

THE HIGH COURT

[2006 No. 593P]
[2006 No. 40 COM]

BETWEEN

VINCENT KEANEY

PLAINTIFF

AND

JAMES SULLIVAN (FIRST DEFENDANT), JOAN SULLIVAN (SECOND DEFENDANT), ST. JOHN CULLIGAN (THIRD DEFENDANT), MICHAEL NOLAN (FOURTH DEFENDANT), TITANIC QUEENSTOWN TRADING COMPANY LIMITED, (IN LIQUIDATION) (FIFTH DEFENDANT), MAGPIE INTERNATIONAL HOLDING COMPANY LIMITED (IN LIQUIDATION) (SIXTH DEFENDANT), TITANIC QUEENSTOWN MEMORABILA LIMITED, (IN LIQUIDATION) (SEVENTH DEFENDANT), ALLIED IRISH BANKS PLC, (EIGHTH DEFENDANT), Q.E.F. GLOBAL LIMITED (NINTH DEFENDANT), ROGER DUNCAN, GEOFFREY LEWIS, DAVID MARSH, TOM MOORE, DECLAN O'LUANAIGH, NEIL PAYNE, DAVID ISAACSON (CARRYING ON PRACTICE UNDER THE STYLE AND TITLE OF ORMSBY RHODES AND BKR ORMSBY RHODES (TENTH TO SIXTEENTH DEFENDANTS), TREGAN PROPERTIES LIMITED (SEVENTEENTH DEFENDANT)

AND

JULIA NOLAN (EIGHTEENTH DEFENDANT)

DEFENDANTS

Judgment of Ms. Justice Finlay Geoghegan delivered on the 16th January, 2007.

1. The plaintiff won a significant sum of money in the Lotto in the 1990's. In 1996, he acquired a premises known as Scotts Building in Cobh, Co. Cork and decided to establish and run a theme bar to be known as the Titanic Bar. In 2000, he retained the services of the first defendant a chartered accountant as financial advisor and to seek an investment partner. The fourth defendant Michael Nolan was identified as such a person, in relation to a joint venture for the premises acquired and the pub to be run therein. In 2000, the plaintiff and the fourth defendant entered into a "Heads of Agreement" and subsequent transactions pursuant thereto. These included a deed of assignment of the 20th October, 2000, by the plaintiff to himself and the fourth named defendant as tenants in common in equal shares of the premises known as Scotts Building; the incorporation of Titanic Queenstown Trading Company Limited ("TQT Company") on the 11th August, 2000 and the granting to it of a lease of the said premises. It was agreed that the proposed pub, the Titanic Bar was to be operated and run by TQT Company which was owned as to 49% by the plaintiff and 51% by the fourth defendant. The publican's licence originally obtained in July, 2000, in the name of the plaintiff was transferred to TQT Company in September, 2001.

2. TQT Company traded as Titanic Bar until December 2002. In July, 2003, the plaintiff and the fourth defendant entered into "heads of agreement legally binding" on 2nd July, 2003 and pursuant thereto entered into a further series of agreements, deeds and share transfers. These included a contract for sale of the plaintiff's interest in the Titanic Bar premises dated the 24th July, 2003; a deed of assignment between the plaintiff and the fourth and eighteenth defendants of the plaintiff's interests in the premises; a transfer of the plaintiff's 49% shareholding in TQT Company to the fourth defendant and a deed of release and other documents referred to in paragraph 62 of the statement of claim. The intended effect of these transactions appears to have been to separate the business and property interests of the plaintiff and fourth defendant.

3. The plaintiff in these proceedings by plenary summons issued in 2006, has brought multiple claims and made many allegations against the 18 defendants arising out of the transactions entered into in 2000, the running of the pub between 2000 and 2003 and the transactions in 2003. He seeks *inter alia* to set aside all the transactions, deeds and property transfers entered into and effected both in 2000 and 2003.

4. Following commencement of the proceedings the fourth defendant, Michael Nolan, the seventeenth named defendant, Tregan Properties Limited and the eighteenth defendant Julia Nolan, his wife made application for admission to the Commercial List. On the 3rd April, 2006, Kelly J. entered the proceedings into the Commercial List and treated the motion as the initial directions hearing. He further ordered that the plaintiff deliver a statement of claim on or before the 13th April, 2006.

5. On the 24th April, 2006, at a further hearing of the directions motion on complaint from a number of the defendants in relation to the form of the statement of claim delivered Kelly J. ordered that: "the plaintiff be at liberty to deliver an amended statement of claim herein by close of business on Monday 8th May, 2006, the said statement of claim to be properly drafted, in the proper form and properly particularised."

6. An amended statement of claim was delivered on the 8th May, 2006.

7. The defendants were further given liberty on the 24th April, 2006, to bring notices of motion for orders dismissing or striking out the proceedings within a period of two weeks from receipt of the amended statement of claim.

8. Pursuant to this liberty four separate notices of motion were issued on behalf of:

- (1) The third, fourth, ninth, seventeenth and eighteenth defendants
- (2) The eighth defendant
- (3) The first defendant
- (4) The tenth to sixteenth defendants.

9. In each of those notices of motion applications are made for orders striking out all or part of the plaintiff's pleadings and/or proceedings against the applicant defendants pursuant to O. 19, rr. 27, 28 and/or the inherent jurisdiction of the court. The precise relief and grounds relied upon differ slightly between the notices of motion and to the extent necessary will be referred to below. All the notices of motion seek orders striking out all or part of the proceedings pursuant to the inherent jurisdiction of the court. Affidavits were sworn in support of those applications and replying affidavits from the plaintiff.

10. On the 3rd July, 2006, at the hearing of the directions motion Kelly J. being satisfied that the relevant affidavit evidence on the motions of the defendants was complete and that the relevant written legal submissions had been exchanged, fixed the hearing of the motions for the 25th July, 2006.

11. On the 24th July, 2006, the plaintiff, without leave of the court purported to deliver a further amended statement of claim. At the hearing on the 25th July, as these were motions to strike out all or part of the proceedings against the relevant defendants, it was accepted that the court should take into account the further proposed amendments in the statement of claim dated the 24th July, 2006, in determining the applications to strike out all or part of the pleadings. It is therefore by reference to that document hereinafter referred to as "the statement of claim" that these applications will be determined.

Application of Third, Fourth, Ninth, Seventeenth and Eighteenth Defendants

12. The third, fourth, ninth, seventeenth and eighteenth defendants are jointly represented and in their notice of motion seek orders striking out all or part of the amended statement of claim delivered on the 8th May, 2006, as against those defendants. They advance a number of distinct grounds relating to the multiple and differing claims. It is proposed firstly to consider the application for an order pursuant to the inherent jurisdiction of the court striking out almost all claims of fraud, deceit, misrepresentation and/or undue influence against those defendants by reason of the failure of the statement of claim to particularise the allegations as required by O. 19, r. 5(2).

Breach of Order 19 Rule 5(2)

13. Of these defendants, the primary defendant is the fourth defendant, Michael Nolan. Further the core of the plaintiff's claim against Mr. Nolan appears to be based upon allegations of fraud, deceit, misrepresentation and/or undue influence.

14. It is on the basis of such allegations that the plaintiff seeks to set aside all agreements and deeds entered into both in 2000 and 2003 with the fourth named defendant.

15. O. 19, r. 5(2) of the Rules of the Superior Courts provides:

"(2) 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."

16. This express requirement of the Rules is in accordance with the long established practice of the courts to require allegations of fraud to be pleaded with particularity. Delaney and McGrath, Civil Procedure in the Superior Courts (2nd Ed.) summarise the position correctly in my view at para. 5.38:

"(b) Allegations of Fraud

5.38 The long established practice of the courts has been to require allegations of fraud to be pleaded with particularity. Rule 5(2) now provides that, in all cases alleging misrepresentation, fraud, breach of trust, wilful or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) must be set out in the pleadings. The rationale of this requirement was explained by Barrington J. in *Hanly v. Finnerty* in relation to a plea of undue influence as follows:

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.

