

THE HIGH COURT

[2016 No. 1779 P.]

BETWEEN

MARY KIERAN

PLAINTIFF

AND

IRELAND, THE ATTORNEY GENERAL, THE MINISTER FOR JOBS, ENTERPRISE AND INNOVATION AND LYNDON MACCANN

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 12th day of April, 2018.**Background:**

1. On 23rd October, 1997 the third named defendant appointed the fourth named defendant as an inspector to investigate and report on the membership of Bula Resources (Holding) plc, pursuant to s.14 of the Companies Act 1990 ("the Act of 1990"). At the relevant time, the fourth named defendant was a member of the Junior Bar.

2. The fourth named defendant delivered his report to the third named defendant in or about July 1998 and it was subsequently published in September 1998.

3. The plaintiff claims that she was the largest shareholder in Bula Resources plc being the owner and controller of 3.95% of the issued share capital, which shareholding was held via Chamonix Nominees Ltd. In her affidavit, the plaintiff states that she attended for interview, accompanied by her solicitor, with the fourth named defendant on 16th March, 1998.

The Proceedings

4. A plenary summons was issued on 26th February, 2016 claiming damages for, *inter alia*, fraudulent misrepresentation, malicious falsehood and defamation. A statement of claim was subsequently delivered.

5. In the statement of claim, the plaintiff alleges breach of fiduciary duty on the part of the third named defendant. Under the heading "particulars of breach of fiduciary duty" the following, *inter alia*, are alleged:-

"(a) The third defendant Minister wrongfully delegated the exercise of her discretion in this matter to the opinions of the fourth defendant without exercising her own independent judgment upon it, including seeking the knowledge of the situation held by the Russian authorities.

(b) The third defendant Minister wrongly acted under the dictation of the fourth defendant without exercising her independent judgment of the situation, including the evaluation of the situation with knowledge of events on the ground in Russia. This led to the development of the oil field by third parties, Sibir Ltd and Shell Ltd, to the loss and detriment of the plaintiff and her economic interests.

(c) The third defendant Minister wrongly placed a fetter on the exercise of her discretion in relation to the matter by not looking beyond the confines of the limited report of the fourth defendant."

In addition, the plaintiff alleges that the defendants made a fraudulent representation by representing that the Salymskoye oil field was a "dud".

6. The claim against the fourth named defendant appears at paras. 18 and 19 of the statement of claim, which reads:-

"18. Wrongly, falsely and maliciously, the said report characterised a well drilled in the Salymskoye oil field to be a dud, without an independent third test well to determine the correctness of which of two previous differing well results was correct.

19. By so representing that the Salymskoye oil field was a dud, the defendants and each of them, made a fraudulent representation to the plaintiff and to the world at large."

In her affidavit opposing these motions, the plaintiff confirmed fraudulent misrepresentation as the sole cause of action being pleaded against the fourth named defendant.

Notices of Motion

7. Separate notices of motion have been issued by the first, second and third named defendants and the fourth named defendant. The reliefs sought in these notices of motion are essentially the same. The reliefs sought are:

(i) An order pursuant to O.19 r.28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the Court dismissing the plaintiff's claim on the grounds that it is frivolous and vexatious and/or is bound to fail and/or is an abuse of the process of the court and/or is contrary to the interests of justice.

(ii) An order dismissing the proceedings on the grounds that the plaintiff failed to commence the proceedings within the time frame prescribed by the Rules of the Superior Courts for commencing judicial review proceedings and/or that they are barred pursuant to the provisions of the Statute of Limitations Act 1957 (as amended) ("the Act of 1957").

(iii) An order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay in the commencement of the proceedings.

8. Affidavits were filed by Ms. Breda Power, on behalf of the first, second and third named defendants. Affidavits were filed by the fourth named defendant and Mr. Michael Quinn, solicitor, on behalf of the fourth named defendant. The plaintiff also filed an affidavit in opposition to the motions.

9. These motions came on for hearing before this Court on 20th March, 2018. Neither the plaintiff nor any legal representative on her behalf appeared, even though the plaintiff had been made aware of the date that the proceedings were to come on for hearing before the court. By letter dated 15th March, 2018 the plaintiff expressed a desire to have an adjournment "due to unforeseen circumstances". The solicitor for the fourth named defendant responded that the matter was proceeding on 20th March, 2018 in circumstances where no description of "the unforeseen circumstances" had been furnished by the plaintiff. By further letter dated 19th March, 2018 the plaintiff reiterated that she wished to have the matter adjourned, the reason provided being that she was "not in top form at present". Despite indicating that she wished to have the hearing of the motions adjourned, the plaintiff provided no reasons to as to why the court should accede to such a request. In the course of the hearing before this Court, the pleadings and affidavits of the defendants and the plaintiff were opened in full.

