[2018] IEHC 209

THE HIGH COURT

[2017 252 S.P.]

BETWEEN

DAVID DULLY

PLAINTIFF

AND

ATHLONE TOWN STADIUM LIMITED

DEFENDANT

AND

FOOTBALL ASSOCIATION OF IRELAND

NOTICE PARTY

(No. 1)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 12th day of April, 2018

1. This case illustrates several questions relating to trust law, particularly the question of removal of trustees. The case involves a number of inter-related interests:

> (i) Firstly, Athlone Town Athletic Football Club, an unincorporated association which has existed since 1887. The club, and therefore the members of the club, are the beneficiaries of the trust.
>
> (ii) Secondly, David Dully, the plaintiff who sues as the appointed nominee of those beneficiaries nominated in that behalf by the executive committee of the club prior to the commencement of the proceedings and in his own right. He was also appointed as a trustee of the club itself in 2014.
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> (iii) Thirdly, Athlone Town AFC Company limited by guarantee, a company set up by the members of the club in 2015 as a vehicle for them to act in a legal capacity.
>
> (iv) Fourthly, Athlone Town Stadium Ltd., the trustee of the trust.

2. I have been assisted by Mr. John Paul Shortt S.C., and Mr. Martin Durack B.L. who addressed the court for the plaintiff, and Mr. Michael Forde S.C. and Mr. Laurence Masterson B.L. who addressed the court for the defendant. There was no appearance at the hearing by the Football Association of Ireland, the notice party.

General findings of fact

3. The Athlone Town Football Club was founded in 1887. It the oldest soccer club in Ireland. From 1927 onwards, St. Mel's Park had been the home of the club. Mr. Dully avers that St. Mel's had been home to many exciting games down through the years, the most famous of which was the visit of A.C. Milan in 1975. The club also prosecuted two successful league campaigns in 1981 and 1983. As of 2004, new FAI licensing regulations imposed by UEFA meant that a new stadium was required. In 2004, the defendant company was incorporated to facilitate that. The last surviving trustee of the club, Mr. Johnny Keena, now deceased, executed a transfer of the St. Mel's ground to the trustee company, the defendant, who transferred the property to Westmeath County Council in exchange for an 8.5-acre site at Lissywollen, Folio 30190F Co. Westmeath, which is the property in question in these proceedings. The equity in the defendant company is currently held as to 97% by Mr. Declan Molloy and as to 3% by Mr. Kieran Temple and Mr. Paddy McCaul. The company has no assets other than the trust property. It appears that the cost of the stadium was something in the order of €4.5 million, funded by lottery monies in the amount of €2.5 million approximately and donations and payments in the amount of approximately €2 million, which includes whatever sum was put in by Mr. Molloy into the defendant company which he says is around €665,000. The stadium was completed in 2007 and the first match was played in that year. I accept the evidence on behalf of the plaintiff that it was widely reported that a "*mystery donor*" had cleared off the debts of the club, that everyone knew about it, that it was widely reported in national media, social media and local media and was always discussed in terms of being a gift.

4. On 23rd February, 2007 a purported lease was entered into between an officer of the club, Mr. Paddy McCaul, and the defendant. Certain provisions of this lease were contrary to the club's *de facto* position regarding use of the stadium and no rent payments were actually made. A further proposed memorandum of agreement was entered into in 2012 but no executed copy has been found. Mr. Dully believes and I accept that it was never acted upon. Mr. Dully says and I accept that the intention was that two leases were of no legal purport and did not create a leasehold interest in favour of the club. He said that the club was incentivised into entering the lease at the request of the defendant to facilitate the defendant reclaiming VAT on the building. He says and again I accept that no account was ever forwarded to the plaintiff in respect of VAT repayment.

5. In December, 2012 Mr. John Hayden was appointed as chairman of the club. He was concerned with the standard of maintenance of the grounds by the defendant. Mr. Dully avers and I accept that the defendant had neglected to carry out maintenance, allowing the stadium to fall into a state of disrepair. After the property was subjected to a flood, no reinstatement work had been undertaken. On 18th January, 2013 a letter was sent to Mr. Tom Burke, project manager of the defendant, raising some of these concerns. The response was that the defendant owned the property. There was therefore a failure to acknowledge the trust. Following the correspondence, the club became understandably concerned as to the status of ownership of the stadium. Mr. Dully averred that the club became concerned that Mr. Molloy had claimed a right to sell the stadium without resort to the club in early 2013. He was not challenged on that averment. On 8th December, 2014 the club appointed Mr. Dully as a trustee.

6. On 23rd April, 2015 a deed of trust was entered into, an important document in the context of these proceedings. It was executed by John Hayden and David Dully as the executive committee of the club and by the defendant. The recitals to the declaration provided at para. B that the legal title to the property has at all times been held by the defendant on trust for the executive committee of the club as beneficial owner. It goes on to recite at para. C that all funding required for the development of the property was provided for and onto the use of the beneficial owner. The declaration then provided at para. 1 that the trustee declares that it holds the title on trust for the beneficial owner and will deal with the property at all times only as directed by the beneficial owner and on behalf of the beneficial owner and will at the request of the beneficial owner convey the property to such

persons at such times and in such a manner as the beneficial owner shall direct. Clause 2 provided that the beneficial owner covenants "*to indemnify the defendant company in respect of all present and future liabilities, actions, proceedings, claims, demands, duties and taxes and all associated interests, penalties and costs and all other costs and expenses whatsoever in respect of the property*". On the same date a 35-year lease between the parties was entered into with effect from 1st January, 2014 at a rent of €10,000 *per* year. The plaintiff's evidence, which I accept, is that the landlord's outlays in respect of the stadium were the basis upon which the rent was agreed.

