finnegan P. points to the connection between proper pleadings and the efficient administration of justice.

13. Second, Dunne J. refers to an aspect of matters which the court has touched upon above, viz. the centrality of trial proceedings in our system of justice, with pleadings but a prelude to that central event. Dunne J. refers in this regard to the following observations of Keane J. in *McGee*, at 234:

*"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."*

iii. A Synthesis of Requirements and Principles.

14. The above is by no means a complete analysis of the case-law relevant to this area of the law. Even so, it is possible to identify from *Aranwell* and *Quinn* and the rules of court and case-law that they touch upon, certain key requirements and principles that are of relevance to the within application and which might perhaps be synthesised as follows:

(i) "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies...but not the evidence by which they are to be proved." (O.19, r.3).

(ii) "In all cases alleging misrepresentation...particulars...shall be set out in the pleadings". (O.19, r.5(2)).

(iii) "A further and better statement of the nature of the claim...or further and better particulars of any matter stated in any pleading...may, in all cases be ordered, upon such terms, as to costs and otherwise, as may be just". (O.19, r.7(1)).

(iv) "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 it will have to meet at the trial." (Mahon; cf. ASI).

(v) It is appropriate to order further particulars "to prevent the defendants from being taken by surprise at the hearing of the case by the introduction of matters not fairly to be ascertained from the pleadings, to save time at the hearing, or to save costs". (Aranwell).

(vi) A plaintiff is required "to plead and particularise any item of damage which represents out-of-pocket expenses and loss of earnings incurred prior to the trial, and which is capable of substantially exact calculation [i.e special damages] ....because a plaintiff who has the advantage of being able to base his claim on a precise calculation must give the defendant access to the facts which make such calculation possible. (Aranwell, Perestrello)

(vii) There is an important link between (a) proper pleadings and efficient discovery, and (b) proper pleadings and the efficient administration of justice. (ASI).

(viii) The centrality of trial proceedings to our court-administered system of justice requires to be borne in mind. "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." (McGee).

### Part 3

#### Conclusions

15. With the above case-law and principles in mind, the court turns to consider the present application for further and better particulars sought, indicating sequentially the particulars sought, the reply given thus far, and what order the court will make.

16. *Particulars Sought: [1] Full and detailed particulars of the relationship alleged to exist between Mr O'Meara and Pershing, stating whether such is said to give rise to a duty of care or a contractual claim.*

*Summary of Reply Received: Mr O'Meara will deal with particulars relevant and necessary to the defence of Goodbody Stockbrokers only. In that context, he repeats the contents of the statement of claim.*

Court Response: To borrow from the observations of FitzGerald J. in *Mahon*, "[A] party should know in advance, in broad outline, the case will have to meet at the trial." This basic threshold is not met if the plaintiff, in a case brought by him against multiple defendants and alleging joint and several liability, declines to identify the claim made against one defendant *vis-à-vis* another. If, in such a case, one defendant does not know what is being alleged against it *vis-à-vis* another, then it has no way of knowing what in truth is the case that it will have to meet at trial. The court will order that further and better particulars be provided in this regard.

17. *Particulars Sought: [2] Full and detailed particulars of the relationship alleged to exist between Mr O'Meara and BoNY, stating whether such is said to give rise to a duty of care or a contractual claim.*

*Summary of Reply Received: The Plaintiff will deal with particulars relevant and necessary to the defence of Goodbody Stockbrokers only. In that context, he repeats the contents of the statement of claim.*

Court Response: Same as response to [1].

18. *Particulars Sought: [5] Full and detailed particulars of each and every breach of statutory duty alleged, identifying the section or subsection of statute relied upon.*

*Summary of Reply Received: Not matters for particulars.*

Court Response: The Unfair Commercial Practices Directive, as implemented, (and also the various MiFID regulations) to which the statement of claim refers are so wide-ranging and detailed, creating all manner of legal responsibilities, that for Mr O'Meara to decline to identify with some greater precision what is being alleged, is in effect to require that a defence be prepared almost *in vacuo*, and certainly in a manner that is unfeasible, inefficient, and likely to involve unnecessary cost and perhaps even wasted court time. The court will therefore order that further and better particulars be provided in this regard.