5.39 Thus, a party is not only required to expressly plead fraud or misrepresentation etc., but he must also give full particulars of its nature and how it is alleged to have occurred. However, it should be noted that, given the difficulty of proving fraudulent intention, malice or any other condition of the mind (which is often a matter of inference to be drawn from the proven facts), it suffices to allege this as a fact without setting out the circumstances from which the same is to be inferred."

17. The defendants also rely upon the pleading requirement as set out in *Bullen and Leake* (12th Ed.) 1975, in relation to the equivalent English rule where at pp 452-453 it states:

"The Statement of Claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrance v. Lord Norreys* (1890) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy v. Garrett* (1878) 7 Ch.D. 473 at 489). 'General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice'

...

Particulars. Full particulars of any misrepresentation relied on must be given in the pleading (R.S.C., Ord. 18, r. 12 (1) (a)). The Statement of Claim must show the nature and extent of each alleged misrepresentation (*Newport Dry Dock & Engineering Co. v. Paynter* (1886) 34 Ch.D. 88) and it must contain particulars showing by whom and to whom it was made, and whether orally or in writing, and if in writing, identifying the relevant document (*Seligmann v. Young* [1884] W.N. 93). Where the plaintiff alleged that the entries made by the defendant in certain books were false, he was ordered in the first place to give particulars of entries which he alleged to be false, and subsequently to give further particulars showing in what respects each of these entries was false (*Newport Dry Dock & Engineering Co. v. Paynter*, ante); "all the accounts rendered to the plaintiff are untrue" did not comply with an order for further particulars of fraud (*Harbord v. Monk* (1878) 38 L.T. 411).

Moreover, the necessary particulars of the fraudulent intention relied on must also be contained in the pleading (R.S.C., Ord. 18, r. 12 (1) (b)), and accordingly, the pleadings must set out the facts, matters and circumstances relied on to show that the party charged had or was activated by a fraudulent intention."

18. I am satisfied that the above is also a correct statement of the pleading requirements in this jurisdiction. The above special requirements in relation to the particulars required where there are pleas of fraud, misrepresentation, undue influence or deceit must also be considered in the context of the general rules as to what ought to be included in a statement of claim. This is well summarised in Delaney and McGrath (2nd Edition) at para. 5.74 to 5.75 where they state:

"5.74 The statement of claim must set out the plaintiff's claim and the relief sought with clarity and particularity in accordance with the principles of pleading set out above. Thus, it should state specifically the relief which the plaintiff claims, either simply or in the alternative. It is important to note that a cause of action must be pleaded in the main body of the statement of claim and it will not be regarded as having been pleaded if it is merely mentioned in the prayer for relief at the end.

5.75 If the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they should be stated, so far as possible, separately and distinctly. It should be noted that there is nothing to prevent the plaintiff setting up two or more separate claims and claiming relief in respect thereto in the alternative."

19. Regretfully, it must be observed that notwithstanding that it is the third attempt to formulate properly and with appropriate particulars the plaintiff's claims against the defendants herein, the statement of claim under consideration not only fails to particularise many allegations but also fails in many respects to set out with clarity the causes of action pleaded and reliefs sought against the defendants. The statement of claim has now 99 paragraphs but nevertheless it remains difficult in many instances to identify the distinct claims and causes of action sought to be pleaded and reliefs claimed in respect of the relevant causes of action.

20. The defendants' application to strike out so much of the claim as alleges deceit, fraud, misrepresentation or undue influence by reason of the plaintiff's failure to comply with O. 19, r. 5(2) is pursuant to the inherent jurisdiction of the court. It is not disputed on behalf of the plaintiff that the court has an inherent jurisdiction to strike out such claims by reason of failure to comply with O. 19, r. 5(2). As previously stated, the original complaint in relation to the lack of particularity was made before the court on a hearing of the directions motion in the commercial list on 24 April 2006. The plaintiff was then given an opportunity to deliver an amended statement of claim and it was specifically ordered that it be in proper form and particularised. Such statement of claim was delivered on the 8th May, 2006, in purported compliance with the order to particularise the claims. The plaintiff having had and considered the full legal submissions of the defendants in these motions has attempted to deliver yet a further amended statement of claim dated the 24th July, 2006. Accordingly it appears that if the court concludes that the claims are not now particularised as required by O. 19, r. 5(2) that the time has come when the court must strike out the relevant claims of the plaintiff herein.

21. The claims against the fourth defendant which allege fraud, deceit, misrepresentation and undue influence in the statement of claim and which it is contended are not particularised as required by O. 19 r. 5(2) may be summarised as follows:

1. The claims in paragraphs 25, 26 and 28 of the statement of claim upon the basis of which the plaintiff seeks to have the heads of agreement of 2000 and deed of assignment of the premises known as Scotts Buildings of the 20th October, 2000, set aside or declared void.
2. The claims made in paragraph 51; and
3. The claims made in paragraphs 62 to 71 inclusive on the basis of which the plaintiff seeks to have set aside or declared void all the agreements, deeds and share transfers entered into in July, 2003.

22. I have considered carefully each of the above sets of pleas and concluded that none satisfy the requirements of O. 19, r. 5(2).

23. The allegations made in paragraphs 25, 26 and 28 contain no particulars and are simply general allegations.

24. Paragraph 51 states at the outset:

"The plaintiff claims deceit, conspiracy, fraud, forgery of documents, breach of fiduciary duty, negligence and breach of contract against the fourth named defendant;—"

25. There then follows a series of individual paragraphs under roman numerals dealing with separate matters, the majority of which relate to the running of the Titanic Bar (and certain of which are objected to as not disclosing a cause of action on other grounds referred to below).

26. The plaintiff does not expressly seek to set aside any document based on these allegations. The plaintiff makes no express claim of any loss or damage by reason of any of the matters alleged therein.

27. Even if the court were to imply an allegation of loss and damage suffered by the plaintiff by reason of the matters pleaded and assume that the plaintiff may be seeking to pursue a claim for damages for the tort of deceit, paragraph 51 does not contain any of the essential elements of the tort of deceit which must be pleaded and proved. *Bullen & Leach* (12th Edition 1975) at p. 450 sets those out as follows:

"In order to sustain the common law action of deceit, the following facts must be established, i.e. they must be pleaded and proved, namely:

- (1) there must be a representation of fact made by words or by conduct, and mere silence is not enough;
- (2) the representation must be made with knowledge that it is false, i.e. it must be wilfully false or at least made in the absence of any genuine belief that it is true;
- (3) the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in a manner which resulted in damage to him;
- (4) it must be proved that the plaintiff acted upon the false statement; and
- (5) it must be proved that the plaintiff has sustained damage by so doing (see *Bradford Third Equitable Benefit Building Society v. Bowers* [1941] 2 All E.R. 205, per Viscount Maugham at 211)."

28. Insofar as any of the subparagraphs of paragraph 51 may be intended as supporting the claims made to set aside the 2000 documents or 2003 documents they do not contain any additional particulars which would satisfy the requirements of O. 19, r. 5(2).

29. Reading paragraphs 62 to 71 of the statement of claim in a manner most favourable to the plaintiff they seek to allege that the

plaintiff was wrongfully induced, to enter into a series of transactions in July, 2003 and a deed of assignment dated the 30th September, 2004, by reason of alleged fraudulent and/or negligent misrepresentations of the fourth defendant, his servants or agents.