7. On the 20th July, 2015 the club formed a company, Athlone Town AFC Co. limited by guarantee, to which I have referred.

8. On 25th April, 2016 Mr. Hayden wrote to the defendant setting out various failures of the defendant to deal with matters and respond to correspondence and stated that the letter terminated the relationship between the defendant and the beneficial owners and called upon the defendant to convey the property to Mr. Hayden and Mr. Dully as trustees of the club. That was not done. An initial payment was made of €2,500 towards building insurance by the club. On 16th October, 2016 the defendant solicitors wrote saying that insurance had not been put in place. Correspondence was then issued to the defendant solicitors in relation to that matter and seeking copies of quotations and policies. That correspondence remains unanswered. On 9th February, 2017, further correspondence was issued on behalf of the club calling on the solicitors for the defendant to draw up all documentation necessary for the purpose of terminating the trust and executing the conveyance in favour of the trustees of Athlone Town AFC. On 27th April, 2017 a further letter was sent pointing out the failure of the defendant to act on that request and pointing out that therefore legal proceedings would be necessary.

9. The club has secured capital sports ground funding in the amount of €200,000 for the provision of an Astroturf facility. Works had to be completed by the end of October, 2017 to enable the drawdown (later extended to the end of September, 2018). An issue arose because the plaintiff's interest in the property was not capable of being registered in the property registration authority and was therefore incapable of holding a charge as was a requirement of the grant funding. Efforts between the parties to resolve that dispute were not successful. The defendant as trustee failed to take all necessary steps to facilitate the securing of the grant. On 19th May, 2017 the plaintiff was authorised by the executive committee of the club to bring the present proceedings.

Procedural history

10. The special summons was issued on 19th June, 2017 seeking to remove the defendant as a trustee and replacing it with another trustee, the company set up by the members. On 28th June, 2017 an AGM was held and passed a resolution transferring the club affairs to the AFC company. An application was then made to Binchy J. on 23rd August, 2017 who allowed short service of a motion dated the same date seeking an order dispensing with the requirement for the consent of the defendant as registered freehold title owner for the registration of the lease. That led to an agreement between the parties on 30th August, 2017 that the defendant consented to the lease being registered but that consent would not prejudice its indemnity and that it would not be estopped from disputing the *locus standi* of the plaintiff. It turns out however that the lease could not be registered and would have to be re-executed. The defendant refused to agree to re-executing the lease.

11. On 12th September, 2017, O'Connor J. allowed re-entry of the matter and a motion was then issued, filed on 12th September, 2017, of which only an undated copy has been included in the Book of Pleadings furnished to me, seeking to relist the motion and "*clarify*" the consent order. That was adjourned to the 13th and then the 15th and ultimately the 25th September, 2017. On the 25th September, 2017 the motion was, according to the note on the perfected order, "*adjourned*" to allow the plaintiff to specify what precise clarifications were required and liberty was given to issue a notice of motion returnable for the Chancery list on 4th October, 2017. Also liberty was given to the defendant to issue a motion but that does not seem to have been taken up and it is not clear at this stage what that referred to.

12. My intention in dealing with the matter on 25th September, 2017 was that the original motion was to be struck out in favour of the more detailed motion that was to be issued, although that was not in fact stated in a formal order at that time.

13. The plaintiff then issued a further more detailed motion dated 28th September, 2017 seeking "*such order as is deemed necessary to provide clarification in respect of the terms of the consent order*". I dismissed that application on 6th November, 2017 because it seemed to me that (a) it went beyond the previous order made on consent so it was not a question of clarifying that order (b) it possibly went beyond the pleadings as they then stood and (c) there was an element of substantive relief being sought in the motion rather than interlocutory relief. However, I gave the plaintiff liberty to amend the pleadings. The plaintiff then brought a motion on the 18th December, 2017 under O.15 r.9 seeking a representative order in favour of the plaintiff. However, at the hearing of that motion, the plaintiff did not ultimately pursue that. In lieu of that, I made an order on 29th January, 2018 allowing a further amendment. The formal order on the latter date did not specifically dispose of that motion but my intention was that it be struck out. An amended special summons was then delivered dated 2nd February, 2018. The defendant then brought a motion dated 8th March, 2018 seeking dismissal of the proceedings, security for costs and a pre-emptive costs order. It is agreed that I would adjourn that motion to the hearing of the action. On the 20th March, 2018 I gave short service to the defendant to bring a motion which was brought returnable for that Friday seeking discovery and particulars and seeking a vacation of the trial date. On 23rd March, 2018, on hearing that motion, I gave liberty to the defendant to cross-examine the plaintiff on his affidavit of discovery and gave liberty to the defendant to file a further affidavit.

