

THE HIGH COURT

[2015 No. 6950 P]

BETWEEN

DECLAN BUTTIMER

PLAINTIFF

AND

BANK OF SCOTLAND PLC AND FRIENDS FIRST LIFE ASSURANCE COMPANY LIMITED

DEFENDANTS

**JUDGMENT of Mr. Justice Meenan delivered on the 26th day of May, 2020**

**Introduction**

1. The plaintiff's claim concerns an investment which he made in or about 2007. The first named defendant, through its servants or agents, marketed a fund known as "*the Invista Opportunity Fund*". The second named defendant was the manager/holder/operator of the said fund. The first named defendant allegedly recommended that the plaintiff invest in this fund. The plaintiff agreed to do so and, in or about October, 2007, invested the sum of some €250,000.
2. As happened to many property investments made in those years, it was hit by the economic crash. However, in the case of the plaintiff, he states that he will ultimately recover some 70% of his initial investment, making him more fortunate than many.
3. The plaintiff initiated proceedings by plenary summons issued on 27 August 2015. The Statement of Claim, delivered 8 December 2017, pleads that there were certain terms and conditions of the agreement between the plaintiff and the first named defendant which were, *inter alia*, as follows: -
  - (i) The fund was anticipated to involve an investment for at least a five to seven-year period;
  - (ii) The fund was tailored to consist of a geared property fund with the potential for capital growth;
  - (iii) The fund would be managed by experienced, competent property managers who had previously achieved attractive returns for investors through exposure to opportunistic investments;
  - (iv) The remuneration of fund managers and asset managers was linked to performance of the funds and assets against agreed business plans and objectives, the fund was not subject to excess charges and all charges were disclosed;
  - (v) The first named defendant would perform an adequate risk assessment prior to recommending that the plaintiff invest in the fund;
  - (vi) The funds in the fund would be managed/invested efficiently; and
  - (vii) There would be no conflict of interest in the management/investment involved in the fund.

The plaintiff alleges breach of contract, negligence, breach of duty (including breach of statutory duty) and misrepresentation by the first named defendant. Particulars are, *inter alia*: -

- (i) Failing to ensure that the remuneration of fund managers and asset managers was linked to performance as represented by allowing same to be subject to excess and undisclosed charges;
  - (ii) Failing to ensure the fund was a suitable investment vehicle to potentially generate capital returns;
  - (iii) Failing to ensure the funds in the fund would be managed/invested efficiently;
  - (iv) Recommending/promoting the fund where it knew or ought to have known it was unsuitable for the investment needs of the plaintiff, in line with his investment experience; and
  - (v) Failing to ensure the fund was suitable for Eurozone investors and would be adequately diversified between the United Kingdom and Continental Europe to mitigate exchange rate risk.
4. The first named defendant delivered a full Defence, pleading, *inter alia*, that the plaintiff's proceedings were barred by reason of the provisions of the Statute of Limitations Act, 1957 (as amended) (the Act of 1957). In the motion before this Court, the first named defendant seeks an order pursuant to O. 25, r. 1 and/or O. 34, r. 2 of the Rules of the Superior Courts directing the trial of a preliminary issue on the following question: -
- "(a) Whether the plaintiff's claim is barred by reason of the provisions of the Statute of Limitations Act 1957 (as amended)."

**Principles to be applied**

5. Order 25, rule 1 of the RSC provides: -

"Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

- Order 34, rule 2 of the RSC provides: -

"If it appear to the Court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court may deem expedient, and all such further proceedings as the

decision of such question of law may render unnecessary may thereupon be stayed.”

6. The rationale of directing the trial of a preliminary issue was set out by O’Donnell J. in *L.M. v. Commissioner of An Garda Síochána* [2015] 2 I.R. 45. He stated: -

“There are, therefore, in my view, circumstances in which justice may well require the trial of a preliminary issue. It is unrealistic not to recognise that much, if not all, substantial litigation is brought against parties which have the resources to meet any award of damages. It is also not uncommon for plaintiffs in such claims to be unable to discharge any award of costs from their own resources. Discovery, although available to all parties, will often bear more heavily on defendants against whom allegations are made than on the party making the allegation... In such cases, the trial of a preliminary issue may be entirely appropriate and indeed required. In other cases, the trial of a preliminary issue may simply be a sensible course for all parties.”

7. In *Campion v. South Tipperary County Council* [2015] 1 I.R. 716, McKechnie J. stated at p. 731: -

“(35) The following therefore is a summary of the legal position before O. 25 of the Rules of the Superior Courts can be successfully invoked:-

- there cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application;
- there must exist a question of law which is discreet and which can be distilled from the factual matrix as presented;
- there must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be will not be sufficient...”

#### **Application of principles**

8. It is common case between the parties that for the purposes of starting time to run under the Act of 1957 that the relevant time starts on the “*accrual of the cause of action*”.

9. In his grounding affidavit, Mr. Morris Phelan, Solicitor of Mason Hayes & Curran, instructed by the first named defendant, maintains that the essence of the plaintiff’s case is that the investment in the fund was unsuitable for him and was mis-sold and/or misrepresented to him. He submits that the plaintiff’s cause of action accrued in October, 2007, being the date of the making of the relevant investment. Mr. Phelan points out the following: -

- (i) The plaintiff entered into a loan facility with the first named defendant on 31 October 2007;

- (ii) The plaintiff's investment in the fund was by way of a Friends First Life Assurance policy. The conditions of the said policy were furnished to the plaintiff on 20 November 2007 and made explicit reference to the impugned charges;
- (iii) The purchase of development lands in Witney, Oxfordshire was completed in April, 2008;
- (iv) The purchase of the property in Switzerland was completed in March, 2008; and
- (v) The purchase of the property in Woolwich, UK, was completed in April, 2008.

All the aforesaid dates were in excess of six years from the date of the issue of the proceedings, 27 August 2015.

10. In his replying affidavit, the plaintiff states, having set out the basis of his claim: -

"...As can be seen, these complaints are predominantly matters that arose during the performance of the fund and not at the time of your deponent's investment into the fund..."

Further, the plaintiff seeks to rely upon the provisions of s. 71 of the Act of 1957, which provides: -

"71(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."

It should be said that this section has not been pleaded as no reply has been delivered. It was first raised in the course of the plaintiff's replying affidavit and stated only in general terms. Further, a possible issue on s. 71 was not dealt with in any substantive way in the written legal submissions filed on behalf of the plaintiff.

11. The position as regards s. 71 of the Act of 1957 is very unsatisfactory. The first named defendant would be entitled to full and detailed particulars of the alleged fraud and its concealment. Further particulars would also be required as to when such fraud was allegedly discovered by the plaintiff and the circumstances of such discovery.
12. Given that a defence under s. 71 of the Act of 1957 is now being relied upon, and the lack of particulars in respect of this, I am of the view that it would be premature, at this stage, to direct the trial of a preliminary issue on the Statute of Limitations. I am going to direct that the plaintiff, within 21 days of the date hereof, deliver a reply pleading the defence of s. 71 of the Act of 1957 and give full and detailed particulars of the alleged fraud relied

upon by the plaintiff, when it was discovered and the circumstances of such discovery. Pending these steps being taken, I will adjourn this motion generally with liberty to re-enter.