30. Particulars of the alleged fraudulent or negligent misrepresentation are set out in paragraphs 64 to 71 inclusive in the following terms:

"64. Representing that draft audited financial statements of the Fifth Named Defendant (for the Titanic Bar) for 15 months to 31 December 2001 were a true and accurate statement of the accounts and affairs of that Company when in fact such accounts were not true or accurate,

(a) They failed to account for all the income of the Company.

(b) Same concealed monies that were misappropriated.

(c) Same misinterpreted and/or misrepresented expenditure.

(d) They misstated the purported Director's loan attributable to the Fourth Named Defendant, misstated the true reason and nature of financial losses, and portrayed serious financial losses and misstated that the Titanic Bar was not capable of recovery or profitability.[sic]

without disclosing, *inter alia*, long term and wholesale illegality, irregularity, breaches of company law and the conversion of funds/takings to the account of the Fourth Named Defendant herein.

65. Representing that the Plaintiff and Fourth Named Defendant had joint personal indebtedness to AIB plc, Midleton totalling €1,265,719.81 as of 5th February, 2003 (as per letter of that date) from the said Bank calling for payment, whereas in fact this was misstated due to the misappropriation of Company income and fraudulent trading, payment of non Company debts from Company monies which Company monies had in turn been misappropriated.

66. Representing that the Titanic Bar was not trading and could not trade profitably, when in fact it was trading profitably or alternatively was capable of trading profitably if run in a regular and legal manner.

67. Representing to the accountant Mr. David Hyland engaged by the Plaintiff to investigate the affairs of the Company and to the Plaintiff that management accounts for the Titanic Bar were true and accurate and regular when they were not.

68. Failure to furnish bank statements as appropriate despite request [sic] by the Plaintiff.

69. Representing to the said Mr. David Hyland (an accountant on behalf of the Plaintiff) at meetings on 14th October 2002, 5th November 2002 and 15th November 2002 that all the information and documents sought by Mr. Hyland at those meetings and in writing and by fax and phone would be made available to him, when the Third and/or Fourth Named Defendant their servants or agents had no intention(s) of providing full information on the accounts and affairs of the Titanic Bar.

70.

a. Concealing from the Plaintiff and/or his accountant Mr Hyland and/or his solicitor, and/or remaining silent in relation to, the full extent and detail of the irregularities and deceit in relation to the trading of the Company, and related companies controlled by the Fourth Named Defendant.

b. Concealing banking arrangements hereinbefore pleaded when the Fourth Named Defendant his servants or agents including the Third Named Defendant and AIB PLC, Midleton or one or more of them owed a duty, fiduciary or otherwise, to the Plaintiff of full disclosure in all the circumstances.

c. Concealing and breaching fiduciary duty, in particular where the Plaintiff and Fourth Named defendant were co-directors, and the Third Named Defendant (accountant) held himself out as director and manager, and where the Plaintiff required honesty from his co-directors to assess the true affairs of the business and the true value of his assets and shareholding in 2003.

71. By letter dated 16th May 2003 from Messrs O'Flynn Exhams Solicitors for the Fourth Named Defendant the said solicitors in writing purportedly deny "mismanagement and impropriety" of any sort in relation to the management of the affairs of the Company/the Titanic Bar. This statement on behalf of the Fourth Named Defendant was untrue but induced the Plaintiff to believe that the Company had been legally and properly managed whilst being unprofitable in the public house trade, and induced the Plaintiff, *inter alia*, to enter into the purported Heads of Agreement of 2003 and to release his 49% shareholding (also challenged in title) and his remaining 50% interest in the Scotts Building, and to execute further documentation on 24th July 2003."

31. In accordance with the principles set out above the particulars in the statement of claim must include the nature and extent of each alleged misrepresentation. The particulars must also show by whom and to whom the alleged representations were made and whether orally or in writing, and, if in writing identify the relevant document.

32. Whilst certain of the above paragraphs identify the matters to which it is alleged the misrepresentation related, there is a failure to identify the nature or extent of any of the alleged misrepresentations. In many there is also a failure to identify the persons by whom or to whom they are alleged to have been made and how made (whether orally or in writing).

33. Accordingly I have concluded that the fourth defendant is entitled to an order striking all of the above claims which are all the claims that allege deceit, fraud, misrepresentation or undue influence against him save to the extent that such claims are included in the claims in paragraphs 73 and 74 referred to below. No objection was rightly made on his behalf to the particulars given in respect

of those claims.

Claims of Fraud and Deceit Against the Third Named Defendant

34. The plaintiff also makes allegations of fraud and deceit against the third defendant in paragraphs 41, 44, 45 and 48 in the statement of claim. I have likewise formed the view that such allegations are not particularised as required by O.19, r. 5(2). I have formed this view independently of whether the matters pleaded constitute a cause of action against the third defendant.

Other Grounds

35. Counsel for these defendants submit that all the remaining claims against these defendants should now be struck out either pursuant to O. 19, rr. 27 or 28 or pursuant to the inherent jurisdiction of the court on one or more of the following grounds:

(i) They disclose no reasonable cause of action against these defendants; and/or

(ii) They are frivolous or vexatious; and/or

(iii) They must fail or are unsustainable as that term has been used by the Supreme Court in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 and *O'Neill v. Ryan* [1993] ILRM 557.

36. The first two grounds need no elaboration. The nature of the third ground is clearly set out by Blayney J. in *O'Neill v. Ryan* where in relation to a similar ground advanced in that case he states at p. 561:

"The second ground invokes an aspect of the inherent jurisdiction of the court which was defined as follows recently by Costello J. in *D.K. v. A.K.*, High Court, 1990 No. 5306P, 2 October 1992:

The principles on which the court will exercise its inherent jurisdiction to strike out a plaintiff's action can be shortly stated. Basically the jurisdiction exists to ensure that an abuse of the court's process does not take place. If it is established by satisfactory evidence that the proceedings are frivolous or vexatious or if it is clear that the plaintiff's claim must fail then the court may stay the action. But it will only exercise this jurisdiction sparingly and in clear cases (*Barry v. Buckley* [1981] IR 306; *Sun Fat Chan v. Osseous Ltd* [1992] 1 IR 425.

Having expressed the view that the plaintiff's claims there were neither frivolous nor vexatious Costello J went on to say:

What I am required to consider therefore is whether any of the claims against all or any of the defendants is so clearly unsustainable that I should strike it out.

I am satisfied that this is a correct statement of the law."

37. The requirement that the High Court only exercise this jurisdiction sparingly derives from the caution expressed by McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 where at pp 428-429 he stated:

"By way of qualification of the jurisdiction to dismiss an action at the statement of claim stage, I incline to the view that if the statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed.

Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought.

Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture. With that qualification, however, I recognise the enforcement of a jurisdiction of this kind as a healthy development in our jurisprudence and one not to be disowned for its novelty though there may be a certain sense of disquiet at its rigour."

38. I now propose considering the remaining claims pleaded against these defendants in accordance with the above principles. By reason of the nature of the pleading there is some difficulty in differentiating and identifying claims. As this is an application to strike out I have attempted to do so in a manner most lenient to the plaintiff. However it also has to be recalled as set out above the purpose of this jurisdiction is to prevent an abuse of process. It would be such an abuse of process to require 18 defendants to defend proceedings with very many serious allegations unless those allegations constitute identifiable causes of action pleaded against the relevant defendant and are not ones which are either unsustainable or must fail.

39. Having regard to the claims which I have already determined should be struck out for failure to particularise the allegations of deceit, fraud etc. the only remaining claim upon the basis of which the plaintiff seeks to set aside any transactions or documents with the fourth and/or eighteenth defendants are those contained in paragraphs 73 and 74 of the statement of claim. Those claims relate to two distinct matters:

1. The deed of assignment now dated 30th September, 2004, (but alleged to have been executed on 24th July, 2003) between the plaintiff and the fourth and eighteenth defendants in relation to the premises known as Scotts Building; and
2. The transfer of the plaintiff's 49% shareholding in TQT Company to the fourth defendant.