Matters before the court

14. What is before the court are the reliefs sought in the special summons and Mr. Forde's motion to strike out the proceedings. The two previous motions that I have referred to brought by the plaintiffs that were disposed of but not formally struck out so should perhaps be struck out now for formal purposes to clarify matters.

Defendant's preliminary objections

15. After the opening of the case on 10th April, 2018 the defendant made a number of preliminary applications.

16. Firstly, Mr. Forde referred to the claim at para. 1(i) of the defendant's motion of 8th March, 2018 seeking dismissal of the proceedings because of the lack of a verifying affidavit but he indicated this was not now being pursued.

17. Secondly, he objected to what he said were the plaintiff's late affidavits, said was seeking an adjournment of the trial and that if they were being allowed he wanted to rely on the replying affidavits of Declan Molloy filed on 9th April, 2018 and an unfiled one sworn on 10th April, 2018 and wanted liberty to file any further affidavits in the course of the trial itself "to mend my hand" as was put by Mr. Forde. After some discussion it was agreed by consent that the trial would not be adjourned. The plaintiff would be allowed to rely on the affidavits delivered in March and April, 2018 that the defendant could file the affidavit of 10th April, 2018 and rely on that affidavit and the one of 9th April, 2018. It was also clarified that the defendant could cross-examine all the plaintiff's witnesses on all of their affidavits and *vice versa*.

18. Finally, as regards the other objections in the defendant's preliminary motion it was agreed that those be adjourned to the close of the plaintiff's case.

Plaintiff's witnesses
19. Three witnesses were tendered on behalf of the plaintiff: the plaintiff himself Mr. David Dully, Mr. John Hayden and Mr. Damien Milton.

David Dully
20. Mr. Dully averred that he was authorised to take the proceedings as nominee of the club pursuant to resolution of the management committee of the 19th May, 2017 and was a trustee of the club having been appointed by deed of appointment on 8th December, 2014. Mr. Dully said that the club was not insolvent. He said that when Mr. Hayden came in as chair and when he came in as secretary they found that the club was insolvent but that was no longer the case. He said that the summons was correct in every respect. He said that he represented all the members of the club, of which there were 45 at the time of the proceedings. Since then a number of members had written letters claiming they were lifelong members. He had no information that any of them were members. Individual authority for the members was not required. He was unable to give details of members' occupations with limited exceptions, as the club rules do not provide for recording occupations. As regards a group of seven additional people alleged to be members, he said that if they were members of the club then they were being represented by him. He said that honorary members are members and therefore he represented them. The procedure in the club constitution is rule 26, that a complaint by a member should be made and considered by the executive committee but that no such objectors had invoked this procedure. He said that if such people considered he was not acting in the best interest of the club he would be shocked. Notification of the AGM of 28th June, 2017 was given on the club website and social media. It was made clear that the defendant was being sued but that was not put to a vote, there were no dissenting voices. Two of the alleged objectors were present and did not dissent. The brief minutes were not a full reflection of a long meeting. The meeting did not pass a resolution formally authorising him to bring the proceedings as such. It was informed that he had already been authorised, this was discussed and nobody objected. He said that the club had been informed that if the grant was not drawn down by September, 2018 it could be 30 years before the club could be eligible for another grant. When asked where was the authority for him to bring proceedings on behalf of the club he referred to rule 15 which allows business and affairs of the club to be managed by the executive committee, rule 27 that the executive has all powers of general management, and rule 41 which allows the executive committee to deal with all matters not specifically provided for. Decisions on interpretation can be appealed to a general meeting of the club but not a court. The alleged dissenters did not so challenge the executive committee decision. He explained convincingly why the club did not respond to a particular letter by the defendant seeking transfer to it of the grant monies. He was cross-examined as to differences between versions of leases which were suggested removed "*protections*" for the defendant as landlord and his reply was essentially that he was acting on legal advices. Mr. Dully was not challenged on a number of fairly central matters deposed to on behalf of the plaintiff. I will come back later to his evidence in relation to the question of the indemnity. I find that he was an impressive and precise witness and having seen and heard his evidence I accept that evidence, including his affidavit evidence, in full.

Damien Milton
21. Mr. Milton was not cross-examined on his affidavit, and therefore I accept his affidavit in full.

John Hayden
22. Mr. Hayden is chairman of the club. The action is brought on behalf of all members. He again referred to the procedure under the club constitution to raise complaints under rule 26. The club was not aware that there were complaints being made about the present proceedings. He said it seemed extraordinary that Mr. Molloy was approached by a number of people at the same time with the same complaint. He said Mr. Dully was in charge of membership but neither he nor Mr. Dully were aware that there were these alleged honorary members and had no evidence that they are. He said the costs of the proceedings duly authorised would fall on the members including the persons who had come forward identifying themselves as honorary members, if they were members. As regards the alleged expenditure by Mr. Molloy, he understood that Mr. Molloy was approached by Mr. Martin Egan solicitor and asked to purchase the company. At that point the company was representing that they owned the stadium without reference to the club. He was not privy to what went on and is a stranger as to how the company made expenditures. He said that the affidavits submitted on behalf of the defendant were contaminated by matters personal to Mr. Molloy. His involvement in the whole affair as with the involvement of other members of the club was not to get something for himself but for the children of the area and children into the future. Again Mr. Hayden was not challenged on a number of fairly central matters deposed to. I will come back later to his evidence in relation to the indemnity and as with Mr. Dully, I find him to be an impressive and precise witness and having seen and heard him in the witness box I accept his evidence including his affidavit evidence in full.

