

**THE HIGH COURT
COMMERCIAL**

[2022] IEHC 95
[2021/3509P]

BETWEEN

PATRICK KEARNEY AND KILMONA HOLDINGS LIMITED

PLAINTIFFS

AND

**J&E DAVY TRADING AS DAVY, KYRAN MCLAUGHLIN, TONY GARRY, BYRAN
MCKIERNAN, BARRY NANGLE, DAVID SMITH, TONY O'CONNOR, FINBARR QUINLAN,
JOSEPH MCGINLEY, FIONA HOWARD, DONAL O'MAHONY, ANTHONY CHILDS, PAT
LYSTER, BARRY KING, BARRY MURPHY, EAMONN REILLY AND STEPHEN LYONS**

DEFENDANTS

JUDGMENT OF Mr. Justice Twomey delivered on the 23rd day of February, 2022

INTRODUCTION

1. The background to this case has been well publicised. It involves the sale of bonds in Anglo Irish bank by the plaintiffs, Mr. Kearney and a company ("Kilmona"), on whose behalf Mr. Kearney is authorised to act. The sale took place through the first defendant ("Davy"), a stockbroking firm.
2. The bonds were sold in November 2014 to a partnership called the O'Connell Partnership, which was made up of 16 employees and senior management in Davy, who are the remaining defendants (the "Partnership"). The net price paid for the bonds by the Partnership was €5.3 million.
3. By letter dated 20th April, 2015 Mr. Kearney's agent (Mr. Tom Browne of LeBruin Private Ltd) confirmed that neither Davy nor the sixth defendant ("Mr. O'Connor") had an advisory or fiduciary relationship with Mr. Kearney and that Mr. Kearney was aware that the bonds were being sold to employees in Davy (as a separate matter, it is claimed by Davy that there was a breakdown in the relationship between LeBruin Private Ltd and the plaintiffs over a profit-sharing arrangement regarding the sale of the bonds between them, which resulted in LeBruin Private Ltd issuing separate proceedings against the plaintiffs, which are not connected with these proceedings).
4. However, on the 30th July, 2015, the plaintiffs instituted proceedings (the "2015 Proceedings") against Davy alleging that the bonds were sold at an undervalue, that there was a breach of fiduciary duty by Davy and alleging a conflict of interest on the part of Davy because of its alleged interest in acquiring the bonds. These proceedings were settled in February 2016. As part of the settlement, Mr. Kearney signed a letter dated 12th February, 2016 confirming that the plaintiffs did not have an advisory or fiduciary relationship with Davy or Mr. O'Connor in relation to the transaction. The plaintiffs received a settlement sum of €1,125,000 with each side bearing their own costs.
5. The next development was that the Central Bank of Ireland investigated this transaction and on 1st March, 2021 it fined Davy €4.13 million in respect of regulatory breaches and failures to flag potential conflicts of interest arising from the transaction. It issued a 13-page Enforcement Action (the "Central Bank Report") detailing the breaches and misconduct on the part of Davy.

6. In particular, the Central Bank highlighted the failure of senior management in Davy to flag the potential conflict of interest to the internal compliance function in Davy and the misleading of the internal compliance function by senior management in Davy. The Central Bank also found that an aggravating factor in the calculation of the fine was that Davy misled the Central Bank on more than one occasion regarding the extent of the wrongdoing.
7. After the issue of the Central Bank Report, Mr. Kearney instituted these proceedings on the 27th April, 2021 against Davy and the Partnership for fraud and conspiracy and a breach of the duty not to create a conflict of interest.
8. In these proceedings, Mr. Kearney alleges fraud on the part of Mr. O'Connor, since Mr. Kearney claims that he asked Mr. O'Connor, in November 2014, when the bonds were being sold by Davy, to disclose the identity of the purchaser, but that Mr. O'Connor refused to do so, instead stating that the purchaser was a client of Davy whose identity could not be revealed because of client confidentiality.
9. Mr. Kearney alleges a further fraud took place in December 2015, in the context of the settlement of the 2015 Proceedings at that time. He claims that Mr. O'Connor, the third defendant ("Mr. Garry") and the fifth defendant ("Mr. Nangle") fraudulently represented that Davy had no association or involvement in the Partnership.
10. On the basis of these two alleged frauds, Mr. Kearney seeks, *inter alia*, to set aside the settlement of the 2015 Proceedings, he seeks damages in respect of the sale at an alleged undervalue of the bonds to the Partnership and he claims an entitlement to an account of the secret profit obtained by the Partnership on their sale of the bonds.
11. The trial of this action therefore will seek to resolve the conflicting positions between the parties. The defendants claim that the plaintiffs were 'execution-only' clients of Davy and therefore the firm owed no fiduciary duty to them, there was no secret profit for which account has to be made to the plaintiffs and that the plaintiffs were aware that the purchaser of the bonds was made up of Davy employees. The plaintiffs claim that they were not 'execution-only' clients, but that Davy was acting as their agent and adviser and so owed them a fiduciary duty and must account for the secret profit made on the sale of the bonds. They also claim that not only were they not aware of the true identity of the purchaser of the bonds (as employees of Davy) until the publication of the Central Bank Report, but that certain defendants fraudulently misrepresented/concealed the identity of the purchaser of the bonds.

