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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	24/3/2016

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2009 No. 109930

BETWEEN:

JOHN JOSEPH MULLAN AND JOHN JOSEPH MULLAN AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIA MULLAN (DECEASED)

Plaintiffs;

-and-

COLM DUFFY OF McCAMBRIDGE DUFFY, GERRY HEANEY, PARTNER, CLAREMOUNT ACCOUNTANTS, DAVID LOVESY OF McCAMBRIDGE DUFFY, KILLIAN MARGEY, PARTNER, TUGHANS SOLICITORS

Defendants.

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MAGUIRE J

Introduction

[1] The application before the court is made by Mr Daniel McAteer. He has applied pursuant to Order 15 Rule 6(2) of the Rules of Court of Judicature to be added as party to an action, which was commenced on 8 October 2009 involving the plaintiffs (Mr and Mrs Mullan) and four defendants:

(1) Colm Duffy of McCambridge Duffy.

(2) Gerry Heaney, Partner, Claremount Accountants.

(3) David Lovesy of McCambridge Duffy.

(4) Killian Margey, Partner, Tughans Solicitors.

The application was initiated on 15 October 2015.

[2] The relevant part of Order 15 Rule 6 for present purposes is paragraph (2). This reads:

> "Subject to the provisions of this rule at any stage of the proceedings in any cause or matter (whether before or after final judgment) the court may on such terms as its thinks just and either on its own motion or an application …
>
> (b) Order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or action there may exist a question or issue arising out or relating or connected with any relief or remedy sought in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."

[3] Also of relevance are the following paragraphs within Rule 6.

> "(3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause of a matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

(5) No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either –

(a) The relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or

(b) The relevant period arises under the provisions of section 9A or 9B of the Statute of Limitations (Northern Ireland) Act 1958 and the Court directs that those provisions should not apply to the action by or against the new party.

In this paragraph 'any relevant period of limitation' means a time limit under the Limitation Acts (Northern Ireland) 1958 to 1982.

(6) The addition or substitution of a new party shall not be regarded as necessary for the purposes of paragraph (5)(a) unless the Court is satisfied that-

(a) The new party is a necessary party to the action in that property is vested in him at law or in equity and the plaintiff's claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined, or

(b) The relevant cause of action is vested in the new party and the plaintiff jointly but not severally, or

(c) The new party is the Attorney General and the proceedings should have been brought by relator proceedings in his name, or

(d) The new party is a company in which the plaintiff is a shareholder and on whose behalf the plaintiff is suing to enforce a right vested in the company, or

(e) The new party is sued jointly with the defendant and is not also liable severally with

him and failure to join the new party might render the claim unenforceable."

The Cause or Matter before the Court

[4] The cause or matter before the court which the applicant wishes to become involved in was initiated by writ. The plaintiffs were John Joseph Mullan and Maria Mullan, husband and wife. Unfortunately, Maria Mullan has since died and the proceedings are now in the name of John Joseph Mullan both in his own right and as a personal representative of the estate of Maria Mullan. The court will continue to refer to them in the plural.

[5] There are four defendants to the existing proceedings, as outlined above.

[6] The original statement of claim was filed on 1 December 2009. It is a substantial document running to some 16 pages. At the factual level the statement of claim outlines the broad factual contentions of the plaintiffs. In essence, these were as follows:

(i) The plaintiffs had gone into business as publicans in 1980. Their accountant was the second named defendant, Mr Heaney.

(ii) On the basis of Mr Heaney's advice, a private limited company was established in which the two Mullans were directors and sole shareholders. The company, JJ Mullan Limited, operated a substantial licence premises known as "Mullans Bar".

(iii) Mullans Bar traded successfully for a time but ran into difficulties in the early 2000s. The second named defendant continued to work as the company's accountant.

(iv) In particular, the company accrued a substantial VAT debt.

(v) The Mullans borrowed money from two employees to assist with cash flow.

(vi) In mid-2004 pressures mounted on the Mullans and the other defendants became involved in various capacities.

(vii) A particular problem was that Customs and Excise was intent on issuing a winding up petition and indeed did issue one in August 2004.

(viii) Various ways of dealing with the situation were under discussion:

(a) A brother of the second named defendant offered to buy Mullans Bar for £1.4m.

(b) The two employees, referred to earlier, negotiated an agreement to give them an option to buy the premises for £1.8m. The agreement was made on 17 July 2004 but it was understood by all parties to the agreement that if a later deal came along they (that is the two employees) would step aside.

