

**THE HIGH COURT**

**No. 2009/9729P**

**Between**

**DANIEL McATEER**

**Plaintiff**

**-and-**

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

**Defendants**

**Judgment of Ms. Justice Iseult O'Malley delivered on the 13th March, 2013**

**Introduction**

1. The background to this case is set out in full in a judgment with the same title and record number delivered by MacMenamin J. on the 6th March, 2012 and this judgment should be read in conjunction with that one.

2. The substantive issues in the case relate to dealings between the plaintiff and other persons in respect of a plan to acquire and develop certain lands in County Kerry. The defendants were, it is alleged, engaged as professional advisors for this project. In summary, the plaintiff claims that instead they involved themselves personally in the plan, wrongfully excluded him for a period from the companies set up to further it and then so mismanaged affairs as to cause the failure of the plan. By reason of this, he says that he has sustained financial loss.

3. After several applications to the court by the defendants on foot of the failure of the plaintiff to make proper replies to requests for particulars, a motion to compel replies or in the alternative to strike out the proceedings was heard by MacMenamin J. In the written judgment already referred to, he declined to strike out the claim but directed that it be stayed until the plaintiff, by way of notice of motion, brought forward a proper, full and comprehensive reply to particulars addressing the issues set out in that judgment, such motion to be brought within 12 weeks of the date of the order. The application now before the court is that motion to vacate the stay on the basis that the requirements laid down by MacMenamin J. have now been complied with.

**The issues identified in the judgment**

4. The questions which MacMenamin J. considered had not been properly answered were as follows:

- a. Who or what entity sustained loss?
- b. Upon what basis was it contended that the plaintiff sustained the loss?
- c. What loss precisely was the plaintiff claiming was attributable to him?
- d. How was the loss calculated?

5. Further in the judgment, he identified a fifth question as being: who precisely had been negligent and in breach of duty?

6. The plaintiffs Notice of Motion, dated the 30th May, 2012, is grounded on the affidavit of his solicitor, which in turn exhibits a letter dated the 30th May, 2012. The letter deals with each of the issues identified by MacMenamin J. as follows:

*I refer to the above matter and in particular, the judgements and orders made by Mr Justice McMenamin (sic) on 6th and 9th March 2012 in which he directed that the action be stayed pending production of further and better particulars in relation to (essentially) 5 issues identified by you. By way of further particularisation and in a genuine attempt to progress matters, I would like to comment as follows (using references that are now familiar to us):*

*1. Who are or (sic) what entity sustained loss?*

*The Plaintiff will argue that the losses incurred, as set out in the Plaintiff's statement of claim, were incurred by the Plaintiff, Mr. Daniel McAteer, in his personal capacity. For the avoidance of doubt, the Plaintiff does not seek to recover losses that may or may not have been incurred by or on behalf Ballinorig Properties Limited or Ballinorig Developments Limited.*

*2. Upon what basis is it contended the Plaintiff sustained a loss?*

*The Plaintiff, in his personal capacity, had been a client of Adams Corporate Solicitors and had dealt principally with Mr Senan Burke of that firm. The Plaintiff claims that he has suffered loss, again in his personal capacity, as a result of breaches by the defendants in relation to this engagement;*

*Further, the Plaintiff claims that he was a partner I member of the joint venture that engaged and retained Adams Corporate Solicitors, and principally Mr. Senan Burke of that firm, to render services to the said partnership I joint venture. In the premises the Plaintiff suffered loss in his capacity as a member of the said partnership I joint venture;*

*Further, the Plaintiff claims that he suffered loss in his capacity as shareholder of Ballinorig Properties Limited and I or Ballinorig Developments Limited. The Plaintiff will argue, inter alia that in their capacity as directors of those entities, the First and Second Named Defendants owed each individual shareholder I member a fiduciary duty and a breach of the said fiduciary duties caused the Plaintiff to suffer a loss. Accordingly, the Plaintiff has a personal cause of action as*

against the said Defendants;