This pre-trial application

12. This Court is concerned with a pre-trial application in which Davy requires further information from the plaintiffs regarding the allegations of fraud against the firm. Davy is seeking an order from this Court pursuant to Order 19, Rule 7 of the Rules of the Superior Court directing Mr. Kearney to furnish adequate replies in respect of Particulars 34 to 52 of Davy's Notice for Particulars.

13. Although Davy is claiming that it requires these replies to properly defend this action, it is the case that a defence has already been filed by Davy in these proceedings. However, it is relevant to note that this was done after a letter from the plaintiffs' solicitors to Davy warning of their intention to seek judgment, if a defence was not filed. The defence, which was then filed by Davy in response, is expressly pleaded to be without prejudice to Davy's contention that the plaintiffs' claim is insufficiently particularised because of the alleged failure to provide adequate replies to particulars to date.

The law relating to providing particulars in fraud cases

14. There are competing interests at stake when one is dealing with a claim of fraud. On the one hand, the defendant accused of fraud is entitled to be sufficiently informed of the case he has to meet, but on the other hand, as one is invariably dealing with an allegation that the defendant is guilty of concealing his wrongdoing, this makes it difficult for the plaintiff to provide the same degree of details of the alleged wrong, as she would be able to provide in, say, a straight-forward breach of contract or negligence case.
15. The case of *National Educational Welfare Board v. Ryan* [2008] 2 I.R 816 emphasises that a plaintiff in a fraud case will often have limited insight of how an alleged (and invariably concealed) fraud operated. If, however, she has to outline in her pleadings the precise particulars of her claim, before she has had the benefit of discovery from the defendant, this will place significant limits on the plaintiff in pursuing her claim. This is because the extent of the discovery to which a plaintiff is entitled is delimited by her pleadings, yet she will not have sufficient details of the concealed fraud, *before* discovery, to properly particularise it in the pleadings.
16. From the case law, it is clear that the solution to this Catch 22 is to permit a plaintiff in fraud cases more latitude in particularising her claim, prior to discovery, than is the situation in non-fraud cases.
17. Of course, it would be too easy if a plaintiff could, by merely asserting fraud, be relieved of the obligation to set out precise particulars of her claim before becoming entitled to discovery. For this reason, the case law makes clear that the plaintiff's pleadings must establish a *prima facie* case of fraud before she can seek to benefit from what is effectively a 'two stage pleading' of fraud (per Costello J. in *James Elliott Construction Ltd v. Kevin Lagan and Others* [2014] IEHC 547 at para. 14) i.e. the first stage before discovery and the second stage after discovery.
18. Clarke J.'s analysis of this issue in the *National Educational Welfare Board* case was endorsed by the Supreme Court in *Keaney v. O'Sullivan* [2015] IESC 75 at p. 24 of Dunne J.'s judgment in the following terms:

"I am conscious of the remarks made in the case of *National Educational Welfare Board v. Ryan* [2008] 2 I. R. 816 at page 825 by Clarke J. where he stated:

'It is in the very nature of fraud (or other unconscionable wrongdoing) that the party who is on the receiving end will not have the means of knowing the precise

extent of what has been done to them until they have obtained discovery. To require them to narrow their case prior to defence (and, thus, discovery) would be to create a classic Catch-22. The case will be narrowed. Discovery will be directed only towards the case as narrowed. Undiscovered aspects of the fraud or consequences of the fraud will, as a natural result, never be revealed. This would, in my view, be apt to lead to an unjust solution.'

He went on to observe at pages 824 to 825 as follows:

'A balance between these two competing considerations needs to be struck. The balance must be struck on a case by case basis but having regard to the following principles. Firstly, no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party, in its pleadings, specifies, in sufficient, albeit general, terms the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and, thus, prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a prima facie case to that effect, the defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial.'