(c) The applicant, Daniel McAteer, reached an agreement with the Mullans to buy the public house. This was executed on 2 August 2004. This involved the sale of the Mullans shares for £200,000; payment of the company's liabilities up to a set amount (£1.75m) and other provisions.

(ix) Mr McAteer was appointed a director of the company on 2 August 2004. He was then asked to run the company jointly with the Mullans. On 10 August 2004 the Mullans decided to allot two new shares in the company to him to reflect this new arrangement.

(x) Colum Duffy, the first named defendant, then advised that the proper course was for the company to enter into a Company Voluntary Arrangement (CVA).

(xi) A meeting occurred involving Mr Mullan and the first, second and fourth defendants at the office of Tughans. This was on 17 September 2004. The brother of the second named defendant also attended. Mr Mullan was told that the company was being placed in a Creditor's Voluntary Liquidation (CVL). When Mr Mullan queried why the proposal was not for a CVA he was told that a CVL was the same as a CVA. The alternative was said to be that Customs and Excise would liquidate the company. Documents were purportedly signed by the Mullans to give effect to these arrangements backdated from 17 September 2004 to 15 September 2004.

(xii) A creditor's meeting took place on 29 September 2004. This resulted in the control of the company being placed in the hands of the first named defendant.

[7] The statement of claim, in the light of the above alleged facts, made a case against each of the defendants. In respect of each, the particulars set out related to breach of contract; negligence; misrepresentation; deceit; fraud; conspiracy and misuse of process.

[8] Events since the delivery of the statement of claim have resulted in it being reshaped considerably. The original statement of claim was compiled without legal assistance, the plaintiffs at this stage being litigants in person. As a result of what was said at the hearing of the applicant's application, it is clear that the applicant

advised and assisted the Mullans in respect of the original statement of claim. Since that time the Mullans have obtained legal advice. There was a hearing before Deeny J in January 2014 at which the defendants were successful in striking out parts of the original statement of claim. It is the court's understanding that the judge struck out all allegations of fraud against each defendant. Thereafter, on 7 July 2015, what is described as an "amended amended statement of claim" was served on behalf of the plaintiffs.

[9] The amended amended statement of claim is in reality a completely revised version of the old statement of claim. Causes of action are maintained against each defendant. A useful general description of the position is found at paragraph 13 where, following a rehearsal of a series of factual allegations, it is stated that:

> "As a result of the above the plaintiffs lost all control of their family company. Consequent upon the plaintiffs relying on the professional advice of the defendants and each of them, the company was placed into an expensive and unlawful CVL, was controlled and managed by an unlawful liquidator due to the acts of the second and third defendant, and became the subject of unnecessary litigation. They failed to provide competent and reasonable advice when the circumstances demanded its provision. They failed to consider all viable options or misrepresented such options which were alternatives to the CVL. They intentionally or negligently subjected the company to bear the significantly increased professional fees of the defendants and legal costs and by virtue of the same failed to protect the interests of the plaintiffs contrary to the duties of the defendants individually and collectively owed to the plaintiffs. The matters set out constitute negligence, breach of contract, breach of retainer, misrepresentation by the defendants and each of them and their servants or agents. Such breaches of duty have caused or contributed to loss and damage being suffered by the plaintiffs."

[10] There are sections then dealing with the particulars of the various causes of action against each of the defendants. In short, the plaintiffs claim against the first, second, and third defendants alleges negligence, breach of contract and/or misrepresentation whereas a claim in negligence alone is asserted against the fourth defendant.

[11] The remedy sought by the plaintiffs against the defendants is that of damages. In broad terms it is alleged that but for the wrongful acts and omissions of

the defendants there would have been a substantial surplus arising to the shareholders on the insolvency of the company.

Litigation Connected to the Dispute

[12] The original statement of claim included a substantial section dealing with the subject of litigation which had by that stage already arisen in respect of the events alleged in the statement of claim.

[13] For present purposes, reference need only be made sparingly to these matters and only to certain of them.

[14] The present applicant on 28 June 2005 obtained a ruling from Girvan J (as he then was) in proceedings taken against the third named defendant and McCambridge Duffy, that the CVL was obtained improperly and had been based on forged documents and incorrect procedures.

[15] On 30 June 2005 the same judge, on the application of Her Majesty's Customs and Excise, ordered that the company be wound up.

[16] By a judgment dated July 2008, Campbell LJ, in litigation in which the applicant was plaintiff and the Mullans defendants and in which the applicant sought declarations that he was a director and shareholder of the company, held that Mr McAteer, if he was ever a director of the company, ceased to be one at the latest on 30 June 2005. He further held that Mr McAteer was not a shareholder in the company.