Defendant's objections at the close of the plaintiff's case
23. At the close of the plaintiff's case, Mr. Forde moved on paras. 1(ii) to 1(v) of his notice of motion of 8th March, 2018. He agreed to postpone the issue of para. 2 to a later and more appropriate stage of the proceedings if it arose. I rejected the objection having heard his submission at that point and found that the plaintiff had authority to bring the proceedings and declined to dismiss the proceedings at the close of the plaintiff's case and I now give reasons for doing so.

Application to dismiss due to failure of the plaintiff to disclose the identities of the members or because not all members have consented or because of a lack of a representative order.
24. The entire argument challenging the beneficiaries' entitlement to sue is in my view inconsistent with the defendant's status as a trustee. Therefore it seems to me the very conduct of the litigation itself amounts to a failure by the defendant to act in the interests of the beneficiaries and therefore amounts to grounds for removal or to a breach of trust. Nonetheless I will put that point to one side for now and consider the objection on the merits such as they are.

25. Mr. Forde submits that the appropriate procedure is O. 4 r. 9, that if the plaintiff sues in a representative capacity the endorsement on the summons shall show in what capacity he or she sues. However, here there is no issue under that heading because the plaintiff sets out his capacity in para. 2 of the special summons. Thus the type of issue that arose in *Hickey v. McGowan* [2017] IESC 6 [2017] 1 I.L.R.M. 293 [2017] 2 I.R. 196 where it was held that there was no basis to conclude that the first defendant was sued in a representative capacity does not arise here.

26. Mr. Forde's submission assumes that one cannot have a representative capacity without a specific representative order under O. 15 r. 9. That is not so. Where an unincorporated body sues by its trustees or management committee it is not necessary for there to be a representative order under O. 15 r. 9. The entitlement to bring the proceedings arises from the club constitution and rules which have the legal status of a contract between the members.

27. That is reinforced by Andrew's *English Civil Procedure* (Oxford University Press, 2003) p. 990, where it notes that representative proceedings can be commenced without the court's permission. While that may, of course, reflect specific English law, the author

notes that English law has allowed representative proceedings over a "*long history*" (p. 987).

28. Mr. Forde submits that there was no authority by the members directly. That is not necessary. It is clear that the rules entrust management of the club to the committee and that was a lawful decision of the committee in that regard. As a basic principle of contract law the committee can lawfully act on behalf of the entire membership if the rules so permit, which is the case here on the correct interpretation of those rules.

29. Even if there was some defect in the plaintiff's authority, a proposition which I reject, this is clearly a question of indoor management and the defendant has no standing to question it. I conclude that there is no defect in the plaintiff's entitlement to sue.

30. The question of setting out details of the members, of their addresses and occupations, does not arise in the absence of a requirement for a representative order. In any event, the defendant is not prejudiced by not having a list of the members nor is it prejudiced by not having descriptions of the members - in fact the defendant already has a list of the members' names and addresses. So the point is a pettifogging and legalistic one.

31. Mr. Forde relied on Zuckerman on *Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2013) para. 13.49, to the effect that it could be unfair on defendants if membership of the class of plaintiffs is dependent on the success of the claim. Nothing like that arises here. We know the class - members of the club. The defendant even has a list of the names and addresses. There is simply nothing to the point made.

32. Even if there is a defect in the representative capacity of the plaintiff, which I reject, he is a beneficiary himself and he also sues in that capacity.

33. Mr. Forde suggested that because he had been nominated to sue, he could not also sue on his own behalf. That does not follow and is indeed entirely illogical. Here he sues in both capacities.

34. Even if I am wrong about all the foregoing, I would exercise my power under O. 15, r. 13 to rectify matters in any event.

Application to dismiss because of a "*pattern of vexatious proceedings*"
35. The defendant's notice of motion contends that the proceedings should be dismissed because of an alleged "*pattern of vexatious proceedings*" by the plaintiff. There is no such pattern. The point being made is absurd. No submissions were, in fact, made to support the notice of motion under this heading. For the foregoing reasons, I dismissed the defence objection at the close of the plaintiff's case.

Defendant's witnesses
36. The defendant put forward two deponents, Mr. Neil McNelis, Solicitor, on purely formal matters, who was not cross-examined, and Mr. Declan Molloy, the principal of the defendant company.

Declan Molloy
37. Mr. Molloy, Mr. Ciaran Temple and Mr. Paddy McCaul are directors of the defendant company. In his first affidavit of 23rd August, 2017, he denied that the property had been held in trust for the club. But he had signed a deed of trust in April, 2015, to that effect. The only explanation he could offer under cross-examination was the totally unsatisfactory comment that "*the trust was signed under certain conditions which were never honoured*". No such conditions were set out or established.

