



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 215

Appeal No. 2014/137

Kelly J.
Irvine J.
Hogan J.

DANIEL McATEER

Plaintiff/Respondent

- AND -

SENAN BURKE, MARK REGAN AND MILAN SCHUSTER

PRACTISING UNDER THE STYLE AND TITLE OF ADAMS CORPORATE SOLICITORS

Defendants/Appellants

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 7th day of October 2015

1. This appeal provides another example of the some of the legal difficulties which are presented where a private investor utilises a private company for investment purposes. It has been clear for over 170 years since the decision of Wigram V.C. in *Foss v. Harbottle* (1843) 2 Hare 461 that, generally speaking, shareholders cannot sue in respect of any loss caused to the company by the wrongful acts of another, even if such wrongful acts have the consequence of causing financial loss to the shareholders by bringing about a loss in the value of their shareholding.

2. While the correctness of *Foss v. Harbottle* has never been doubted, a rigid and unyielding application of that rule sometimes causes unfairness to shareholders. In that respect, there have been some judicially created exceptions to the rule while in other cases the Oireachtas has intervened by statute to provide shareholders with a remedy. A further difficulty presented by the rule lies in the precise identification of where the supposed injury to the company begins and ends, as it is sometimes not easy to isolate any independent injury to shareholders (such as where a professional person gives negligent advice to a prospective investor in a company) from other losses which are properly regarded as occurring to the company caused by the wrongful actions of others. Many of these difficulties are illustrated by the issues arising in the present appeal.

3. These proceedings were commenced in the High Court by the plaintiff on 29th October 2009 in which he sued the defendant solicitors for damages for breach of contract and for negligence. While the background to the dispute is a complex one, it may, in essence, be summarised as follows: the plaintiff, Mr. McAteer, is a businessman and accountant residing in Co. Derry. The plaintiff claims that the defendant's solicitors were retained by him and his fellow investors in the summer of 2006 to draft and execute a share subscription and shareholder's agreement. He contends that this agreement envisaged that two new companies would be established and that the plaintiff (or his nominee) would be a director of the companies. He further contends that 12 new shares would be allotted to each company and that he in turn would receive three such shares in each company.

4. The plaintiff then says that although these two companies (Ballinorrig Developments Ltd. ("Developments") and Ballinorrig Properties Ltd. ("Properties")) were duly incorporated, he later discovered that he had not been in fact appointed a director of the companies, nor had his shareholding been allocated to him. He further contends that the assets of both Developments and Properties were transferred to two other companies controlled by the defendants. He further contends that the first and second defendants appointed themselves as directors of both Developments and Properties.

5. It appears that Developments and Properties were involved in a plan to develop certain lands at Tralee, Co. Kerry for the purposes of development of a medical centre. Although the lands were re-zoned from agricultural purposes by Kerry County Council in early 2007, the plan never came to fruition. This, the plaintiff says, was because the first and second defendants wrongfully involved themselves personally in these companies; wrongfully excluded him from these companies and then so mis-managed the affairs of both Developments and Properties that the plan failed. All of these events culminated in what the plaintiff claims was considerable financial loss.

6. A statement of claim was delivered by the plaintiff as far back as April 2010 making allegations along these lines. The defendants delivered a defence on 7th March 2011 in which they denied having acted for the plaintiff in relation to these matters, while also denying all allegations of wrongdoing.

7. On 30th July 2010 the defendants issued a notice for particulars in which they requested details on how the plaintiff maintained that he personally had sustained any loss. Although the plaintiff furnished replies to the notice for particulars on 20th September 2010, the defendants contended that the particulars of loss were inadequate in that they did not identify with clarity which entity or entities had suffered loss. This prompted various applications to the High Court on the part of the defendants for an order compelling fuller replies to the particulars which it had raised.

The judgment of MacMenamin J.

8. These matters were fully addressed by MacMenamin J. (then a judge of the High Court) in a reserved judgment delivered on 6th March 2012. No appeal has been taken from that judgment. As will shortly become apparent, the present appeal has been taken against a subsequent decision of O'Malley J. (then a judge of the High Court) delivered on 13th March 2013 which concerned itself with the question of whether the orders made by MacMenamin J. had been duly complied with by the plaintiff.