The summons

[17] While the applicant's summons refers to and sets out the terms of Order 15 Rule 6(2), it fails to mention whether he seeks to be added as a plaintiff or as a defendant. It is also unclear as to what exactly is the question or issue to be determined as between the applicant and any party to the cause or matter. Notably, the application is also outside the relevant period of limitation which applies in this case. The relevant period of limitation is six years and the application of the applicant has been made outside that period.

The position of the parties before the court

(i) The Applicant

[18] The applicant's submissions before the court evinced a strong desire on his part to become involved in the existing action. His putative involvement straddled him acting in a number of capacities. These included the following:

(a) On behalf of the company.

(b) In his own capacity as a director of the company.

(c) In his own capacity as a shareholder of the company.

(d) In his own personal right.

[19] The applicant's motivation appears to be, *inter alia*, to seek to expose the defendants' fraud perpetrated against the company; to uncover the bogus liquidation which took place; to seek to make good any losses to those creditors of the company who had sustained loss, in particular, the two individuals who had worked for and lent money to the company; to vindicate his own position as director and shareholder of the company; and to recover what was due to himself following the non-fulfilment by the Mullans of their part of the deal which he had made with them.

[20] It was clearly evident in the applicant's submissions to the court that he considers that the defendants and each of them have acted improperly and unprofessionally in the way in which they advised the Mullans. This was and is consistent with the applicant's admission in the course of the hearing that he was an architect of the Mullans' original statement of claim.

[21] Mr McAteer maintains, moreover, that the judgment of Campbell LJ referred to above is legally wrong. While he sought to appeal it, his appeal, it appears, was unsuccessful.

[22] Finally Mr McAteer, who it appears has his own actions extant against some of the defendants (he said he had a case against McCambridge Duffy and one against Tughans), submitted that the most convenient course was that he should be able to join in the existing action.

(ii) The plaintiffs in the action (the Mullans)

[23] Mr Brian Fee QC on behalf of the Mullans argued that it was not appropriate to add the applicant as a party to the proceedings. The reality, he said, was that the applicant's application was based on his wish to put a case against the defendants in fraud but this aspect of the matter had been ruled against by Deeny J on 24 January 2014 and had long ceased to be part of what was now an action principally based on negligence and breach of contract.

[24] Additionally Mr Fee supported the view that the applicant was neither a director nor shareholder of the company as Campbell LJ had ruled.

[25] He further submitted that the Mullans were no longer assisted by or involved with the applicant.

(iii) The first-named defendant (Colm Duffy of McCambridge Duffy)

[26] Mr Mark Orr QC appeared for the above. He opposed the applicant's application. In particular, he relied on the submissions of the second-named defendant in respect of limitation to the effect that the application was out of time. In Mr Orr's submission, it was too late to re-open issues about whether the applicant was a director or shareholder of the company. This had been settled by Campbell LJ's judgment – which was the decision on the matter by a competent court. He cited a passage from Edwards v Edwards [1967] 2 AER 1032 at 1033 which ended "Once there is a decision on a matter by a competent court, it is binding on all courts of similar jurisdiction". Mr Orr also pointed out that the applicant could not enter into litigation on behalf of the company as he needed the leave of the court to do so – a position which Mr McAteer accepted. This appears to be a proper concession on his part.

(iv) The second-named defendant (Mr Gerry Heaney)

[27] This defendant was represented by Mr Good QC. The principal grounds of his opposition to the applicant's application were that:

(a) A court of competent jurisdiction had already determined that the applicant is neither a director nor a shareholder of the company.

(b) In any event, the application is outside the limitation period to be joined in the existing action.

[28] Mr Good in his submissions raised an objection both in cause of action and issue estoppel. In his submission, the determination of Campbell LJ was that of a competent court (the High Court) in a cause of action involving the same issue which the applicant now wishes to raise by his application. Likewise, in essence, the same parties were involved. In this connection it is clear that the liquidator was added as a party before Campbell LJ. The reality, he argued, was that the applicant was seeking to re-litigate the case put before Campbell LJ. It would be unjust now to permit new proceedings to be started in respect of the matter by adding the applicant as a party to the extant proceedings.

[29] As regards the issue of limitation, Mr Good drew attention to Article 73 of the Limitation (Northern Ireland) Order 1989 which sets out the requirements to be met where a "new claim" is made in the course of an action after the expiry of the time limit under the Order. The applicant's potential cause of action, on Mr Good's analysis, accrued in 2004 yet the application now seeks for the applicant to be joined in 2015. On this basis, the applicant was out of time.