40. Whilst the plaintiff has sought to join the pleadings in relation to both, they are in reality two separate and distinct property transfers in separate documents and the pleas in relation to each must be considered separately.

41. In relation to the deed of assignment the relevant pleas are those contained in paragraph 73(i) to (vi) inclusive set out below and the first sentence of paragraph 74 confined to the deed of assignment as distinct from all the transactions of 24th July, 2004.

"73. Further and in the alternative the Plaintiff avers that the purported Deed of Assignment purportedly inscribed with the 30th September 2004 between Vincent Keaney and The Fourth Named Defendant and Julia Nolan of the premises Scotts Buildings, Cobh, Co. Cork (registered in the Registry of Deeds on the 25th day of October 2005) has been deceitfully interfered with by the Fourth Named Defendant and the Third Named Defendant (as attorney on the 24 July 2003 for the Fourth Named Defendant) in the following respects:

- i) The date of first execution thereof by the disponent was properly the 24th July 2003 and not the date inserted thereon which is a deliberate and intentional misleading date.
- ii) Further the Memorial of said Deed executed by the Fourth Named Defendant and sworn by Denis Calahan Solicitor perpetuates the lie as to the date of true execution of the Deed.
- iii) The Deed was not stamped until the 13th May 2005 and the Plaintiff asserts that the post-dating of the Deed was to avoid and/or mitigate substantial stamp duty penalties. Further the consideration of "€525,000 now paid by the purchasers to the Vendor receipt of which the vendor hereby acknowledges" was in fact blank on the day on which the Plaintiff signed. The Plaintiff was not furnished with a copy of this Deed after his signature despite promise of same. No cash consideration was passed on the day. In fact Condition 11 of the Law Society Contract for Sale dated 24th July 2003, executed the same day as the Deed of Assignment stated:-

"The Vendor acknowledges that the purchase price for the property in sale is paid by the Purchaser taking over the AIB loan attaching to the property. The parties agree that the value attributable to the property in sale is €525,000"

which contradicts the purported deed.

- iv) In the premises the Deed has not the correct consideration inscribed thereon nor has the Deed been stamped on the basis of a 50% sale at Market Value which was the correct basis for ad valorem due stamping.
- v) The Plaintiff asserts that (outside his control) the true nature of the transaction was not disclosed to the Revenue Commissioners who, if notified, would have sought stamp duty on the basis of gross market value (divided by two) at the time of execution plus penalties and interest for late stamping.
- vi) Further and/or in the alternative in the event that the Plaintiff is successful in asserting to this Honourable Court (which the Plaintiff denies) that the true date of this Deed is the 30th September 2004 as inscribed thereon (which date the Plaintiff vehemently denies) it flows therefrom that this Defendant the Fourth Named Defendant misled Cork Circuit Cork on Affidavit in the ejectment proceedings bearing the following title and record number *Michael Nolan Plaintiff v. Titanic Cobh Trading Company Limited Defendants, The Circuit Court, Cork Circuit, Record No. P110/2004* that he had title to grant a Lease in favour of Titanic Cobh Trading Company Limited dated the 24th July 2003; if he did not acquire title (which is denied) until 30th September 2004."

Paragraph 74 in the first sentence currently alleges:

"By reason of the foregoing the said purported transactions of the 4th July, 2003, are void/voidable and should be set aside by this Honourable Court and the Plaintiff has suffered and continues to suffer loss, damage, inconvenience and distress, and the loss of his interest in the Titanic Bar premises."

42. That pleading in part relates to the allegations which have already been struck out in paragraphs 62 to 71 inclusive and concerned all the transactions of the 24th July, 2003. In accordance with the principles set out above, the plaintiff must now be entitled to amend that paragraph so as to confine it only to the deed of assignment referred to in paragraph 73.

43. Having regard to the matters of fact alleged therein which I must for the purposes of this application treat the plaintiff as capable of proving, it appears to me that these defendants have not made out a case that this pleading does not disclose a cause of action or is vexatious or frivolous or that the court should exercise its inherent jurisdiction in accordance with the decision of the Supreme Court in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425, to strike out the claim on the basis that it must fail or is unsustainable. In the affidavit grounding this application sworn by the solicitor on behalf of these defendants the facts alleged by the plaintiff in relation to the allegedly incorrect date and incorrect consideration in the deed are not disputed.

44. In reaching this conclusion I have taken into account the submissions made on behalf of these defendants by their counsel in reliance upon the principles of estoppel by deed. However having regard to the purpose of the allegedly incorrect date as pleaded in paragraph 73(iii) and allegedly incorrect consideration, it does not appear to me that in accordance in particular with the cautionary view expressed by McCarthy J. in *Sun Fat Chan v. Osseous Limited* this court should now reach a conclusion at this stage in these proceedings that the defendants are entitled to rely upon those principles in such a way that this claim must fail.

45. Having formed this view, it does not appear appropriate that I should express any view on the merits of the claim.

46. I have concluded that the plaintiff must be permitted to pursue the claims pleaded in paragraph 73(i) to (vi) and the first sentence of paragraph 74 as amended as against the fourth and eighteenth defendants as both are parties to the deed of assignment. Whilst paragraph 73 contains a reference to the third defendant acting as attorney for the fourth defendant, the Deed exhibited in the affidavits sworn in this application shows that the third defendant is not a party and did not execute same as attorney for the fourth defendant. On this basis any claim in paragraph 73 against the third defendant appears unsustainable and must be struck out.

47. The position in relation to the claims in respect of the share transfers also contained in paragraphs 73(vii) and 74 is quite different. The claims made in those paragraphs must be read in conjunction with the claims made in the amended versions of paragraphs 46 and 48 and paragraph 62 of the statement of claim. From those paragraphs it appears that the plaintiff alleges that on 24th July, 2003, he executed a share transfer of his 49% shareholding in TQT Company to the fourth defendant in consideration of €1. Whilst it is alleged that such share transfer has not been adjudicated or stamped there is no factual allegation of interference with the share transfer or incorrect facts stated therein similar to those contained in paragraph 73(i) to (iii) in relation to the deed of assignment of the Scotts Building.

48. Whilst the plaintiff in paragraph 74 as amended pleads:

"the plaintiff seeks to condemn a/ the Share Transfer to Michael Nolan (49%..)"

49. I am satisfied that there are no facts or claims in the amended pleading which support a cause of action that would entitle the plaintiff to obtain such relief.

50. Accordingly such claim should be struck out. Hence, the court, in considering the additional claims sought to be made by reason of alleged irregularities subsequent to the execution of the share transfer to the fourth defendant must do so on the basis that the plaintiff executed a share transfer of the shares representing his 49% interest in TQT Company to the fourth named defendant in July 2003 which is not subject to challenge in these proceedings.

51. The plaintiff in paragraph 74 next seeks to have the court condemn "the purported transmission on to Mr. St. John Culligan" (i.e. third defendant). Having regard to the undisputed executed share transfer to the fourth defendant there is no cause of action for which the plaintiff could have *locus standi* to pursue to seek such relief. It will also be struck out.

52. Finally in the same paragraph the plaintiff seeks the "rectification/reconstruction of a/the share register to have the plaintiff's name restored thereon and be permitted to take such action as a shareholder on the register may take including a derivative action."

53. The court has jurisdiction under s. 122 of the Companies Act 1963 to make an order for rectification of a share register. Insofar as relevant this provides:

"122. – (1) If –

(a) the name of any person is, without sufficient cause, entered in the register of members or omitted therefrom in contravention of subsections (1) and (2) of section 116: or

(b) ...

the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of compensation for any loss sustained by any party aggrieved.