I would readily endorse these observations. However one has to bear in mind, as Clarke J. said, that a plaintiff alleging fraud has to pass the threshold 'in a sufficient manner to give the defendant a reasonable picture of the fraud to be contended for'." (Emphasis added)

19. In his judgment at para. 6.1, Clarke J., as he then was, concludes his analysis as follows:

"I am, therefore, satisfied that this is an appropriate case to permit the plaintiff to defer giving any further particulars of its claim until after it has had the benefit of such discovery or interrogatories as might be agreed or directed by the court. I am satisfied that the pleading already in place in this case goes significantly beyond a mere assertion. I am satisfied that there is no prejudice in requiring the defendant to plead at this stage or, at a minimum, no prejudice which cannot be adequately dealt with by indicating that full particulars will have to be delivered well in advance of trial, and that the defendants will have the opportunity of making any appropriate amendments to their defence in the event that same should be justified by the particulars then delivered. Any such adjustments can, if appropriate, involve the making of a lodgement. In addition, I am satisfied that the Board has made out a prima facie case of fraud and that, having regards to those factors, the balance of justice does not require that any further particulars be delivered at this stage."

20. Accordingly, the key issue for this Court is whether the plaintiffs have provided a reasonable picture of the alleged fraud and whether they have established a *prima facie* case of fraud, as distinct from making a mere assertion of fraud against Davy, such that they should not have to answer the particulars in further detail at this stage, but may defer giving any further particulars of the claim until after discovery and/or interrogatories.

Does Davy have a reasonable picture of the fraud and is there a *prima facie* case of fraud?

21. As a plaintiff is required to provide '*facts, matters and circumstances said to give rise to the alleged fraud*' (per Dunne J. at para. 8 of Keaney), it is relevant to note that the plaintiffs made, in this regard, uncontroverted written submissions that they have provided the considerable detail of transactions, persons, dates, what was said *etc.* in their pleadings of the alleged fraud by Davy. Particulars have been given by the plaintiffs that:

- The transaction and events in dispute are the sale of the bonds by Davy in November 2014, and the subsequent settlement of the 2015 proceedings;
- The identity of the individuals with whom the plaintiffs dealt with when dealing with Davy - i.e. Mr. Tony O'Connor, Mr. Tony Garry and Mr. Barry Nangle who were executives and employees of Davy;
- The dates on which the matters complained of by the plaintiffs occurred was the 14th November, 2014;
- The meetings requested by Mr. Garry were in December 2015 at which Mr. Garry and Mr. Nangle on behalf of Davy were present and Mr. Kearney and Mr. Alan Mains were present on behalf of the plaintiffs in the context of the proceedings issued by the plaintiffs against Davy on the 30th July, 2015;
- Statements were allegedly made by Mr. O'Connor to Mr. Kearney on the 14th November, 2014 with regard to the identity of the purchaser of the bonds;
- Statements were allegedly made by Mr. Garry and Mr. Nangle in December 2015 concerning Davy's association with the purchaser of the bonds and their denial that Davy had any involvement in or association with the purchaser;
- Mr. O'Connor on the 14th November, 2014 and Mr. Garry and Mr. Nangle in the course of the meetings in December 2015, refused to disclose the identity of the purchaser which they identified was a client of Davy and whose identity could not be disclosed for client confidentiality reasons;
- Davy at no time between November 2014 and the 1st March, 2021 disclosed to the plaintiffs that the purchaser of the bonds was the Partnership, which consisted of executives and employees of Davy;

- The plaintiffs between November 2014 and the 1st March, 2021 did not know the identity of the purchaser of the bonds;
 - The plaintiffs, following the publication on the 1st March, 2021 of the Central Bank's Report, discovered for the first time that Davy had sold the bonds to certain of its executives and employees who were trading as the Partnership;
 - The plaintiffs, following the publication of the Central Bank Report on the 1st March, 2021, discovered that the Partnership had subsequently sold on the bonds at a substantial profit which would otherwise have accrued to the plaintiffs but for the alleged fraud;
 - The plaintiffs, in support of their case against Davy and the Partnership, are relying upon the Central Bank Report which deals solely with the role played by Davy in the sale of the plaintiffs' bonds and the findings of which have been accepted and agreed to by Davy and pursuant to which the Central Bank imposed a fine of €4.1 million;
 - In light of the matters pleaded by the plaintiffs and the subsequent findings made by the Central Bank, the plaintiffs are claiming that the conduct of Davy and in particular the Partnership, amounts to the defendants having embarked on a fraudulent enterprise which involved the Partnership as executives and/or employees of Davy fraudulently concealing from the plaintiffs, at a time when Davy was allegedly acting as the plaintiffs' adviser and agent in the sale of the bonds, the fact that the Partnership had purchased the plaintiffs' bonds with the intention of thereafter selling them on for a substantial profit and for their personal benefit to the detriment of the plaintiffs;
 - The plaintiffs seek orders directing the defendants to disgorge and fully account to the plaintiffs in respect of the personal financial gain made to the detriment of, and which should have accrued to, the plaintiffs.
22. As regards the Central Bank Report, Davy claims that this Report is not admissible at the trial of the action, since it says that the plaintiffs' case has nothing to do with how co-operative Davy was with the Central Bank (which Davy says is the focus of that report). In addition, the Report states at para 4:
- " The *potential* conflict of interest between the [Partnership] and [the plaintiffs] should have been flagged to Davy Compliance under the terms of Davy's conflict of interest policy." (Emphasis added)
23. Counsel for Davy submitted that, on his reading of this report, it '*in fact, did not find that there was a conflict of interest*' and so this is further reason as to why, in his view, the Report is inadmissible.
24. For their part, it is relevant to note that the plaintiffs have relied extensively upon the Central Bank Report in their Statement of Claim, pleading at para. 58 that the egregious

