

**THE HIGH COURT
COMMERCIAL**

2005 No. 2478P

BETWEEN/

SEAMUS DUIGNAN

PLAINTIFF

AND
VIVIAN W. DUDGEON, PATRICIA GAFFNEY, BARBARA MANNING
RICHARD LAW NESBITT AND PETER MADDEN

DEFENDANTS

Judgment of Mr. Justice Kelly delivered on the 14th day of October, 2005.

Introduction

1. Arnotts Ltd. (Arnotts) applies to be joined as a defendant in these proceedings. The defendants, who are the trustees of the Arnotts' Staff Pension Fund (the trustees) support that application.

2. The plaintiff, who is the former managing director of Arnotts, having worked there for over 40 years, opposes the application.

The proceedings

3. The plaintiff is a member of the Arnotts' Staff Pension Fund (the fund). The current value of his pension is in excess of €5.3m.

4. In his statement of claim he contends that pursuant to the trust deed and rules of the fund and the provisions of s. 34 of the Pensions Act, 1990, he was and continues to be entitled to the transfer of his pension to another retirement benefit scheme. He alleges that in breach of trust, fiduciary duty, statutory duty and in breach of the scheme the trustees failed to properly consider and/or effect the transfer of the plaintiff's pension entitlements. Particulars of these allegations are set out at para. 7 of the statement of claim. They read as follows:

"The plaintiff's employment terminated on 31st January, 2004. At all times, he intended to transfer his pension entitlements to an alternative scheme. On or about the 3rd day of February, 2004 the plaintiff requested the transfer from Mr. Knowles acting on behalf of the defendants who confirmed that he could transfer, subject only to receipt of information regarding the alternative scheme.

The plaintiff set up an alternative pension scheme known as the Seamus Duignan Executive Pension Portfolio ('the Rock River Enterprises Pension Scheme'), which was approved by the Revenue Commissioners.

The defendants failed to effect the transfer on the basis that the plaintiff's employer considered his termination to be a retirement. No retirement took place. On numerous occasions, the plaintiff sought to address this point with reference to the evidence apparently presented to the defendants by the company and sought such facility. The defendants refused to entertain the plaintiff's request to consider the evidence adduced by the company and the defendants purported to make a finding without affording the plaintiff an opportunity to consider and/or respond to the said evidence.

The defendants failed to afford the plaintiff any proper and/or fair procedure and deprived the plaintiff of the natural and/or constitutional justice which he was entitled to. In particular, the plaintiff was deprived of the evidence advanced by the company to the defendants which the defendants maintain was the basis of their concluding that the plaintiff had retired, upon which conclusion they based their refusal to transfer. Furthermore, the defendants gave the company priority when adjudicating on the plaintiff's right to transfer.

The plaintiff reserves the right to raise further particulars up to and including at the trial of the hearing and upon receipt of discovery, including third party discovery."

5. The primary relief claimed by the plaintiff is a declaration that the determination by the trustees regarding his right to transfer his pension entitlements is null and void and without legal effect.

6. In the trustees' defence, they specifically deny that the plaintiff's employment "terminated" on 31st January, 2004. They contend that the evidence available to them from both the plaintiff and Arnotts was that the plaintiff retired on 31st January, 2004. They further plead that in the light of the plaintiff's retirement he was not entitled to a transfer of his pension to another scheme and the trustees were not entitled to effect any such transfer.

7. It is clear from this exchange of pleadings that the plaintiff contends that his employment terminated on 31st January, 2004 but not by retirement. He positively asserts that no retirement took place. The trustees on the other hand contend that the evidence available to them from both the plaintiff and Arnotts was to the effect that the plaintiff had retired, thereby disentitling himself to a transfer of his pension entitlements.

8. In the affidavit grounding the application Arnotts aver as follows:

"The trustees determined that as the plaintiff had retired from the company by agreement on or about 31st January, 2004 he could not transfer his pension out of the fund. It is this decision which the plaintiff challenges in these proceedings. In essence, he asserts that he did not retire but rather that he left the service of the company. Thus the main issue in dispute between the plaintiff and the trustees is the same as is in dispute between the plaintiff and the company, namely the basis on which the plaintiff left the company."

9. The affidavit also points out that the plaintiff has brought a claim against Arnotts before the Equality Tribunal, in which he alleges that he had been dismissed due to what is described as 'disability discrimination'. The affidavit points out that para. 10 of the statement of claim alleges that on foot of certain representations and/or agreements between the plaintiff and Mr. Knowles, the plaintiff understood that his pension entitlements would be transferred "and proceeded to act accordingly, including allowing the company terminate his employment". Arnotts contends that this assertion in the statement of claim is inconsistent with the claim that has been brought before the Equality Tribunal.