9. In his judgment MacMenamin J. accepted (at para. 28) that the plaintiff had yet to provide a "satisfactory explanation of which party had allegedly suffered loss." While MacMenamin J. refused to strike out the claim as an abuse of process, he instead 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 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?

10. MacMenamin J. also identified a further issue, namely, who precisely had been negligent and in breach of duty?

11. In the wake of that decision the plaintiff then issued a notice of motion dated the 30th May, 2012. That motion was grounded on the affidavit of his then solicitor, which in turn exhibited a letter dated the 30th May, 2012, the terms of which are necessary to set out in full. The letter dealt 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 MacMenamin 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 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/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/joint venture. In the premises the plaintiff suffered loss in his capacity as a member of the said partnership/joint venture. Further, the plaintiff claims that he suffered loss in his capacity as shareholder of Ballinorig Properties Limited and/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/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 project and that the action of the defendants undermined the viability of the joint venture 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 Piers 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 [he] 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/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 Piers 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' 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.

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 26th October 2011 and 4th January 2012 are repeated, *i.e.*, the persons were Senan Burke and Mark Regan, partners in the firm Adams Corporate Solicitors."

12. Following the delivery of these particulars the plaintiff then applied by motion to have the stay on the proceedings which had been granted by MacMenamin J. pending the delivery of the appropriate particulars lifted. The plaintiff contended that he had now complied with the requirements prescribed by MacMenamin J.

The judgment of O'Malley J.

13. That application was duly heard by O'Malley J. and in a judgment delivered on 13th March 2013 she agreed that the stay should now be vacated: see *McAteer v. Burke* [2013] IEHC 629. O'Malley J. noted that at the hearing of the application before her the plaintiff's position had been further refined in that it was then 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. She concluded that the stay should be lifted:

"The applicable principles of law are set out in the judgment of MacMenamin J. and there is no need to repeat them here. I am satisfied that a major reason for the unsatisfactory nature of the plaintiff's 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*."

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. 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. 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. I will therefore grant the relief sought in the notice of motion."

14. The defendants have appealed to this Court against that decision. At the first hearing of this appeal on 18th May 2015 the parties were all represented by solicitors and counsel. At the conclusion of the hearing this Court indicated that although the pleadings and the replies to particulars were still inadequate, the Court was nonetheless disposed to afford the plaintiff one further opportunity to furnish an amended statement of claim which would identify clearly what loss he suffered personally as a result of the alleged negligence of the defendants. The Court further indicated that it was not prepared to make any further allowances for the plaintiff, so that the pleadings as thus furnished would represent the final position of the plaintiff without the necessity for further amendments or notices for particulars.

15. At the resumed hearing on 29th June 2015 the plaintiff represented himself. He had, however, furnished a further amended statement of claim in accordance with the Court's direction. The defendants maintained that even with these amendments the claim had still not been pleaded with sufficient particularity. They contended given the delays in the prosecution of this litigation associated with the failure of pleading that the claim should at this stage be struck out.

16. It is now necessary to examine the amended statement of claim to see whether it satisfies the directions previously given by this Court. It is thus necessary for this purpose to set out in full the proposed amendments.

Amendment No. 1 - new paragraph 20

17. The new paragraph 20 provides:

"The defendants were retained at the outset to register the plaintiff's (25%) interest in the project. They failed to do so but rather registered that interest in their own names/the names of companies under their complete control. The defendants acted against express instructions in doing this. Subsequent to this the defendants unlawfully acquired an interest in the project when they acquired two shares for Mr. Michael Desmond who the defendants knew to be under serious financial pressure. The defendants acquired two shares at under value. Not only did the defendants act unlawfully in this acquisition but they also deprived the plaintiff and his other legitimate shareholders, the right to acquire Mr. Desmond's shares thereby increasing their net value in the project. Having at the outset excluded the plaintiff and others to the project by registering the shares in their own names, the defendants manoeuvred their way into the project by acquiring Mr. Desmond's shares. Once they had acquired Mr. Desmond's shares the defendant's frustrated progress to the project by failing to provide the requisite information to the bank in support of a funding application. By April 2008 the bank had indicated that they would not be supporting the project. However, the project could still have been taken forward as a result of an arrangement with the company, Pierse Desmond Limited, Mr. Pierse, the landowner. However, the defendants communicated with the plaintiff's shareholders and advised them how to effectively vote the plaintiff out of the company. The defendants also began actively advising Mr. Pierse behind the scenes since the litigation of the plaintiff. While advising Mr. Pierse how to run his case against the plaintiff, the defendants also made an approach to Mr. Pierse and offered to buy his land for him over a four year period. At the same time the defendants made misrepresentations about the plaintiff to his fellow shareholders and Mr. Pierse to the effect that the plaintiff had tried to inflate the project for his own benefit to the tune of €50m. By breaching confidence and by making misrepresentation about the plaintiff, the defendants not only damaged the plaintiff's standing but attempted to secure the project for themselves on favourable terms to the exclusion of the plaintiff. The defendants continued to advise Mr. Pierse in litigation against the plaintiff and in so doing breached their duty and care of confidence."