[30] To be within time, it was submitted, the applicant would have to be able to comply both with the terms of the Limitation Order and with any restriction found in the rules of court.

[31] Article 73(4) of the Limitation Order provides that the addition or substitution of the new party must be necessary for the determination of the original action. This is expanded upon in Article 73(5) which provides that joinder is not necessary unless either:

> "(a) The new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or
>
> (b) Any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in the action."

[32] Mr Good submits that the applicant could not demonstrate that a claim already made in the proceedings here at issue cannot be maintained unless the applicant is joined. Consequently, he argues, that the applicant's application must fail. The applicant's failure to meet this condition, he says, is fatal to the application.

[33] It would only be if the applicant satisfied Article 73's requirements that it would be necessary to determine whether his application satisfies the relevant rules of court. The relevant rules of court are found within Order 15 Rule 6. They have been set out above at paragraph [3]. The specific paragraphs of rule 6 which govern the subject are paragraphs (5) and (6).

[34] Mr Good says that there is no evidence before the court that the applicant can bring himself within the requirements of these paragraphs. The key points are that it is not necessary for the determination of the existing action that a new party be added. Moreover the case is not a case which comes within any of the particular provisions set out in paragraph (6).

(v) The fourth-named defendant (Killian Margey of Tughans)

[35] Mr Hanna QC appeared for the fourth-named defendant. Mr Hanna argued that the court should be slow to accede to an application of this sort where it goes against the wishes of all of the existing parties. To grant it would, he suggested, inevitably bring about additional costs on the existing parties, introduce new issues into the litigation, increase the complexity of the litigation and lengthen the duration of the action.

[36] Mr Hanna reminded the court that all of the secured creditors of the company were paid in full but that there was a substantial deficit in respect of unsecured creditors. Notably, the applicant was not an unsecured creditor and no unsecured creditor had made any claim against any of the defendants. Any such claim now would be statute barred.

[37] In respect of Campbell LJ's judgment, the fourth-named defendant supported the proposition that Mr McAteer was bound by it. Mr Hanna supported the reasoning of Campbell LJ.

[38] Counsel went on to make the point that any action which conceivably could involve the interests of the applicant was against the Mullans assuming they succeeded against one or other of the defendants. This could, Mr Hanna suggested, be catered for by a separate action taken by the applicant.

[39] The issue of damages was what was alive in the subsisting action. The issue was the existence or otherwise of financial loss suffered by the Mullans as a result of the advice and conduct of the defendants. Mr Hanna submitted that it was difficult to see how any of these matters could give rise to a question or issue "arising out of or relating to or connected with any relief or remedy claimed" in the action.

[40] Finally, Mr Hanna posed the question why the applicant, given that he had originally assisted the Mullans with the initiation of the litigation and had helped them since (at least until recently), had not joined with them as a co-plaintiff. He could also have applied to intervene in the early stages of this litigation. But rather than do this he had waited for over six years to make the present application.

The court's assessment

[41] In the course of the hearing in respect of this application the submissions of the applicant covered a wide area of ground. While the court has not set out above the details of all of the matters covered, it has considered them.

[42] The court's focus must ultimately be on the legal provisions which govern this sort of application.

[43] It is convenient, however, to deal, before applying these provisions, with some discrete issues.

[44] The first of these relates to the capacity in which the applicant makes this application. It is not in dispute that he is not making this application on behalf of the company. Mr McAteer frankly accepted that he was not in a position to advance any argument on this point as the necessary legal formalities had not been complied with. However, he does maintain that he is entitled to act in his capacity as director and/or shareholder of the company.

[45] The court is of the view that on this issue it ought to regard the judgment of Campbell LJ as definitive on these points. The issues at stake in the litigation before Campbell LJ involved the very same issues of whether it could be said and declared that Mr McAteer was either a director or shareholder of the company. Following a careful examination of the matter Campbell LJ held that he was neither. At paragraph [29] of his judgment Campbell LJ held that:

> "Mr McAteer cannot show that his name was entered on the register of members prior to 13 August 2004…he is therefore not entitled to a declaration that he is a shareholder in the company."

This conclusion was repeated in stark terms at paragraph [34] of the judgment where the Judge, having reviewed the circumstances, held that "Mr McAteer is not a shareholder in the company". Likewise, in respect of whether Mr McAteer was a director, the Judge concluded at paragraph [37] as follows:

> "If Mr McAteer was at any time appointed a director of the company he ceased to hold office, at the latest, when the winding up order was made, if not when the petition was presented."