breaches and wrongdoing engaged in by the defendants are substantially confirmed in the findings made in that Report. The plaintiffs also plead at para. 59 that the substance of the Central Bank's findings against Davy corroborates the fraudulent concealment and wrongdoing alleged against the defendants in the proceedings, including Davy's alleged withholding of the identity of the purchaser of the bonds and the alleged assurances by Davy that there was no connection between the Partnership and Davy.

25. In addition, in the reply to the Notice for Particulars regarding the plea at para. 50 of the Statement of Claim (that the Partnership was set up to conspire with Davy to obtain a secret profit), the plaintiffs state that they rely '*on the entirety of the Central Bank Report in support of*' their claim in the proceedings.
26. While there may be an argument at a later stage regarding the admissibility of the Central Bank Report, at this stage, this Court is concerned with whether the plaintiffs have established a *prima facie* case of fraud. For this purpose, it is not necessary to determine the admissibility or otherwise of the Central Bank Report.
27. Therefore, as regards the contents of the Report in the context of whether this assists the plaintiffs in establishing a *prima facie* case of fraud, first, it is relevant to note that the Central Bank makes findings in respect of misleading actions on the part of Davy, albeit to the Central Bank and to the internal compliance department of Davy, and so not to the plaintiffs. However, these misleading actions by Davy relate to the very transaction at issue in these proceedings, namely the sale of the bonds.
28. Secondly, and more significantly, it is relevant to note that at the core of the plaintiffs' proceedings is an alleged conflict of interest and its concealment by Davy regarding the sale of the bonds. In this regard, this Report does make findings regarding a *potential* conflict of interest by Davy regarding this very transaction.
29. When one considers the details of the pleas made to date, as outlined above, combined with this evidence contained in the Central Bank Report (*albeit* that its admissibility may be challenged at a later date), it does seem to this Court that these allegations of fraud are very far removed from being mere assertions (although it should be noted that this does not mean that Davy may not have a defence to these allegations and, as previously noted, Davy is claiming that the plaintiffs were aware of the identity of the purchaser of the bonds).
30. Not only can it not be said that the plaintiffs are making wild or baseless assertions, if the foregoing evidence is found to be true and admissible, it seems to this Court that it supports a *prima facie* finding of fraud which, *albeit* that it should be emphasised that this is still some way from establishing, on the balance of probabilities, that the defendants are guilty of fraud.
31. It also seems to this Court that, based on the foregoing summary of the pleadings (as well as the Central Bank Report), the defendants have a reasonable picture as to the fraud alleged. This is because they have been provided with, *inter alia*, the names of the

people who made the allegedly fraudulent representations, the substance of the alleged fraudulent statements and the specific and approximate dates of when they were made.

In addition, this is not a complex case

32. Combined with this is the fact that, although there is a considerable sum of money involved, the essence of the plaintiffs' claim against the defendants is not a complex one. It is, in essence, that a selling agent, who was allegedly acting for the seller of a product, had a conflict of interest when selling that product to the buyer. This is for the very straight-forward reason they claim that the agent was in effect also the buyer, which fact the agent failed to disclose to the seller.
33. This absence of any complexity in the plaintiffs' claim is relevant because, as is clear from the judgement of O'Donnell J., as he then was, in the Supreme Court case of *Quinn Insurance Ltd. (Under Administration) v. Pricewaterhousecoopers (A Firm)* [2019] IESC 13 at para. 24, '*the more complex the case is, the more detailed the particulars that should be required.*' This absence of complexity in these proceedings therefore, albeit that they are of high value, supports the finding that the details of the plaintiffs' claim provided to date are sufficient to give Davy a reasonable picture of the fraud alleged against it.

CONCLUSION

34. When all of the foregoing particulars contained in the pleadings and the contents of the Central Bank Report are taken into account, it seems to this Court that the plaintiffs have established a *prima facie* case of fraud against Davy and Davy has a reasonable picture of that alleged fraud.
35. Accordingly, as was the case in *National Educational Welfare Board v. Ryan*, this is an appropriate case to permit the plaintiffs to defer giving any further particulars of their claim until they have had the benefit of such discovery or interrogatories as might be agreed or directed by the Court. This is because this Court is satisfied that the pleadings already in place go significantly beyond mere assertion of a fraud against Davy.
36. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms of any draft agreed court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).