18. The first element to this claim is that the defendants wrongfully failed to register the plaintiff's 25% interest in the project. (It is now not disputed that the plaintiff was only registered as a member of both Properties and Developments and provided with three shares in each company on 5th November 2009.) Second, it is alleged that the defendants deprived the plaintiff of certain pre-emption rights in respect of the potential acquisition of the shareholding of a Mr. Michael Desmond. Third, it is alleged that the defendants failed to provide appropriate information to the bank in support of a funding proposal. Finally, it is contended that the defendants wrongfully communicated with the other shareholders and advised them on how to vote the plaintiff out of the company.

19. So far as the first element of the claim is concerned, it is hard to see how this is not a claim in negligence which is personal to the plaintiff since it concerns his very membership of the two companies in question. The same can be said in respect of the second element of the claim – the alleged failure to respect the potential pre-emption rights of the plaintiff *qua* shareholder – since this is a right which is personal and specific to each shareholder. One can equally take the same view in relation to the contention that the defendants advised the other members as to how the plaintiff was voted out of the company, as the essence of the claim is that the defendants breached a duty which was personal to the plaintiff.

20. I nevertheless take the view that the plaintiff cannot maintain the third element of the claim, namely, that the defendants' wrongly frustrated the progress of the project by failing to provide the bank with the appropriate information. If that indeed occurred, it was wrong done to the relevant companies since they were thereby denied the opportunity of realising the appropriate profits from the venture. Under the rule in *Foss v. Harbottle*, the plaintiff is precluded from pursuing this claim and this element of paragraph 20 should accordingly be struck out.

Paragraph 22

21. Paragraph 22 now provides:

"The defendants also breached their duty of confidentiality to the plaintiff by disclosing to third parties private and confidential information about the plaintiff and his client's financial affairs, knowledge which was obtained by the defendants when they were retained by the plaintiff. The defendants released confidential information about the medical project to Mr. Pierse and provided confidential information about the financial dealings of Messrs. Farrell and Harrigan who had been joint clients and business associates of the plaintiffs and defendants. At one point Mr. Farrell has forwarded funds to the defendant with the purpose of acquiring a vehicle in anticipation of his return to Ireland from the USA. This payment was made promptly and fully to the offices of the defendants. The defendants conspiring with Mr. Pierse and other individuals based in Northern Ireland put out a rumour that the plaintiff had used these funds to buy his wife an expensive jeep. The defendants continued to conspire with Mr. Pierse and the individuals in Northern Ireland to damage the plaintiff's business interests, private interests, certain High Court matters and other investigations that are ongoing in Ireland. The plaintiff has suffered and continues to suffer loss and damage as a result of having to deal with the litigation involving Mr. Pierse, the individuals in Northern Ireland who are been assisted by the defendants."

22. The essence of this plea is that the defendants wrongfully breached their duty of confidentiality by disclosing confidential information concerning the plaintiffs to third parties. It is also contended that the defendants committed a malicious falsehood by spreading false stories concerning the plaintiff. Again, these are clearly claims which are personal to the plaintiff and are not barred by the rule in *Foss v. Harbottle*.