38. He entered into a strange arrangement which he was unable to clearly explain whereby he says he paid the company €665,445 which was described in a document prepared by himself as "*payments of share capital*". In return for this, he presumably got €665,445 worth of share capital as his own document suggests. He then stated under cross-examination, not given in his affidavit, that anything over €450,000 was "*put down as a loan*". This presumably was an attempt to explain why the company then paid him €121,445, although this was described in his own document as "*part repayment of share capital*".

39. A further strange story was offered about the destination of a VAT repayment. The VAT was repaid on the basis that the Revenue were persuaded that the company was "*entirely separate*" from the club. This was a strange contention given that it is acknowledged that the land was held in trust for the club.

40. The Revenue paid €312,000 on 7th March, 2012, on that basis. There was then a further strange arrangement with Deloitte Touche that it was paid half of this. The other half seems to have made its way to Mr. Molloy. He was not entirely clear in cross-examination about that but in re-examination he said he did get this. At other times, he said he only got the €121,000.

41. On re-examination he said he put €665,000 into the company and €450,000 was share capital. When asked by his own counsel if the €215,000 was a gift to the company, he said that was correct and he would only expect to get it back if he sold the company. He then changed his evidence and said he did not know the exact term, that it was put in as a loan and he would get it back at some stage.

42. On his own handwritten note, he got back €121,445 but as I say, he also said at a different point that he got back half the VAT which would have been over €150,000.

43. He said he had been approached by Martin Egan, Solicitor, who knew he had €1m to "*invest*". Mr. Egan was aware of his business dealings because Mr. Egan had represented Mr. Molloy when he came into the €1m.

44. Remarkably, he said he invested in a company where the extent of the company's indebtedness was not explained to him. Mr. Egan asked him if he had an interest in buying the stadium. €800,000 was Mr. Egan's estimate of the company's liabilities but he did not go into it. Mr. Molloy thought the stadium was worth that.

45. He said in his last minute affidavit sworn on Day 2 of the hearing that the stadium committee agreed with the arrangement that he would pay the company, would be repaid in turn and that this arrangement was not reduced to writing as he trusted the stadium committee.

46. He denied under cross-examination that any arrangements were on the basis that the stadium company was holding the lands in trust for the club and said there was no such thing. He denied that he threatened to sell the land but then admitted that he did and said it was a casual remark. That it seems to me is an implausible explanation. A threat by a trustee to sell property over the head of the beneficiary cannot be regarded as casual.

47. He then gave a further contradictory story about a personal loan to the club which was not then a personal loan because it was made as a director of the company and then under further cross-examination said "*it would be done in a personal capacity*".

48. He swore an affidavit on 12th March, 2018, para. 4 of which denies ever having claimed a right to sell the property without resort. He accepted in cross-examination that this was very different to his oral evidence and that he did so threaten but was provoked. Then in re-examination he seemed to try to wriggle out of the contradiction which he previously acknowledged under cross-examination. Having seen and heard Mr. Molloy, I find that he is an unreliable witness, that his evidence was unsatisfactory, confused and in certain respects evasive, was riddled with contradiction, complication and unexplained or implausible propositions.

49. Given that the land was held in trust, the shares in the state and company are not worth anything because the company has no assets in its own right. Clearly, Mr. Molloy's motivation in terms of the present proceedings is that despite the fact that the land is held in trust, he has decided that his shares and alleged loans are an investment that he wants to get back. The incompatibility of those two propositions has led to a great deal of the confusion and contradiction in his evidence.

50. Having seen and heard him in the witness box, I reject his evidence both orally and on affidavit generally and in particular where it conflicts with that by and on behalf of the plaintiff.

Defendant's objection at the close of evidence

51. Notwithstanding having objected unsuccessfully to the plaintiff's capacity to bring proceedings at an earlier stage, Mr. Forde submitted that at the close of evidence that because some of the alleged beneficiaries, that is the club members, are allegedly objecting to the proceedings, a trustee of the club should not be allowed to obtain relief in the manner in which the present plaintiff has brought proceedings.

52. I cannot see any substantial difference between that and the objection rejected at the half-time stage, although Mr. Forde says there is a "*vital difference in principle*" and submits that if the plaintiff has *locus standi*, it puts the court in an impossible position if only one beneficiary is making the complaint.

53. Unfortunately, I cannot accept that submission. This plaintiff is authorised by the club's executive committee. If it was the case that an individual beneficiary brought proceedings to resolve trust questions independently of an executive committee of a club, the court could direct notice to be given to the executive committee; but that is not a problem here.

54. Whether a claim for removal of a trustee or interpretation of a trust is brought by a majority, a minority or just one of the beneficiaries, the court can manage the proceedings and ensure any necessary parties are brought in. Here no such problems arise because the proceedings were authorised on behalf of the club.

Defendant's status as a trustee

55. I make the following findings of fact and law in relation to the defendant's position as a trustee. Mr. Forde suggests that I should focus on the defendant's conduct from the issuing of the proceedings to date and not on any matters before then. That is not a sustainable submission. In deciding whether a trustee should be removed, regard must be had to all relevant circumstances including conduct of the defendant prior to the proceedings.