(3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register."

54. Viewing the confused amended pleading in the most favourable light to the plaintiff the allegation now sought to be made appears to that his name is wrongfully omitted from the register of members by reason either of the alleged failure to stamp the share transfer form or irregularities concerning subsequent transmissions of those shares or inconsistencies with annual returns to the Companies Office.

55. The plaintiff, as a person who has executed a transfer of his entire shareholding in TQT Company is no longer a person entitled to be a member of the Company. Further TQT Company is obliged under s. 116 of the Act of 1963 to make the relevant entry in the register of members following such transfer. On the admitted facts, the plaintiff has executed a share transfer over all his shares (which for the reasons already set out in this judgment he is not permitted to challenge) and having done so notwithstanding the alleged subsequent irregularities, is not a person who could succeed to obtain an order under s. 122 of the Act of 1963 for rectification of the share register to have his name restored as a member of TQT Company.

56. Hence, in accordance with the decision of the Supreme Court in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 this is a clear case in which the court should exercise its jurisdiction to also strike out all those parts of the plaintiff's claim which seek to challenge the subsequent dealings in the shares formerly held by him and the claim for rectification of the share register.

Claims against Fourth Defendant in relation to TQT Company

57. The plaintiff expressly makes three related claims which are encapsulated in the pleading at paragraph 51(ix) where it is alleged:

"The company was never in any true sense of the word permitted to trade, but was an intentional sham for the exclusive profit of the Fourth Named Defendant, his servants or agents. The Corporate Veil should be pierced by this Honourable Court and the Rule in *Foss v. Harbottle* should have no application. . . . *Inter alia*, the Plaintiff seeks without prejudice to take derivative actions on behalf of the company. . . ."

58. These defendants seek to have such claims and other claims which are in reality claims which may only be brought by TQT Company now struck out pursuant to the inherent jurisdiction of the court partly by application of the rule in *Foss v Harbottle*(1843) 2 Hare 461

59. Firstly in relation to the claim that TQT company is a sham, the defendants submit insofar as the plaintiff makes this claim, that the only legal basis for same could be if the pleadings disclose a cause of action for a claim that the company was a sham in the sense in which that term was explained by Toulson J. in *Yukong Line Limited v. Rendsburg Investments* [1998] 2 B.C.L.C 485. There Toulson J. adopted with approval, the well known formulation of Diplock L.J. (as he then was) in *Snook v. London and West Riding Investments Limited* [1967] 1 All E.R. 518 at 528:

"As regards the contention of the plaintiff that the transactions between himself, Auto-Finance Limited and the defendant were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing, I think, however, is clear in legal principle, morality and the authorities ... that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

60. I am satisfied that the defendants are correct in their contention that, on the facts as pleaded, the plaintiff's claim is not capable of sustaining the claim that TQT Company is or was "a sham" within the meaning of the above. It is joined as fifth defendant. At paragraph 51 i) it is expressly pleaded that the plaintiff and fourth defendant agreed that the joint venture would be run by a limited

company with 49% and 51% shareholdings respectively. It is also pleaded at paragraph 31 of the statement of claim that TQT Company was incorporated on 11th August, 2000, and took a short term lease of the Titanic Bar premises. Further it is pleaded at paragraph 31(iii) the seven day publican's licence was transferred to TQT Company on 26th September, 2001. Having regard *inter alia* to such facts as pleaded it does not appear that the pleadings disclose a reasonable cause of action that TQT Company was a sham.

61. Accordingly I am satisfied that so much of the claim as asserts that the company was a sham should now be struck out as it is a claim which must fail.

62. Insofar as the plaintiff alleges that the Corporate Veil should be pierced the defendants submit there is no basis for any claim to "lift the Corporate Veil" from the facts as pleaded. I accept this submission. The phrase "lifting the Corporate Veil" is one which is applied to circumstances where a court will by exception to the ruling of *Salomon v. Salomon and Company Limited* (1897) A.C. 22, make a shareholder or director personally liable for the debts of the company at the behest of a third party. In truth what the plaintiff is seeking to do in this statement of claim is to pursue claims against the fourth defendant and others for alleged misapplication of funds of the company or wrongdoing to the company. It is well established that the plaintiff as a shareholder has no entitlement to any assets of the company such as would entitle it to pursue such a claim. See *Macaura v. Northern Assurance Company* (1925) A.C. 619.

63. The plaintiff seeks the non application of the rule in *Foss v. Harbottle* or as more recently pleaded the right to take a derivative action by way of exception to the rule as he has pleaded claims against many defendants which in reality allege wrongs or damage to TQT Company and not the plaintiff personally.

64. All those defendants seek to have such claims struck out in particular in reliance upon the decision of the Supreme Court in *O'Neill v. Ryan* [1993] ILRM 557 and the authorities referred to therein.

65. In *O'Neill v. Ryan* Blayney J. at p. 567 explains the rule in *Foss v. Harbottle* in the following terms:

" The rule is concerned with answering the question of who is the proper plaintiff to bring an action in respect of damage suffered by a company. It states that the proper plaintiff is the company itself. In the case of *Prudential Assurance Co. Ltd v Newman Industries Ltd (No. 2)* [1982] Ch 204 the Court of Appeal said in its judgment at p. 219 referring to the case of *Gray v Lewis* (1873) LR 8 Ch App 1035:

This case highlights what the rule in *Foss v Harbottle* is primarily concerned with, namely, is a plaintiff shareholder entitled to prosecute an action on behalf of the company for a wrong done to it, or ought the action to be struck out on the footing that it is for the company and not for a shareholder to sue? That is what *Foss v Harbottle* itself was about...

The exceptions made to the rule, which allow minority shareholders to bring a derivative or representative action, are made in order to ensure that a majority in control of the company should not be able with impunity to act illegally or oppressively or in such a way as to commit a fraud on the minority. But where a derivative or representative action is permitted as an exception to the rule, the action is brought in *respect of damage to the company*. (own emphasis) Instead of the company itself bringing the action in respect of such damage, the exceptions permit one or more minority shareholders to bring it. But that action is always brought in respect of damage to the company."

66. For the reasons already set out in this judgment all claims seeking to have set aside the transfer of his shares to the fourth defendant are being struck out. Further his claim for rectification of the share register is also being struck out.

67. As appears from the statement of the law set out by Blayney J. above the plaintiff could only assert an entitlement to bring a derivative or representative action for damage to the Company by way of exception to the rule in *Foss v Harbottle* if he were a shareholder. As he has disposed of his shares he is no longer a shareholder. He is not permitted by this judgment to pursue further any claim which challenges the share transfer executed. Accordingly it is unnecessary to consider whether he could bring himself within one of the specific exceptions to the rule which apply to shareholders.

68. Counsel for the plaintiff sought to rely upon what is sometimes regarded as a fifth exception to the rule in *Foss v Harbottle* that "it is in the interests of justice" that an exception be permitted. There are no facts disclosed by the plaintiff which support a submission that it would now be "in the interests of justice" to permit him as a person who disposed of his shares in TQT Company in 2003 to pursue claims for alleged damage to TQT Company prior to that date by a plenary summons issued in 2006.

69. By reason of the above conclusions it is unnecessary to consider the further submissions that the plaintiff could not bring himself within the exceptions to the rule as TQT Company is in liquidation and a liquidator appointed who may pursue any relevant claims on behalf of the company.

70. Hence all claims of non application of the rule in *Foss v. Harbottle* and/or to pursue a representative or derivative action by way of exception to the rule will be struck out.