Paragraph 26

23. Paragraph 26 provides:

"Due to the actions of the defendants the plaintiff has suffered and continues to suffer loss in the following ways:-

☐ by failing to register the plaintiff's interest in the medical project at the outset, by then unlawfully acquiring an interest in the project in using their position to usurp the plaintiff, by mobilising the plaintiff's fellow shareholders against the plaintiff, by making misrepresentations and malicious falsehoods about the plaintiff, by frustrating the progress of the project, by then trying to acquire the project for themselves by making malicious falsehoods against the plaintiff to Mr. Pierse and by subsequently conspiring with Mr. Pierse against the plaintiff, the defendants denied the plaintiff the opportunity of making a substantial profit on a viable medical project

☐ by breaching confidentiality and by conspiring with the plaintiff's opponents in litigation, the defendants had damaged the plaintiff's business and private interests and have caused, and continue to cause, loss and damage as a result of the plaintiff having to defend his position against his opponents who were been assisted by the defendants, who in turn are misusing information acquired when they were the plaintiff's solicitors."

24. This plea largely repeats the pleas already covered in paragraphs 21 and 22. One new feature is the claim that the defendants "denied the plaintiff the opportunity of making a substantial profit on a viable medical project." It is clear, however, that any profit on the project was to be realised in the first instance by the two companies. This claim, therefore, is in essence a claim that the value of the plaintiff's shareholding in the two companies was compromised by reason of a wrong done to these companies. This, however, is precisely the type of claim which, if it is to be pursued, must, by virtue of the rule in *Foss v. Harbottle*, be pursued by the two companies, Properties and Developments, and not by the plaintiff as it is not personal to him. I would therefore strike out this element of the claim.

25. It likewise follows that the particulars of loss which follow from paragraph 26 will have to be further amended to confine the claim to damages which are purely personal to the plaintiff. The plaintiff cannot, for example, claim for the loss of profits which he contends the hospital contracts would have generated. One or both of the two companies would have been parties to these contracts and any profit which these companies might have realised would have inured in the first instance for their benefit alone. Again, a claim based on such loss of profits is a claim which the companies alone – and not the plaintiff – could have brought. Nor can the plaintiff claim for the architects fees and professional fees incurred in relation to this project, since these were the costs incurred by the companies and not by the plaintiff.

26. These additional particulars of loss, raising, as they do claims which are peculiar to the companies and not to the plaintiff qua shareholder of those companies, will accordingly have to be struck out.

Conclusions

27. As will be seen from the narrative in this judgment, the plaintiff's case has evolved since the commencement of these proceedings almost five years ago. As both MacMenamin J. and O'Malley J. pointed out in their respective judgments, much of this difficulty has been created by reason of the plaintiff's endeavours to make claims which are barred under *Foss v. Harbottle* in addition to claims which are personal to him. Further difficulties have resulted from his failure to identify with sufficient clarity those claims which are merely personal to him and to confine these proceedings to those claims.

28. The delays to date have been most unsatisfactory and must have been immensely frustrating for the defendants. It is also clear that the plaintiff did not fully comply with the stipulations imposed by this Court at the hearing on 18th May 2015 in that – as this judgment demonstrates – the amended statement of claim still requires further amendments to excise claims which are barred under the rule in *Foss v. Harbottle*. It is nevertheless clear that the claims which still remain are entirely personal to the plaintiff.

29. There remains for consideration the question of whether this Court should now grant the plaintiff yet further leave to amend the (already amended) statement of claim as furnished by him on 13th June 2015 in the light of this analysis of that pleading. Not without considerable hesitation I have concluded that it would be so appropriate. In this regard I take account of the fact that the striking out of pleadings (and, by extension, the action) should normally be avoided if a further amendment will regularise them: see, e.g., *Sun Fat Chan v. Osseous Ltd.* [1992] 1 I.R. 425, 428, per McCarthy J. One must also acknowledge that the plaintiff is no longer professionally represented.

30. In these circumstances, I would grant the plaintiff liberty to make these amendments solely for the purpose of ensuring the case is now confined entirely to purely personal claims, while excluding all claims barred by *Foss v. Harbottle*. There must, however, also be no further delay on the part of the plaintiff and the duty rests upon him now to take such steps as will ensure that these proceedings are swiftly brought to a hearing. I would accordingly hear the parties on the question of the finalisation of the pleadings in the light of this judgment and what steps are now appropriate to ensure that the case can be quickly heard by the High Court.