Events Prior to the Issuing of Proceedings

10. As was stated at para 2 above, the report of the fourth named defendant was delivered to the third named defendant in July 1998 and subsequently published in September 1998. The within proceedings were initiated by way of plenary summons issued some seventeen and half years later.

11. The plaintiff and the fourth named defendant both had residences in a particular area in County Kilkenny. On a number of occasions in or about 2005 the fourth named defendant had a number of unplanned encounters with the plaintiff, which he described in his affidavit as follows:

"..on a couple of occasions while out walking, she came over to me and tried to engage me in relation to the report. Without explaining in what way she contended that my findings of fact were wrong, she asserted that my findings were incorrect. I refused to engage with her and never asked her why she thought that my findings were incorrect. I simply stated that the report had been delivered and published and I was now *functus officio*."

12. In or about 2006 the fourth named defendant received a phone call from the plaintiff to the effect that she needed to talk to him urgently but she did not say what it was about. The fourth named defendant described this in his affidavit as follows:

"..reluctantly, I agreed to meet her. However, it became immediately apparent that she wanted to discuss the report again. I reiterated that there was nothing to discuss, that I was *functus officio* and I left."

13. A number of years ago, prior to the commencement of these proceedings, the fourth named defendant arranged for files including the tapes of all witness interviews and electronic files to be destroyed.

14. In her affidavit, sworn some three months after the affidavit of the fourth named defendant, the plaintiff does not deny any of the aforesaid. In fact the plaintiff confirms she was aware that the fourth named defendant had destroyed his records prior to the issuing of the proceedings.

15. Given the contents of the affidavits, the court is entitled to rely on the following in determining whether the defendants are entitled to the reliefs sought:

- (i) The plaintiff was fully aware of the contents of the fourth named defendant's report no later than 2005.
- (ii) The plaintiff took issue with certain findings of fact in the said report no later than 2005.
- (iii) The plaintiff was aware of the destruction of records prior to issuing these proceedings.

Lapse of Time

16. As stated, some seventeen and a half years have elapsed between the publication of the report and the commencement of these proceedings. In the intervening period, two particular time limits have long since expired.

17. Firstly, O.84 r.21 of the Rules of the Superior Courts provides that "an application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*..."

18. Whilst the within proceedings were initiated by way of plenary summons, it must be noted that judicial review proceedings cannot be circumvented by merely initiating plenary proceedings (see *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301).

19. Secondly, the plaintiff's claim against the first, second and third named defendants is for breach of a fiduciary duty and fraudulent misrepresentation. Against the fourth named defendant the claim is for fraudulent misrepresentation alone. The time permitted to bring such proceedings under the Statute of Limitations Act 1957 (as amended) expired up to twelve years prior to the issuing of proceedings. The plaintiff has made no case that there was any impairment such that would prevent time running against her. In her affidavit she contends that time does not run in circumstances where her claim is for fraudulent misrepresentation. This is an incorrect statement of the law. Section 71 of the Act of 1957 provides:

"(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either—

- (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
- (b) the right of action is concealed by the fraud of any such person,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

In her replying affidavit, the plaintiff has not deposed to any facts as might bring her within the provisions of s.71. Rather, she incorrectly states "there is no time limit on fraud." By reason of the foregoing it follows that the plaintiff's claim is out of time by reason of O.84 r.21 and/or the provisions of the Act of 1957.

20. There is another aspect to the lapse of time in this action. Even if the claim was not time barred by statute, these proceedings would have to be dismissed under the inherent jurisdiction of the court to dismiss proceedings where, owing to a lapse of time, a fair trial is no longer possible. There are numerous authorities on this, see *Toal v. Duignam* (No. 1 and 2) [1991] ILM 135 and *O'Domhnaill v. Merrick* [1984] I.R. 151 *Manning v. Benson & Hedges Ltd* [2004] 3 I.R. 556.

21. The principles in these cases are particularly applicable to the case of fraudulent misrepresentation being made against the fourth named defendant. The plaintiff was aware that all of the documentation, notes and records (including electronic records) produced for the purpose of compiling the report were destroyed prior to her initiating proceedings in 2016. In answer to this, the plaintiff stated in her affidavit:

"22....irrespective of the destruction of any records or the creation of the report, no prejudice is suffered as a result by the fourth named defendant, as the genesis for the cause of action alleged is located within the four corners of the report and it does not require reference to other material in order to be adjudicated upon."