56. Mr. Dully avers that the defendant was aware at all times that it was acting as trustee for the beneficial owners. He was not cross-examined to the contrary. The declaration of trust is by its own very terms declaratory of the pre-existing position. It is clear firstly, that there have been multiple breaches of trust and secondly, that independently of that it is in the beneficiary's interest to have the defendant removed as a trustee.

57. The defendant denied the validity of the trust on affidavit. That amounts to a fundamental breach of trust. The defendant failed to honour the declaration of trust by failing to convey the interest in the property as required having been called upon to do so in accordance with the declaration of trust.

58. It made a threat to sell the stadium without recourse to the club. As I have said, that averment on beheld of the plaintiff was not specifically challenged in cross-examination; such a threat is a fundamental breach of trustee's obligations in circumstances such as these. I find that the defendant allowed the stadium to fall into disrepair, failed to deal with the correspondence in relation to insurance and as Mr. Dully avers placed locks upon the gates to the premises, thereby restricting the entrance for use by club members.

59. I accept Mr. Dully's evidence under cross-examination that Mr. Molloy showed up at the club and "told young kids to stop training and put a lock on the gate", as it was put. Mr. Dully said that the defendant forwarded correspondence to the facilities manager of the FAI, the purpose of which was to adversely affect the licence held by the club to participate in League of Ireland competitions and I accept that evidence which again amounts to a breach of trust.

60. Furthermore, correspondence with AP Wireless Ltd. was brought to the club's attention whereby its interest was expressed in locating a telecoms mast within the stadium. That was ignored by the defendant, again amounting to a breach of trust.

61. I also take into account the manner in which the present proceedings were defended. It seems to me that the approach of querying the beneficiaries entitlement to assert their rights under the trust is not an approach that is open to a trustee and speaks volumes about the defendant's failure to appreciate its role as a trustee.

62. The defendant's whole approach has been obstructive and it has acted an antagonist and not a trustee in relation to a range of matters. It failed to facilitate the proposed development which possibly could have avoided the proceedings. I also consider the manner of the conduct of the proceedings was generally obstructive notwithstanding occasional flashes of co-operation such as the consent order.

63. One particular item in the prosecution of the proceedings which stands out is that in the course of cross-examination, Mr. Forde suggested to the plaintiff that his house and pension were at risk of costs. It seems to me that was a gratuitous point which was very much of a piece with the defendant's approach overall.

64. This is clearly a case where the existing trustee must be removed. Biehler on *Equity and the Law of Trusts in Ireland* (Round Hall, 2016) at p. 477, indicates that "*the court also has an inherent jurisdiction to remove trustees where they act dishonestly or incompetently or even where their conduct is deliberately obstructive".* The discussion cites *Arnott v. Arnott* (1924) 58 I.L.T.R.145, where Murnaghan J. said that the power to remove a trustee should be exercised if the welfare of the beneficiaries demanded it, even

without incompetence. A trustee may also be removed when driven by self-interest; *Kirby v. Barden* [1999] IEHC 129, *per* Carroll J.

65. Reliance was placed by Mr. Forde on a single proposal put by the defendant but Mr. Dully said that was considered and having received legal advice, the offer was not responded to because the trust between the company and the club had broken down. Also, there was a huge difficulty with transferring a grant given to the club to another entity. The proposal was considered, but he said he expected the defendant to engage with the plaintiff long before and it seems to me that was an entirely reasonable conclusion.

66. This offer by the defendant company goes nowhere near establishing its *bona fides* as a trustee. Mr. Forde put it that the club "*declined to engage*". I entirely reject that characterisation. The "*offer*" was a non-runner and the club's non-reply must be put in the context of multiple failures by the defendant in duties as a trustee.

67. Mr. Forde then suggested that his client was entitled to be regarded as co-operative by agreeing to short service and agreeing to the consent order and an adjournment. Those were absolutely minor steps in the overall context. The defendant's obstruction is fundamental to the difficulties that have arisen in this case.

68. When asked to give one reason why his company should not be removed as a trustee Mr. Molloy said "*because we are the honest people in this case and doing what is right, holding on to what we paid for and stopping it being stolen from us*". That is clearly totally irrelevant to the issue of removal of the trustee and involves a fundamental misunderstanding of the role of trustee. It is clear that the trustee has allowed Mr. Molloy's own financial regrets to influence it in the exercise of its trust functions. That is a conflict of interest apart from anything else. See *Spencer v. Kinsella* [1996] 2 I.L.R.M. 401, *per* Barron J.

Indemnity Issue

69. I make the following findings of fact and law in relation to the indemnity. The deed of trust states that the beneficial owner covenants with the company to indemnify it in respect of all present and future liabilities and all other costs and expenses whatsoever in respect of the property.

70. Mr. Molloy claims this covers an alleged agreement by the company to repay him €665,000.00 approximately which was either allegedly loaned (although I would reject the proposition that it was in fact loaned) or invested in the company to buy shares. His argument is that the company has a liability to him and that that liability of the company is covered by the indemnity on behalf of the club.