71. The question which must be addressed in relation to each of the relevant defendants is whether there are claims now sought to be pursued by the plaintiff which are in reality claims for alleged damage to TQT Company which in accordance with the rule in *Foss v. Harbottle* may only be pursued by the company. The claims against the fourth named defendant which in reality are claims for damage to TQT Company include the claims pleaded at paragraphs 51(v), (vi), (ix), (x), (xii), 54, 59, 60 and 93.

72. All of the above are unsustainable as claims by the plaintiff against the fourth named defendant and will be struck out.

73. The relevant claims against the third defendant are those set out at paragraph 44 of the statement of claim and are likewise unsustainable.

74. At paragraph 58 of the statement of claim the plaintiff alleges oppression by the fourth defendant in connection with the running of the Titanic Bar. Insofar as the claims as pleaded may be attempting to allege oppression as a minority shareholder within the meaning of s. 205 of the Companies Act 1963 as the plaintiff is no longer a shareholder apart from any other reason it is not now a sustainable claim. The pleading does not disclose any other recognisable cause of action against the fourth defendant and will be struck out.

75. The claims at paragraphs 91 to 94 inclusive of the statement of claim are claims in accordance with their heading alleged to be

made against the seventeenth defendant. The plaintiff is not bound by the headings and in reality the pleading at paragraphs 91 and 92 are of an alleged agreement between the plaintiff and the fourth defendant and an alleged breach thereof.

76. Counsel for the fourth defendant urged that the court should now strike out that claim for breach of contract as not being sufficiently particularised. No notice for particulars was raised in relation to those pleas. In the absence of such a notice and failure to comply with an order compelling replies it does not appear to me that the court should now strike out those claims.

77. The agreement alleged is an agreement that any acquisition of the Tregan Building or any part thereof would be undertaken on a 50/50 joint enterprise basis with equal introduction of capital or alternatively each such party having the opportunity to purchase on a joint basis. It is then alleged that the fourth defendant in breach of the agreement bought in his sole name all the shareholding in the seventeenth defendant without including the plaintiff in the purchase. The plaintiff then alleges "the fourth named defendant excluded the plaintiff from any opportunity of investment in the shares and therefore in the real property/title represented by the shares is the Tregan Building."

78. It is further pleaded in paragraph 12 of the statement of claim that Tregan Properties Limited is the owner of the Tregan Building.

79. The relief which the plaintiff then seeks by reason of the alleged contract and breach thereof is set out at paragraph 94 of the statement of claim as:-

(i) A declaration that the plaintiff is beneficially entitled to a 50% Shareholder in the Seventeenth Named Defendant.

(ii) An order for payment out to the plaintiff of 50% of the net proceeds of sale of the Tregan Building, or alternatively the payment of such proceeds of sale into Court pending suit.

80. Counsel for the seventeenth defendant submits that even if the plaintiff is permitted to pursue the cause of action pleaded in paragraphs 91 and 92 it could not sustain a claim for relief sought in paragraph 94 (or any relief) against the seventeenth defendant. That submission appears to me correct. Whilst the plaintiff is entitled to pursue the claims made in paragraphs 91 and 92 (subject to an additional amendment of a necessary pleading that by reason of the alleged breach of contract the plaintiff has suffered loss and damage and the particularisation of that loss and damage) there are no material facts pleaded which support any cause of action that would entitle the plaintiff to orders of the type sought against the seventeenth defendant. The claim for damages for breach of contract against the fourth defendant may be pursued but the plaintiff's claim against the seventeenth named defendant will be struck out.

81. The final set of claims against the third defendant objected to as unsustainable are those set out in paragraphs 41 to 43, certain of 44 and 45 of the statement of claim. In essence they are claims (for loss and damage) by reason of alleged breach of duty by the third defendant as a director of TQT Company to the plaintiff as a shareholder. The third defendant relies upon the general principle in relation to the duties owed by a director as stated by Keane J. in *Crindle Investments v. Wymes* [1998] 4 I.R. 567 whereat p. 591 he stated:

"There can be no doubt that, in general, although directors of a company occupy a fiduciary position in relation to the company, they do not owe a fiduciary duty, merely by virtue of their offices, to the individual members. That was the effect of the decision in the leading case of *Percival v. Wright* [1902] 2 Ch. 421, but it has been emphasised in subsequent decisions that, in particular circumstances, a company director may indeed be in a position where he owes a fiduciary duty to individual shareholders."

82. Whilst it is accepted that in certain factual situations a director may be considered to owe a fiduciary duty to individual shareholders it is contended that no facts are pleaded in the statement of claim giving rise to any such special circumstance. This appears to me to be correct.

83. Accordingly I find these claims also to be claims which do not disclose a cause of action of the plaintiff against the third defendant and must be struck out.

84. The claims made against the ninth defendant QEF Global Limited are set out at paragraphs 86 to 88 inclusive of the statement of claim. The claims made are in reality reliefs sought and are not based on any separate cause of action pleaded against that defendant. There is no surviving cause of action in the statement of claim pleaded against other defendants which could support those reliefs against the ninth defendant and therefore those claims must fail and should now be struck out.

85. Summary of Position Against Third, Fourth, Ninth, Seventeenth and Eighteenth Defendants

1. All claims against the third defendant are struck out.

2. All claims against the fourth defendant are struck out other than

a. The claim for damages for breach of contract in respect of the alleged agreements of 2000 in relation to the matters pleaded in paragraphs 27, 32(i) and 57 concerning the discharge of debts of Pollyxfen Design Limited. No substantive objection was made to this claim.

b. The claim in relation to the deed of assignment dated the 30th September, 2004, between the plaintiff and the fourth and eighteenth defendants as pleaded in paragraph 73(i) – (vi) and the first sentence of paragraph 74 subject to such sentence being amended to be confined to the Deed of Assignment now dated the 30th September, 2004 between the plaintiff and the fourth and eighteenth defendants in respect of the premises Scotts Buildings, Cobh, Co. Cork

c. A claim for damages for breach of contract in respect of the agreement and breach thereof alleged at paragraphs 91 and 92 of the statement of claim in relation to the Tregan Building subject to amendment to claim and particularise loss and damage alleged.

3. All claims against the ninth defendant are struck out.

4. All claims against the seventeenth defendant are struck out.

5. All claims against the eighteenth defendant are struck out except the claims in paragraphs 73(i) – (vi) and 74 subject to the amendment as directed above.

Application of First Named Defendant

86. The first defendant is alleged to be a chartered accountant who the plaintiff retained in 2000, to negotiate with an investment partner and render independent financial advice to the plaintiff. (See paragraph 20 of the statement of claim). It is also alleged that the first defendant acted as an “ostensible” director and secretary of the Company. The plaintiff makes certain allegations against the first defendant in the opening paragraph of the statement of claim and then sets out his claim in paragraphs 33 to 36. Those claims may be summarised as follows:

1. A claim for damages for negligence and breach of contract
2. Claims for breach of fiduciary duty which appear to relate to his position as a director and the plaintiff’s position as a shareholder of the company
3. Claims for breach of duty alleged to be owed to the company with consequent loss and damage to the company
4. Claims that the first defendant acted deceitfully.

87. Counsel for the first defendant accepts that insofar as the statement of claim includes claims for damages for negligence for breach of duty owed to the plaintiff personally and for breach of contract that such claims cannot now be struck out.

88. Insofar as the claims include a claim for breach of fiduciary duty I am satisfied that the statement of claim does not include material facts which support any special relationship between the first defendant as a director and the plaintiff as a shareholder such as would establish a cause of action by the plaintiff as shareholder by way of exception to the general rule set out by Keane J. (as he then was) in *Crindle Investments v. Wymes* [1998] 4 I.R. 567 referred to above. Accordingly all claims for breach of fiduciary duty are ones which must fail and should now be struck out.