The Plaintiff also claims that he suffered loss, in his personal capacity, for the loss of profit and opportunity in relation to the medical project that was to be progressed by the Plaintiff and his partners which was the subject of the agreement prepared by the Defendants in October 2006. For the avoidance of doubt, the Plaintiff will claim that he was denied the opportunity, by reason of the actions of the Defendants, to participate in any meaningful way in the joint venture I project and that the action of the Defendants undermined the viability of the joint venture I project. Further, and again for the avoidance of doubt, the Plaintiff does not seek to recover damages for any mischief or damage that may have been suffered by or on behalf of Ballinorig Properties Limited and / or Ballinorig Developments Limited;

Furthermore, the Plaintiff claims that he incurred costs relating to litigation involving Messrs Pierse and Desmond and that these costs have been aggravated by the actions of the Defendants who had and have been coordinating and directing litigation against the Plaintiff by providing advice to the Plaintiff's opponents. The Plaintiff is personally liable for the said costs and as such, the Plaintiff will argue that Plaintiff, (sic) in his personal capacity, has sustained losses under this heading.

3. What loss precisely is the Plaintiff claiming was attributable to him?

The Plaintiff is not setting out any claim by or on behalf of the two companies, and is not seeking to recover damages suffered by the companies - the Plaintiff is arguing, inter alia, that had the project proceeded unhindered, the partnership I joint venture would have realised a substantial profit of which the Plaintiff was entitled to 25%. It is correct to say that two companies were to be used as vehicles through which the work of the partnership / joint venture was to be conducted, but the Plaintiff is not claiming, in any respect, damages incurred by the companies.

The Plaintiff claims that he has suffered loss personally in his capacity as a client of the Defendants arising out of their breach of confidence and in particular, their releasing information about the Plaintiff's and his client's personal financial affairs.

The Plaintiff also claims the loss of profit and opportunity in relation to the medical project that was to be progressed by the plaintiff and his partners and which was the subject of the agreement prepared by the Defendants in October 2006. This medical project was to be developed in Tralee, County Kerry. The Defendants were instructed to recognise the Plaintiff's shareholding and directorship in the project and failed to do so. Instead they pursued their own agenda in an attempt to benefit from the project themselves.

The Plaintiff claims that he (and his other partners) had a right to acquire Mr Desmond's shares if Mr Desmond had decided to sell. The Plaintiff was denied this opportunity as a result of the Defendants' mischief

Furthermore, the Plaintiff claims that he incurred costs relating to litigation involving Messrs Pierse and Desmond and that these costs have been aggravated by the actions of the Defendants who had and have been coordinating and directing litigation against the Plaintiff by providing advice surreptitiously to the Plaintiff's opponents.

4. How is the loss calculated?

The Plaintiff was entitled to one quarter of the profits arising from the medical development. The Plaintiff lost this opportunity as result of the Defendants (sic) conduct. The overall profit of the development was identified along two classifications: (a) profit on land; and (b) development profit. At the time of the execution of the agreement in October 2006, it was expected that the profit on the land would have been £18,000,000 in total. This was based on a land valuation of 64 acres at £500,000 per acre less the option price to acquire this land of £14,000,000.

In summary, the position was as follows:

- Option Price to the joint venture for the 64 acres: £14, 000,000
- Valuation/Estimate sale price for 64 acres with the benefit of zoning for medical related facilities: £32,000,000
- Profit attributable to joint venture relating to land gain: £18,000,000
- Share attributable to Plaintiff: 25% = £4,500,000

In addition to the above, the expected development profit for the medical campus which entailed approximately 46,000 square metres of development was £68,000,000 (over and above the land cost). The Plaintiff's share of the joint venture profit would have been 25% of this, namely £17,000,000.