71. The difficulty with this argument is that having heard evidence from both sides I reject the argument that there was any such agreement or liability. I reject this for a series of reasons:

(i) This is contradicted on the face of the deed of trust which recites at recital C that all funding required for the development of the property was provided for and on to the use of the beneficial owner. That, it seems to me, is a conclusive answer to Mr. Forde's case.

(ii) He who asserts must prove; the defendant has not proved that there was any such agreement to repay monies paid by him and therefore the entire factual basis for his contention under this heading does not arise.

(iii) I reject Mr. Molloy's evidence generally.

(iv) None of the many people who could have testified to this alleged agreement were brought forward. Mr. Egan did not put in an affidavit; the other directors did not swear affidavits.

(v) I do not accept that there was any alleged loan. It seems to me that Mr. Molloy's evidence on this point was somewhat contradictory and contrived. He said that his purchase of shares was "*put down as a loan*", a form of words that suggests retrospective or at the very least artificial characterisation of it as a loan. In my view Mr. Molloy's evidence in this regard is a reconstruction and does not reflect the reality which on the balance of probabilities was that he purchased shares in the company and either subsequently or artificially decided to characterise some of those share purchases as a loan. That would be of a par with the strange and artificial way that the VAT issue dealt with.

(vi) If I am wrong about that and if there was any such agreement between Mr. Molloy and the company and/or any alleged loan, the words of the indemnity used in their context in terms of the relevant circumstances any alleged liability "*in respect of the property*" does not on the proper interpretation include the purchase of shares by Mr. Molloy in respect of the company or any alleged loans by him to the company.

(vii) It would have been a fundamental issue if the club had taken on a liability of two thirds of a million euro. It would have been unthinkable that the club would have committed to such a fundamental matter without it being specifically discussed and agreed.

(viii) Insofar as evidence of the circumstances of entering into the declaration of trust are relevant, such matters reinforce the conclusion I would have arrived at independently. I accept the evidence on behalf of the plaintiff that this issue was never raised and the discussion of the declaration of trust and that the indemnity was to deal with the ongoing costs of operation if in excess of the rent payment received. Mr. Dully said he was there when the declaration was agreed and it is to cover anything above the €10,000 rent *per* year. Reference was made to correspondence of 23rd June, 2016 from Hugh J. Campbell solicitors regarding payment of €17,356.73. It was suggested that that was inconsistent with his case but it seems to me it is not inconsistent insofar as it is limited to this specific issue of the costs of the transfer. Regarding the deed of trust, Mr. Hayden's affidavit says that at the time of the declaration of trust the recitals were "*at no time … understood or referred to or purported to refer to monies of which the club had no knowledge … and in particular the sums which are now being alleged as due and owing by the defendant which said sums are dubious*". Mr. Hayden avers specifically that the indemnity was intended to cover operational expenses. He said that the claims in relation to Mr. Molloy's purchase of shares or alleged loans were never discussed when the deed of trust was entered into. Mr. Hayden was the person who drafted the deed of trust presented to the defendant's solicitors for approval and was involved in meetings to discuss it. When asked if it included historical debts that the stadium may have had, the answer was no. The reason it was put in was firstly a rates bill and secondly other charges, for example from Westmeath County Council. Insofar as it was historical that was for what was known and represented at the time. It is clear from Mr. Hayden's evidence, which I accept, that it was never intended to cover costs of construction or the other claims now being made. It was not put to him in cross-examination what it was so intended.

(ix) These conclusions reinforced by the fact that I accept Mr. Hayden's evidence that the club was never formally called upon to meet any such liabilities.

(x) The plaintiff's witnesses were not cross-examined on the premise that they agreed to the indemnity on the basis it would cover the defendant's purchase of the share capital or loans to the company.

(xi) The unchallenged evidence of Mr. Milton that the company's payment was publicly reported as "*an amazing act of generosity*" does not advance its position.

(xii) It also does not assist its case when one puts the contribution of €665,000 in the context of the overall approximately €4.5 million costs, the rest of which was either grant-in-aid from the State or donations from the public. It would be surprising if Mr. Molloy and Mr. Molloy alone were to have some form of legal recourse to be repaid his contribution. Mr. Forde then falls back on general equitable and legal principles that the trustee has a right to payment from the trust property for expenses properly incurred. All other things being equal I would broadly accept the proposition that the trustee has a right to reclaim expenses properly incurred from a beneficiary unless ousted by agreement. It seems to me that the intention of the declaration of trust was to be comprehensive and to oust any other implied equitable or statutory right to indemnification. If I am wrong about that, the various points I made in relation to the declaration apply *mutatis mutandis* to the point under this heading. Assuming I am wrong about all of that, on the basis of Mr. Forde's argument the company could have asserted an intention to reclaim the liabilities from the club but the major liabilities in respect of the construction of the stadium were incurred ten or more years ago prior to 2007 and issues of laches and limitation will arise. No such proceedings however were ever taken by the company. The rule in *Henderson v. Henderson* (1843) 3 Hare 100; 67 E.R. 313 would imply that the company's failure in these proceedings to establish that there is any such liability is determinative. Mr. Molloy's position can be put in the context of para. 31 of his first affidavit where he says that the "*purported deed of trust is ineffective and a sham*" and claims that €630,000 is owing to him and says no repayments have been made by the defendant or the club. Yet in oral evidence he accepted that he got either half the VAT which would have been €150,000 plus or €121,000 approximately, depending on which version of his inconsistent evidence one was to accept. It seems to me that his credibility is in tatters. The situation here calls to mind the observation of Tomlinson L.J. in *Thevarajah v. Riordan* [2015] EWCA Civ. 41 where he referred to the situation as raised in that case: "*By an order of 21st March, 2014 Mr. David Donaldson QC, sitting as a Deputy Judge of the Chancery Division, to use his own language at paragraph 20 of his judgment giving his reasons therefor, ordered "implementation of an arrangement lacking (as pleaded, and perhaps in fact) agreement of an important element". In consequence he attributed to the Appellant … and to the first, second and fourth respondents, respectively … an agreement which, demonstrably, they had not made. The question which arises on this appeal is whether he was right to do so. There is something very wrong with our legal system if the answer to that question is yes."* Similarly here, in considering the question of whether the club has any liability to the trustee in relation to any alleged liabilities that the defendant company has to repay Mr. Molloy money which he either used to buy shares in the company or allegedly lent to the company, to interpret an indemnity clause as covering such alleged liabilities would be to attribute to the parties an agreement which they did not make. There would be something very wrong with our legal system if the answer to question I have just posed is yes.