10. The entitlement of the plaintiff to have a transfer of his pension funds depends upon the circumstances in which he left Arnotts. The trustees were not privy to the circumstances of the plaintiff's departure. They contend that they have acted on the basis of information given to them in that regard.

11. It is in these circumstances that Arnotts seeks to be joined.

Basis for joinder

12. Arnotts' application is based upon the provisions of O. 15, r. 13 which insofar as is relevant provides that:-

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order ... that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

13. This rule was considered by the Supreme Court in *Barlow v. Fanning* [2002] 2 I.R. 593. That court took the view that exceptional circumstances would be required before the court would join a defendant to proceedings against the wishes of the plaintiff. The general rule of practice is that the plaintiff is entitled to choose the person or persons as defendants against whom he wishes to pursue his claim for the relief or remedy he seeks. Normally he cannot be compelled to proceed against other persons whom he has no desire to sue.

14. Despite that, however, it is clear that the court does have power to add a person as a defendant against the will of a plaintiff if it is satisfied that that person's presence is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. The decision in *Barlow's* case is not inconsistent with other decisions cited such as *Allied Irish Coal Supplies Ltd. v. Powell Duffryn Intl. Fuels Ltd.* [1998] 2 I.R. 519 and *Kelly v. Rafferty* [1948] N.I. 187. Neither of these are pertinent to this case as I will explain when I set out my conclusions.

The plaintiff's attitude

15. I now deal with the approach of the plaintiff to this application. His counsel opposed it. The position taken by the plaintiff in his affidavit is somewhat more nuanced. There he says:

"I am not in a position to consent to the said application and am advised that the joinder of Arnotts Ltd. is a matter more properly for this court."

16. He then contends that Arnotts is seeking to broaden the scope of the proceedings by seeking determinations regarding his departure from that company. In that regard attention was called to the provisions of para. (iv) of the notice of motion. There Arnotts, in addition to seeking its joinder to the proceedings, also sought "an order directing that the issue as to the circumstances in which the plaintiff left Arnotts Ltd. be determined as between the plaintiff and Arnotts Ltd. as part of these proceedings". Counsel on behalf of Arnotts disavowed any intention to broaden the scope of the proceedings. In support of that approach he specifically withdrew the relief sought at para. (iv) of the notice of motion.

17. The plaintiff contends that the main issue in the action is not his departure from Arnotts but rather his right to have his pension benefits transferred under s. 34 of the Pensions Act, 1990.

Conclusions

18. The essence of the plaintiff's claim is that the trustees were wrong to refuse to transfer his pension entitlements from the fund to another pension scheme. The trustees made that determination on foot of information received by them to the effect that the plaintiff had retired from his position in Arnotts. If he retired he was not entitled to have his pension funds transferred. The plaintiff asserts that no such retirement took place. Whether his departure from Arnotts was by means of retirement or not is a matter between him and Arnotts. It cannot be a matter between the plaintiff and the trustees for they were not his employers.

19. The manner in which the plaintiff's employment terminated on 31st January, 2004, is pivotal to his alleged entitlement to have his pension funds transferred. That issue can only be determined in a binding manner between the plaintiff and Arnotts. On the proceedings as constituted at present, Arnotts would have no entitlement to be heard, still less could it be bound by any determination which the court might make as to the circumstances of the plaintiff's departure from it. There is, in my view, much merit in the contention made by the trustees that they are observers rather than participants in the determination of that issue.

20. In my opinion it is entirely artificial to suggest, as the plaintiff does, that his departure from Arnotts is not the main issue in the proceedings. It is, in many respects, at the forefront of the proceedings and the Plaintiff himself has made it so by his positive assertion that he did not retire from his position. The crucial question of whether that is correct or not can only be decided with Arnotts being joined as a defendant.

21. In my view it makes no sense for the action to proceed without this issue being properly addressed. The action as constituted at present cannot effectually and completely adjudicate upon and settle that crucial question.

22. The cases cited in opposition to this application are not on point. The joinder of Arnotts is not with a view to deciding a peripheral issue as was sought to be done in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn Intl. Ltd.* [1998] 2 I.R. 519. *Kelly v. Rafferty* [1948] N.I. 187 held that the court will not join a new defendant and so compel a plaintiff to make a new claim inconsistent with the one already made. The instant case is the polar opposite. The joinder of Arnotts allows the plaintiff to have determined in a binding way his existing assertion that his departure from Arnotts was not by way of retirement. He is not being required to make any new claim or one which is inconsistent with that assertion.

23. In my view Arnotts ought to be joined as a defendant to these proceedings and I so order.