22. In the course of the hearing, a number of sections of the report furnished by the fourth named defendant were opened to the court. Of particular importance is the fact that there is no reference to the Salymkoye oil field being a "dud". Such a representation is not "located within the four corners of the report" as asserted by the plaintiff. In the absence of the documentation, records and notes produced for the purposes of drafting the report it is difficult, if not impossible, to see how the plaintiff could now advance such a claim.

23. By reason of the foregoing, it follows that, in addition to what is stated at para. 19 above, the fourth named defendant is entitled to have the proceedings against him dismissed on the grounds that a fair trial is no longer possible.

Order 19 Rule 28 Rules of the Superior Courts

24. The court was referred to a number of authorities on the application of O.19 r.28, which Order permits a court to strike out a claim on the ground that it discloses no reasonable cause of action. The court must exercise caution in exercising a jurisdiction that would result in an action being struck out in its entirety, see *Aer Rianta v. Ryanair* [2004] 1 I.R. 506.

25. The claim made against the first, second and third named defendants is for "breach of a fiduciary duty" as set out in the relevant extracts of the statement of claim at para. 5 above. The third named defendant appointed the fourth named defendant as an inspector pursuant to the provisions of s.14 of the Act of 1990.

Section 14 provides:

"(1) The Minister may, subject to subsection (2), appoint one or more competent inspectors to investigate and report on the membership of any company and otherwise with respect to the company for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of the company or able to control or materially to influence the policy of the company.

(2) An appointment may be made by the Minister if he is of the opinion that there are circumstances suggesting that it is necessary—

- (a) for the effective administration of the law relating to companies;
- (b) for the effective discharge by the Minister of his functions under any enactment; or
- (c) in the public interest.

(3) The appointment of an inspector under this section may define the scope of his investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in particular may limit the investigation to matters connected with particular shares or debentures.

(4) Subject to the terms of an inspector's appointment his powers shall extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of his investigation.

(5)..."

26. The aforesaid provisions empower the third named defendant to appoint an inspector. The "warrant of appointment" for the fourth named defendant states *inter alia*:

"The Tanaiste and Minister for Enterprise, Trade and Employment, Mary Harney T.D., in exercise of the powers conferred on her by s.14 of the Companies Act, 1990, being of the opinion that there are circumstances suggesting that it is necessary for the effective administration of the law relating to companies for the effective discharge by the Minister of her functions under any enactment; and with the public interest hereby appoints Lyndon McCann B.L., as inspector under the said section to investigate and report ..."

Having regard to the provisions of s.14 and the terms of the subsequent "warrant of appointment" this Court cannot see where the "fiduciary duty" contended by the plaintiff arises.

27. The plaintiff claims fraudulent misrepresentation against all four defendants. Reference has already been made to the fact that there are no representations as claimed by the plaintiff "within the four corners of the report" as she contends. Further, a number of elements must be present in order to maintain an action for fraudulent misrepresentation. These were stated in *Forshall v. Walsh* (Unreported, High Court, Shanley J., 18th June, 1997):

- "(a) A Plaintiff seeking to establish the commission of the tort of fraud or deceit must prove-
 - (i) the making of a representation as to a past or existing fact by the Defendant

(ii) that the representation was made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false

(iii) that it was intended by the Defendant that the representation should be acted upon by the Plaintiff

(iv) that the Plaintiff did act on foot of the representation and

(v) suffered damages as a result.

Where fraudulent misrepresentation is alleged it must be established that the representation (as defined above) was intended to and did induce the agreement in respect of which the claim for damages arises."

28. It is clear, in applying the foregoing test, that the plaintiff has not established any basis for making a claim for fraudulent misrepresentation.

29. By reason of the foregoing, the defendants are entitled to an order pursuant to O.19 r.28 dismissing the plaintiff's claim on the grounds that the statement of claim as delivered by the plaintiff discloses no reasonable cause of action.

Conclusion

30. In summary, the defendants are entitled to an order dismissing the plaintiff's claim on the grounds that:

(i) The proceedings were initiated after the time periods provided for by O.84 r.21 of the Rules of the Superior Courts and/or the provisions of the Statute of Limitations Act 1957 (as amended) had expired.

(ii) A fair trial is no longer possible owing to the lapse of time, pursuant to the inherent jurisdiction of the court.

(iii) That the statement of claim as delivered by the plaintiff discloses no reasonable cause of action.