Pre-emptive Order regarding costs

72. As the defence fails, the point raised in para. 2 of the defendant's notice of motion of 8th March, 2018 does not arise.

Order

73. Accordingly, the order will be:

(i) That the plaintiff's motion of 12th September, 2017 be formally struck out; that was my intention when dealing with it on 24th September, 2017 but no formal order to that effect was made.

(ii) That the plaintiff's motion of 18th December, 2017 be formally struck out; again that was my intention when dealing with it on 29th January, 2018 although no formal order was made.

(iii) That the defendant's motion dated 8th March, 2018 be dismissed.

(iv) That there be an order under the inherent jurisdiction of the court and/or s. 25 of the Trustee Act 1893 and/or s. 22 of the Land Law and Conveyancing Reform Act 2009 that the defendant be removed as a trustee and replaced with Athlone Town A.F.C. Co. Limited by guarantee with immediate effect.

(v) That there be an order under the inherent jurisdiction of the court and/or s. 22 of the Land Law and Conveyancing Reform Act 2009 directing the defendant to execute an assignment or assignments of all of its interest in Folio 30190F and entitlements under lease and any other entitlements in connection with the property such as the benefit of any mobile mass assessments or insurance policies in a form prepared by the plaintiff; and I will discuss with counsel the timescale and mechanism for this.

(vi) That there be a declaration pursuant to the inherent jurisdiction of the court and/or s. 22 of the Land Law and Conveyancing Reform Act 2009 that the indemnity in favour of the defendant covers liabilities incurred at the time of its execution and into the future in respect of the trust property and does not cover any alleged liabilities of the company towards Mr. Molloy to repay him any sums allegedly paid by him to acquire shares in the company or advanced by way of alleged loans to the company.

(vii) I will hear the parties further on whether the claim of an account for profits or damages is appropriate and as to what further or other reliefs are appropriate or as regards any other consequential matters.

Postscript

74. By way of postscript, during the delivery of the foregoing judgment Mr. Molloy left court and thereafter was uncontactable by telephone. Mr. Shortt suggested that this in itself was a contemptuous act, a matter in relation to which I make no finding at the present time. Having heard the parties, albeit recognising that Mr. Forde is thereby handicapped in his instructions, by the

defendant's own actions, I will make further orders as follows:

(i) I will order that the plaintiff present all necessary documents to the defendant by serving them by email on Mr. McNelis by 5pm on Friday 13th April, 2018, for the assignment of the defendants' legal interest in the lands, the benefit of the lease and benefit of any other rights in connection with the property, such as insurance, mobile phone masts or any other rights whatsoever in connection with the property; and that the defendant shall either execute the documents by 2pm on 16th April, 2018 or apply to the court at that time for an order to the contrary and I will further direct that the directors Mr. Declan Molloy, Mr. Kieran Temple and Mr. Paddy McCaul do co-operate with that order.

(ii) I note that the plaintiff is opting to pursue the damages claim and will adjourn that claim for further mention.

(iii) I will make a mandatory order that the defendant, its directors, Mr. Declan Molloy, Mr. Kieran Temple and Mr. Paddy McCaul, its officers, servants and agents hand over all keys at 8pm on 12th April, 2018 at the Stadium in Athlone and attend in court 24 at 12.50pm on Friday, 13th April, 2018 with all documents of title.

(iv) I will make an order restraining the defendant, its directors, Mr. Declan Molloy, Mr. Kieran Temple and Mr. Paddy McCaul, its officers, servants and agents from entering the premises prior to 8pm on 12th April, 2018 or thereafter without the consent of the plaintiff or from taking any further steps in relation to the property save as specifically requested by the plaintiff.

(v) I will put the matter in for mention at 12.50pm on Friday, 13th April, 2018 to confirm compliance with the foregoing.

(vi) I will give liberty to give notice of the order by phone, text message or similar message.

(vii) I will adjourn the question of costs until Monday 16th April, 2018.