89. Insofar as the plaintiff seeks to maintain claims against the first defendant for breach of duty owed to TQT Company with consequent loss and damage to the company the plaintiff is not now entitled to maintain such a claim. It is a claim which TQT Company alone can pursue against the first named defendant by reason of the rule in *Foss v. Harbottle* as set out above and that part of the claim must fail and accordingly will now be struck out.

90. The plaintiff has failed to particularise the allegation that the first named defendant acted deceitfully in breach of O. 19, r. 5(2) and for the reasons set out above that claim will also now be struck out.

91. Hence all claims except for damages for breach of contract and/or negligence against the first defendant are struck out.

Application of Eighth Named Defendant

92. The eighth defendant is Allied Irish Banks PLC who is alleged at paragraph 9 of the statement of claim to have been the banker to the “public house hereinafter referred to”. It is clear from the pleading that such public house is the public house alleged to have been operated by the Company.

93. The claims against the eighth defendant are set out at paragraphs 83 to 85 inclusive of the statement of claim. The primary claim made is a claim for damages for negligence and breach of duty in permitting cash takings from the licensed premises to be lodged to a personal account controlled by the fourth defendant. In essence the plaintiff is alleging that monies belonging to TQT Company were negligently permitted by the eighth defendant to be lodged to personal accounts of the fourth defendant.

94. Counsel for the eighth defendant submits that this is a claim for damage to TQT Company by reason of alleged negligence of the eighth defendant. Further that in accordance with the rule in *Foss v. Harbottle* it is a claim which may only be maintained by the company and therefore insofar as the plaintiff seeks to make this claim it is a claim which must fail.

95. That submission appears to me correct and for the reasons more fully set out above that the court must now in application of the rule in *Foss v. Harbottle* and in accordance with the decisions of the Supreme Court in *O’Neill v. Ryan* and *Sun Fat Chan v. Osseous Limited* strike out that part of the plaintiff’s claim against the eighth defendant.

96. The plaintiff also seeks to make two further claims. Firstly a claim to set aside the deed of release dated the 24th July, 2003, to which it is alleged the eighth defendant was a party but did not execute. It is clear from paragraph 84 of the statement of claim that the plaintiff does not allege any separate cause of action against the eighth defendant to ground that claim. It is based upon the other matters pleaded in particular against the fourth defendant and in respect of which I have already concluded that the plaintiff’s claim must be struck out. Accordingly it follows that the plaintiff’s claim against the eighth defendant in relation to the deed of release must also fail and should therefore now be struck out.

97. The final claim is a claim for discovery and/or disclosure of certain bank accounts and files allegedly held by the eighth defendant in relation to the Company and the Titanic Bar and the fourth defendant and the plaintiff personally.

98. The statement of claim does not disclose any basis on which it is necessary to maintain the eighth defendant as a party to these proceedings for the purpose of obtaining such documents. In reaching this conclusion I am not deciding whether or not the plaintiff in connection with the surviving claims in these proceedings is entitled to obtain documents from Allied Irish Banks PLC. If discovery of any documents under the control of Allied Irish Banks PLC is relevant and necessary for the disposal of the surviving claims then there is available to the plaintiff the third party discovery procedure under the Rules of the Superior Court.

99. Accordingly the plaintiff’s entire claim against the eighth defendant is struck out.

Applications of Tenth to Sixteenth Defendants

100. The tenth to sixteenth defendants are the partners of BKR Ormsby Rhodes/Ormsby Rhodes Chartered Accountants who were auditors to TQT Company.

101. The plaintiff's claim against these defendants is primarily pleaded at paragraphs 89 and 90 of the statement of claim though certain of the earlier paragraphs are also relevant to the claims made against them.

102. The claims made against Ormsby Rhodes may be fairly summarised as follows:

1. A claim for damages for loss and damage suffered by TQT Company by reason of alleged negligence and breach of duty by Ormsby Rhodes in carrying out their duty as auditors to TQT Company.
2. A claim for loss and damage allegedly suffered by the plaintiff by reason of alleged negligence and breach of duty owed by Ormsby Rhodes to the plaintiff in carrying out their duties as auditors to TQT Company.
3. A claim that Ormsby Rhodes are vicariously liable for the alleged wrongdoing of the first defendant and therefore liable to the plaintiff for the loss and damage suffered by the plaintiff by reason of the alleged wrongdoing of the first defendant.

103. The Ormsby Rhodes defendants seek to have each of the above claims struck out on the basis that as pleaded they do not disclose any reasonable cause of action or that insofar as a cause of action is disclosed it is one which must fail or that the claims are frivolous or vexatious.

104. In relation to the first identified claim above, namely, the claim for alleged loss and damage to TQT Company for the reasons already set out in this judgment, this is a claim which may only be maintained by the company and the plaintiff has not established that he comes within any of the exceptions to the rule in *Foss v. Harbottle* so as to permit him now to pursue such claim. Accordingly that part of the claim must be struck out as it does not disclose a reasonable cause of action for the plaintiff against these defendants.

105. These defendants submit that insofar as the plaintiff seeks to maintain a personal action for loss and damage to the plaintiff by reason of the alleged negligence and breach of duty of Ormsby Rhodes in carrying out their functions as auditor to the Company that in accordance with the decision of the Court of Appeal in *Prudential Assurance v. Newman Industries* [1982] Ch. 204 as applied by the Supreme Court in *O'Neill v. Ryan* [1993] ILRM 557 that the plaintiff as shareholder cannot have any cause of action against these defendants. The defendants rely upon the principles set out at p. 224 in *Prudential Assurance v. Newman Industries* and approved of by the Supreme Court in *O'Neill v. Ryan*:-

"A personal action would subvert the rule in *Foss v. Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed upon them by the articles of association."

106. The plaintiff in the statement of claim has not particularised the loss and damage allegedly suffered by him by reason of the alleged negligence and breach of duty of Ormsby Rhodes as auditors to TQT Company. However, there is nothing in the pleadings which establishes any basis for a contention that such alleged loss of the plaintiff is other than a diminution in the value of his shareholding in the Company consequent on the alleged damage to TQT Company.

107. Accordingly it appears to me that the principles set out above, applied by the Supreme Court in *O'Neill v. Ryan* also apply to this part of the personal claim sought to be made by the plaintiff against Ormsby Rhodes. No cause of action vests in him as a shareholder for any diminution in the value of his interest in TQT Company by reason of the alleged negligence and breach of duty of Ormsby Rhodes as auditors to TQT Company.

108. In reaching this conclusion I have taken into account the pleading at paragraph 89(iii) in which it is alleged by reason of the matters stated therein that Ormsby Rhodes should not have acted as auditors or resigned and owed a duty of care "accordingly to the plaintiff personally and as shareholder/director of the Company". No loss and damage is pleaded or alleged as a result of the failure of Ormsby Rhodes to decline to act as auditors or to resign. The loss and damage which is pleaded is by reason of the alleged negligence in carrying out the audit of the company as appears from paragraphs 89(vi) and 90.

109. Having reached these conclusions it is unnecessary for me to consider the further submission made on behalf of these defendants that the claim as pleaded does not disclose any set of circumstances which would give rise to a duty of care owed by Ormsby Rhodes to the plaintiff personally as distinct from TQT Company whilst carrying out their duties as auditor to the Company. If it were necessary I would have also found in accordance with that submission. No material facts are pleaded which support circumstances in which the law would impose a duty of care by Ormsby Rhodes to the plaintiff personally in carrying out their duties as auditors to TQT Company.

110. The claim against Ormsby Rhodes in vicarious liability for the alleged wrongdoing of the first named defendant Mr. Sullivan is pleaded at paragraph 90(aa) as follows:

"Further and in the alternative to the extent that the Plaintiff has suffered loss and damage by reason of the wrongdoing of the First Named Defendant as hereinbefore pleaded, Ormsby Rhodes are vicariously liable therefore in respect of such losses having regard to their relationship and/or association with the First Named Defendant."