The Defendants have been coordinating litigation against the Plaintiff in other unrelated matters which has and continues to expose the Plaintiff to costs and outlays which may or may not be recoverable at this stage, cannot be quantified exactly. (sic) In summary, the Plaintiff claims loss as follows:

(i.) Non allocation of shares (the profit here arises in the difference between the value of the lands and the option prices at which the new companies were entitled to buy the lands): **£4,500,000**

(ii.) Loss of potential profits in the partnership/joint venture (being the Plaintiff's 25% share of the development profit, excluding land costs, of the medical campus): **£17,000,000**

(iii.) Purchase of Michael Desmond's shares at an under value: **Up to £2,800,000**

(iv.) Miscellaneous expenses and costs arising out of the Defendant's breach of their duty to the Plaintiff in that they provided confidential information and also engaged in assisting the Plaintiff's opponents in other litigation: **Ongoing**

5. Identify who precisely was (a) negligent and in breach of duty; (b) engaged in conduct in breach of trust and confidentiality, and (c) guilty of negligence and breach of contract.

*The previous responses of 26<sup>th</sup> October 2011 and 4<sup>th</sup> January 2012 are repeated, i.e. the persons were Senan Burke and Mark Regan, partners in the firm Adams Corporate Solicitors.*

7. At the hearing of the application the plaintiffs position was further refined in the submissions of counsel (who did not appear in the application before MacMenamin J). It is now stated that the plaintiff claims a loss on his own account and does not (as it is conceded he cannot) claim in his capacity as a shareholder.

#### **Submissions**

8. The defendants maintain that the replies are still inadequate and that the plaintiffs claim should therefore be permanently stayed. At the hearing counsel for the defendants subjected the letter of the 30th May, 2012 to a detailed critical analysis, comparing it to previous replies and setting it against the concerns expressed by MacMenamin J. He says that the essential complaint is that the plaintiff has still not explained why or how exactly he would have obtained the money. He argues that the question of calculation of the loss is pivotal because of its connection with the question of where the loss resides.

9. Counsel for the plaintiff concedes that the plaintiff had for some time been trying to ride two horses and that certainly appears to have been the case. It is admitted that there should not have been any reference to his shareholding, since he was not a shareholder at the relevant time, and that the rule in *Foss v Harbottle* [1843] 2 Hare 461 prevents him from claiming in respect of any loss suffered by the companies. He now makes it clear that he claims only for his own loss. With regard to the inconsistencies and potential weaknesses in the replies on the other issues, it is submitted that these are matters for cross-examination and comment at the hearing of the action. He does not, he says, have to prove the causation of the loss - in this regard he relies on the judgment of Finnegan P. in *ASI Sugar v Greencore* 2004 WJSC-HC 405. As far as the calculation of loss is concerned, he concedes that some aspects are speculative, being based on a view of what *might* have happened had things gone according to plan. However, there is evidence as to the price of the option before rezoning and either side can put up their own evidence as to the costs of building and so on.

#### **Conclusions**

10. The applicable principles of law are set out in the judgment of MacMenamin J. and there is no need to repeat them here.

11. I am satisfied that a major reason for the unsatisfactory nature of the plaintiffs previous replies to the defendants' notices for particulars was the fact that he was, as his counsel says, attempting to ride two horses. This was an ill-judged effort, apparently based on a belief that he could somehow benefit from any loss established in the case to have been sustained by the companies. As MacMenamin J. said

*"...the plaintiff has failed to properly particularise his case, perhaps because the process of particularisation gives rise to legal difficulties derived from the rule in Foss v Harbottle. "*

12. It appears that better advice has now prevailed and that aspect has now, albeit late in the day, been clarified. The question of where the loss lies, for the purposes of the case, has therefore been answered.

13. I am also mindful of the view set out in paragraph 51 of the judgment of MacMenamin J. that to strike out or dismiss the claim at that time would be "excessively draconian" and "not justified on the basis of the authorities" in circumstances where the claim was a viable one, although not properly particularised.

14. Counsel for the defendants has made a number of acute, well-founded criticisms of the particulars. However, it seems to me that these are in reality criticisms of the case itself as made by the plaintiff, rather than going to any core difficulty in defending the case.

15. I will therefore grant the relief sought in the Notice of Motion.