[46] Mr McAteer maintains that Campbell LJ was wrong to have reached these conclusions but, in the court's estimation, this is not to the point as the judgment of Campbell LJ has not been overturned either in the Court of Appeal or the Supreme Court. It is plain that this state of affairs has not been for lack of trying on the applicant's part. In the papers is a skeleton argument which Mr McAteer prepared for his appeal against the judgment to the Court of Appeal. From this it is clear that he was inviting the court to acknowledge that the Judge had been wrong in his conclusions and to overturn his judgment.

[47] When the Court of Appeal dismissed Mr McAteer's appeal he then petitioned the Supreme Court for leave to appeal. The petition is also found in the papers. At paragraph 6 of the petition reference is made to the treatment of issues in the Court of Appeal. In this section, Mr McAteer states:

> "The Court of Appeal also concluded that there was no substance to the Petitioner's appeal…The learned Court concluded that because the Petitioner was not entered in the Register of Shareholders of the company that he was not a shareholder. The learned Court also agreed with the Trial Judge's conclusion that the duties and powers of directors ceased on liquidation of the company."

Ultimately, the Supreme Court refused the applicant leave to appeal.

[48] In the face of this sequence of events, the court considers that it must approach the application on the footing that the applicant cannot now advance it on the basis that he is a director or shareholder of the company.

[49] This means that the only capacity in which Mr McAteer can advance this application is in his own name. This, in effect, it seems to the court, means that his interest in the current action relates to how the Mullans may fare as against the defendants and whether, should they succeed, in whole or in part, he could then claim against them based on the arrangements he had made with them, including on the basis of an agreement which he alleges they entered into in or about 2009/10.

[50] The second issue the court considers it should deal with is that of limitation. In this regard the submissions of Mr Good on this point have been set out above. These submissions appear to the court to have merit.

[51] What the applicant is seeking to achieve, in the language of the Limitation (Northern Ireland) Order 1989 is to add "a new claim" in a pending action. This is demonstrated by Article 73 (8) which defines "a new claim" as meaning "any claim involving either (a) the addition or substitution of a new cause or action; or (b) the addition or substitution of a new party". Consequently, Article 73 applies. As submitted by Mr Good, the applicant must satisfy the tests in Article 74 (4) as explained in Article 74 (5). Article 74 (4) (b) indicates that the applicant must demonstrate that "the addition or substitution of the new party [*viz* the applicant] is necessary for the determination of the original action". Article 74 (5) explains that "the addition or substitution of a new party is not to be treated for the purpose of (4) (b) as necessary for the determination of the original action unless either (a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name (which is clearly not this case) or (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action". In respect to this last provision, the court is unable to conclude that the original action cannot be maintained and disposed of without the applicant being a party to it. It follows that the applicant cannot satisfy the requirement of necessity in accordance with Article 73 (5). This is enough to mean that the applicant's application is in conflict with the provisions of the 1989 Order. Moreover, even if this were not so, the court is also unconvinced on the evidence before it that the applicant could bring himself within any the situations referred to in Order 15 rule 6.

Conclusion

[52] In this case the court is not minded to add the applicant as a party to the existing provisions. Its reasons for its decision, *inter alia*, are as follows:

(a) It is not the court's view, having reviewed the materials before the court, that the applicant's presence before the court is necessary to ensure that all matters in dispute in the cause may be effectually and completely determined and adjudicated upon. On the contrary, the court sees no reason why the underlying proceedings cannot be disposed of as between the existing parties without the involvement of the applicant.

(b) In the court's view, it is neither just nor convenient to add the applicant as a party. Given the considerations already described the reality of the application is that the applicant can only represent his personal interest and be involved in his personal capacity. In so far as he may wish to pursue the Mullans, if they were to succeed in whole or in part against one or more of the defendants in the current proceedings, this can be catered for in separate proceedings.

(c) Additionally, by reason of the operation of the Limitation Order this application has been made out of time.

(d) The court, moreover, is clear that it is not convenient for the applicant now to be added to the proceedings given the factors referred to by Mr Hanna and set out above at paragraph [35]. The reintroduction by the applicant of the issue of fraud into this litigation now, two years after Deeny J removed it, finds no favour with the court.

(e) In view of the fact that the applicant was an architect of the plaintiffs' original statement of claim in 2009, there will be no injustice in the court refusing this application as the applicant plainly had the option of joining in these proceedings from the outset. He chose not to do so for his own reasons and the application now made has not been made timeously.

[53] For the above reasons the court refuses the applicant's application.