111. The further pleadings in relation to the alleged relationship are to be found in paragraphs 20, 22 and 89(i) where it is alleged:

"20. Accordingly the plaintiff required and sought financial advice and an investment partner. In or about 2000, the plaintiff engaged the services of the First Named Defendant James Sullivan accountant, who acted as Cork Agent and office for Ormsby Rhodes, to obtain and negotiate with an investment partner and render independent financial advice to the plaintiff.

22. The plaintiff at this stage in 2000, believed the first named defendant was an independent advisor and agent for Ormsby Rhodes.

89(i) The First Named Defendant was at all material times a chartered accountant carrying on practice from 46 Grand Parade, Cork, where the Cork branch of Ormsby Rhodes also carries on practice as chartered accountants. The First Named Defendant at all material times acted as agent for Ormsby Rhodes or alternatively had a close association/partnership with that firm."

112. These defendants submit correctly in my view that in accordance with the requirements of O. 19, r. 3 that the plaintiff is under an obligation in the statement of claim to state at least in summary form the material facts upon which he relies for his claim that Ormsby Rhodes are vicariously liable for any alleged wrongdoing of the first defendant.

113. Whilst it is accepted that, in certain circumstances a principal may be vicariously liable for the torts of its agent or a partnership liable for the torts of a partner it is contented on behalf of these defendants that there is no factual basis for the general assertion made in the pleading that either the first defendant was at any relevant time acting as agent for Ormsby Rhodes or was a partner of that firm. David Marsh states on behalf of these defendants in the affidavit sworn grounding this application at paragraph 10:

"For the sake of clarity, I confirm that these defendants never engaged the first named defendant as agent on their behalf. Equally, there is no partnership between the first named defendant and these defendants and nor has any partnership existed... these defendants never acted as Cork office for the first named defendant."

114. He explains in the affidavit that in March, 1999, these defendants purchased the client base of Sullivan and Associates Chartered Accountants, 46 Grand Parade, Cork, a practice then owned by the first and second defendants. He further states that it was not an incorporation of that practice into the practice of the defendants and the defendants did not employ or retain the services of any employees and/or principals of Sullivan and Associates (including the first and second defendants). They did occupy the premises formally occupied by Sullivan and Associates and paid a rent on an arms length basis to ICP Consulting Limited a company of the first defendant.

115. The plaintiff in the affidavit sworn in response states at paragraph. 4:

"4. I say that Mr. Sullivan in 2000 continued to occupy and practice from the offices which Ormsby Rhodes ever they had a lease of. The phone number (021 427 9721), fax number and address (46 Grand Parade, Cork) of Ormsby Rhodes in 2000 was identical to that of James Sullivan, when I consulted. When I went in the door to consult with James Sullivan, Sullivan represented himself to me as part of Ormsby Rhodes and I felt that I was consulting with a prestigious firm of national standing. In this regard I beg to refer to documents which support Sullivan as associated with and or part of Ormsby Rhodes marked with the letters "B" upon which I have signed my name prior to the swearing hereof."

116. The documents at Exhibit B include a letter from Mr. Sullivan to the plaintiff of the 27th March, on note paper of ICP Consulting with an address of 46 Grand Parade, Cork, a letter from Ormsby Rhodes of the 4th May, 2000, to a Mr. Donegan, solicitor from 46 Grand Parade, Cork and an extract from what appears to be a phone directory showing a phone number for Ormsby Rhodes at 46 Grand Parade, of 021 4279721. This is the phone number referred to in the affidavit and on the notepaper from Ormsby Rhodes. It is one digit different to the phone number on the ICP notepaper. It is 021 279722. The fax numbers of both are identical.

117. Subject to the above the plaintiff does not dispute the factual averments of Mr. Marsh set out above.

118. Geoffrey Lewis swore a further affidavit on behalf of these defendants on the 19th June, 2006. The facts stated therein do not put the matter further. He confirms that the defendants occupied what he describes as "the old offices" of the first defendant, but states that it was not on the basis of a partnership, agency or association with the first defendant.

119. Notwithstanding that the plaintiff amended the statement of claim on the 24th July, no amendments were made to the relevant pleadings in relation to the allegation of vicarious liability subsequent to the exchange of affidavits. The plaintiff has pleaded any material facts which support the assertion that the first named defendant was in partnership with or acting as agent for Ormsby Rhodes.

120. The only evidence which appears available to the plaintiff from the affidavit sworn is his potential oral testimony that when he went in the door to consult with the first named defendant that the first named defendant "represented himself to me as part of Ormsby Rhodes". The letter from the first defendant exhibited by the plaintiff and on which he appears to rely does not indicate in any way that the first named defendant was part of Ormsby Rhodes. On the contrary it indicates that he was a director of a firm ICP Consulting, Management Consultants.

121. Counsel for these defendants, in submission have pointed out the number of inconsistencies in the statement of claim with the bald assertion that the first defendant acted as agent for Ormsby Rhodes. The plaintiff also pleads that at the same time the first defendant acted as "the undisclosed agent of the fourth named defendant" (See paragraph 25 of the statement of claim). Further notwithstanding the general allegation of agency the plaintiff pleads no privity of contract between the plaintiff and Ormsby Rhodes in relation to the alleged contract or agreement with the first defendant.

122. I have reached the conclusion that the bald assertions that the first defendant acted as agent for or was in partnership with Ormsby Rhodes are ones which having regard to the affidavit evidence (which it was common case I am entitled to take into account in considering the matter pursuant to the inherent jurisdiction of the court) are ones which the plaintiff could not sustain at the hearing of the action. As presently pleaded there are no material facts to support the claims as required by Order 19 r. 3 of the Superior Court Rules.

123. By reason of each of the above conclusions it appears that the plaintiff has no reasonable cause of action for vicarious liability of Ormsby Rhodes for the actions of the first defendant on the basis of an alleged agency or partnership.

124. The remaining issue is whether by reason of the alleged "association between the first named defendant and Ormsby Rhodes" the plaintiff has a reasonable cause of action for vicarious liability. There are likewise no material facts pleaded as to the nature of the alleged association.

125. Even if the court were now to permit the plaintiff to further amend the statement of claim so as to set out the material facts it appears from the affidavits of the plaintiff and those sworn on behalf of these defendants that the only facts upon which the plaintiff can rely is that the first defendant and Ormsby Rhodes practised in Cork from the same premises in 2000.

126. The plaintiff has not established any basis for a reasonable cause of action for a claim that one person could be considered as

vicariously liable for alleged wrongs in the professional or business dealings of another person simply by reason of the fact that the two persons (albeit sharing a common profession) practised from the same premises.

127. The law will in certain circumstances recognise that one person may be liable for the wrongs of another even where no formal legal relationship exists. However, the relevant test is whether the defendant has sufficient control over the acts of the other to be held liable for his wrongs. See McMahon & Binchy: *The Law of Torts* (3rd edition) pp. 1092-1094. The plaintiff in the statement of claim has not pleaded any facts in relation to the alleged association between the first defendant and Ormsby Rhodes which could support a claim that Ormsby Rhodes had any control over the actions of the first defendant in respect of his alleged dealings with the plaintiff and alleged wrongs committed.

128. I have accordingly concluded that the plaintiff has not established a reasonable cause of action as pleaded, or even with any amendment permitted, against Ormsby Rhodes to be vicariously liable for the alleged wrongful acts of the first defendant.

129. The plaintiff's entire claim against the Tenth to Sixteenth Defendants is therefore by struck out.

130. The fifth, sixth and seventh defendants, acting by their liquidator have filed a defence. The liquidator was represented at the hearing of these applications but no relief is sought by those defendants.