19. *Particulars Sought: [6] Whether it is alleged that Mr O'Meara would have exercised the option to buy and whether he has since bought or sold Anheuser-Busch shares.*

*Summary of Reply Received: Not matters for particulars.*

Court Response: This issue is a central issue so far as the pleading and particularisation of special damages are concerned. The court will therefore order that further and better particulars be provided in this regard.

20. *Particulars Sought: [7] Whether Mr O'Meara received any payment by reference to the non-exercise of the rights issue...and the difference in value between the applicable share value and the amount received.*

*Summary of Reply Received: Not matters for particulars.*

Court Response: Same as response to [6].

*21. Particulars Sought: [10] Full and detailed particulars of the claim made by Mr O'Meara in respect of funds, profits, dividends, interest payments, commission, and other rights generated with the shares.*

*Summary of Reply Received: Unknown pending discovery.*

Court Response: Same as response to [6].

*22. Particulars Sought: [11] The nature of any rights attaching to the Anheuser-Busch shares which give rise to any loss beyond share value plus dividend loss.*

*Summary of Reply Received: Unknown pending discovery.*

Court Response: Mr O'Meara is or was a shareholder of Anheuser-Busch. It seems very unlikely that he does not know, to at least some level of detail, the terms and conditions attaching to the shares that he holds/held. This issue also goes to the particularisation of special damages. The court will therefore order that further and better particulars be provided in this regard.

*23. Particulars Sought: [12] Full and detailed particulars of the loss and damage alleged by Mr O'Meara.*

*Summary of Reply Received: Unknown pending discovery.*

Court Response: The court must admit to surprise that Mr O'Meara who has commenced these proceedings and who claims to have suffered loss and damage is unable to provide any particulars as to that loss and damage at this time. This category also goes to the particularisation of special damages. The court will therefore order that further and better particulars be provided in this regard.

*24. Particulars Sought: [13] Full and detailed particulars of the facts alleged to entitle Mr O'Meara to aggravated or exemplary damages.*

*Summary of Reply Received: See Statement of Claim.*

Court Response: The court has seen the statement of claim and, without seeking in any way to adjudicate on whether aggravated or exemplary damages might ultimately be ordered, Mr O'Meara will need to provide further and better particulars in this regard if he is to satisfy the requirement post-Mahon that a party should know in advance, in broad outline, the case it will have to meet at the trial."

*25. Particulars Sought: [14] Full and detailed particulars of the claim for misrepresentation.*

*Summary of Reply Received: See Statement of Claim.*

Court Response: As mentioned previously above, in breach of O.19, r. 5(2) of the Rules of the Superior Courts, which requires that "In all cases alleging misrepresentation...particulars...shall be set out in the pleadings", Mr O'Meara has declined to detail his claim for misrepresentation, itself a most serious charge to level any person, and perhaps especially at a regulated financial service provider which would almost certainly find itself in difficulty with its regulator/s were such an accusation to be sustained in court. The court will order that further and better particulars be provided in this regard.

*26. Particulars Sought: [15] (By reference to the statement of claim), whether it is being suggested that one or other of the defendants acquired Mr O'Meara's rights issues themselves.*

*Summary of Reply Received: Unknown pending discovery. See Statement of Claim.*

Court Response: To borrow from the observations of FitzGerald J. in Mahon, "[A] party should know in advance, in broad outline, the case it will have to meet at the trial." This basic threshold is not met if the plaintiff cannot even indicate what he is suggesting about the defendants having acquired (and it does appear that he is making some claim as to the defendants having acquired) the rights issues themselves. The court will order that further and better particulars be provided in this regard.

*27. Particulars Sought: [16] The period for which Mr O'Meara held his existing shareholding in Anheuser-Busch (and if disposed of, when and for what price).*

*Summary of Reply Received: Not matters for particulars.*

Court Response: To borrow again from the observations of FitzGerald J. in Mahon, "[A] party should know in advance, in broad outline, the case it will have to meet at the trial." This basic threshold does not appear to the court to be met, if the plaintiff cannot even indicate the most basic of information relevant to the damages sought – how long he held his shares for, and the price for which they were disposed. The court will order that further and better particulars be provided in this regard.