

THE HIGH COURT

COMMERCIAL

2010 11862 P

BETWEEN

IBB INTERNET SERVICES LIMITED, IRISH BROADBAND INTERNET SERVICES LIMITED (TRADING AS IMAGINE NETWORKS)

AND

BY ORDER

IMAGINE COMMUNICATIONS GROUP LIMITED

PLAINTIFFS

AND

MOTOROLA LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 6th day of July, 2011

Background

This action began on 23rd December, 2010. At that stage, just the first two plaintiffs were parties to it.

Those plaintiffs alleged that by contracts dated 7th May, 2009, 5th June, 2009, 13th October, 2009 and 10th December, 2009, made between those plaintiffs and the defendant and by a side letter agreement from the defendant to the first plaintiff dated 3rd December, 2009, the defendant agreed to carry out works and provide services to the plaintiffs in respect of the provision of what is called a WiMax telecommunications network. It is alleged that the first two plaintiffs were induced to enter into these contractual arrangements on foot of representations made to them by the defendant concerning the capability and capacity of the network to be provided by it. The first two plaintiffs alleged that the defendant breached those contractual arrangements and was negligent in respect of the making of the representations.

On 28th February, 2011, on the plaintiffs' application, the case was transferred to the Commercial List and, in addition, the third named plaintiff was joined to the action. Directions as to pleadings were given, as a result of which a Statement of Claim was delivered on 4th March, 2011. It claims damages of in excess of €100 million against the defendant.

There followed no fewer than three Notices for Particulars and three Responses thereto, which, in turn, were followed by the delivery of an amended Statement of Claim. That was delivered on 11th May, 2011. The plaintiffs indicated a desire to deliver that amended Statement of Claim when threatened with a motion to strike out the Statement of Claim in its original form as embarrassing.

That motion was threatened because of the defendant's contention that the content of the Statement of Claim, when compared to the three sets of Replies to Particulars which had been delivered, gave rise to much confusion. Three areas, in particular, were identified. They were:

- (a) An allegation that the defendant was liable in damages to, *inter alia*, the third plaintiff on foot of an assertion that it and the other plaintiffs operated as a single economic unity. There was no such allegation contained in the Statement of Claim.
- (b) A plea that the defendant was liable to the third plaintiff because the first and/or second plaintiff entered into the agreements with the defendant as agents for the third plaintiff.
- (c) A plea that the third plaintiff was entitled to an indemnity from the first and/or second plaintiffs and that this gave rise to an entitlement on the part of the third plaintiff to claim damages against the defendant.

An examination of the Statement of Claim in its original form, which runs to some fifty pages, confirms that the complaints made by the defendant concerning its shortcomings, when compared to the particulars delivered, appear to be well founded.

One might have hoped that the delivery of the amended Statement of Claim would have clarified the position, particularly since by then, the case had been transferred to the Commercial List. The defendant contends that matters were, in fact, made more obscure by its delivery.

The Amended Statement of Claim

Five complaints are made concerning this amended Statement of Claim. They are as follows:-

- (i) the amended Statement of Claim has maintained the plea that the third defendant was not a party to the written agreements entered into by the first and second plaintiffs;
- (ii) despite the fact that replies to particulars made it clear that the revenue to be derived from the WiMax network (the

network) came from customers connected to the network and that the great majority – if not all – of the customers connected to the network were in fact the customers of a subsidiary company of the third plaintiff which was not a party to the proceedings, it was pleaded that the income derived from customers utilising the network was earned by the third plaintiff and/or its subsidiaries;

(iii) the claim of the third plaintiff was advanced on the basis that the plaintiffs constituted a single economic entity;

(iv) by way of contrast to the “single economic entity” plea, the amended Statement of Claim also pleaded – by way of alternative – that the first and second plaintiffs had executed the written agreements, the subject matter of these proceedings, as agents for the third plaintiff; and

(v) the allegation that the third plaintiff was entitled to an indemnity from the first and second plaintiffs which had been advanced in the replies to particulars was not pursued in the amended Statement of Claim.

Criticisms

In addition to the above complaints the defendant makes a number of criticisms.

The first criticism is that the plea of “single economic entity” and the plea of “agency” which are contained in the amended Statement of Claim are not only inconsistent but, it is argued, mutually exclusive.

The defendant contends that it cannot understand why there are three plaintiffs in the proceedings if there they were part of a single economic entity.

It is also argued that the first and second plaintiffs could not be both the agents of the third plaintiff and part of a single economic entity with the third plaintiff.

Regardless of which version is propounded, it is argued that the first and second plaintiffs could not themselves have suffered loss or damage.

Because of this, further inquiries were made by the defendant by means of a notice for particulars of 12th May, 2011. The current motion was issued because the defendant does not believe that it received an adequate response to five of those requests.

Request for Particulars

The first request asked the plaintiffs to identify the contracts the subject matter of the proceedings to which it is alleged that the third plaintiff was privy.

The second sought confirmation of whether it is the plaintiff’s case that the first and second plaintiffs as agents of the third plaintiff had themselves rights or obligations under the contracts or not.

The third request sought confirmation that it was not being alleged that the first plaintiff had suffered any losses arising from the acts or omissions alleged against the defendant.

The fourth particular sought confirmation that it was not being alleged that the second plaintiff had suffered any losses arising from the alleged acts or omissions of the defendant.

Finally, the plaintiffs were asked to identify with precision whether it was contended that customers who had been identified in earlier replies to particulars of 4th May, 2011, as customers of Imagine Broadband Services were the customers of the third plaintiff directly or were alleged to be its customers through its subsidiaries including Imagine Broadband Services.

On 13th May, 2011, the plaintiffs responded to these requests.

The responses did not identify the contracts to which it was alleged the third plaintiff was a party. They confirmed which of those contracts were allegedly breached and which were written and oral. The plaintiffs also confirmed that the third plaintiff was not a named party to two of the agreements but went on to contend that the Imagine group of companies operated as a single economic unit or, alternatively, on the basis of agency, the plaintiffs proposed to make the case that the defendant has liabilities to the third plaintiff arising out of all of the contracts entered into by any of the plaintiffs.

It is important to point out that the amended Statement of Claim appeared to make a new case on behalf of the plaintiffs to the effect that the relationship of principal and agent existed between the third plaintiff and the first and second plaintiffs respectively but that the third plaintiff’s status as principal was disclosed.

The Present Position

The defendant complains that having regard to the matters to which I have alluded and indeed a good many more which, in the circumstances, it is not necessary that I recite, it is disadvantaged in that it does not know the case that it has to meet with a view to delivering its defence. I am of the view that there is a good deal of force in these criticisms.

As things stand, there is a substantial lack of clarity as to precisely what the plaintiff’s case will be at trial. Certainly, it appears to be making a number of alternative cases but if that is so they must be pleaded with clarity. It was also alleged that a number of these alternative claims are mutually exclusive. This gave rise to a question posed during the hearing as to the extent to which any such claim can be advanced.

Counsel on behalf of the plaintiffs indicated the case which he wishes to make at trial. It is as follows.

He contends that the plaintiff companies (but not them exclusively) operate as a single economic entity. On that basis, he contends that the third plaintiff is entitled to bring a claim in respect of all of the written agreements because the third plaintiff was effectively the contracting party.

As an alternative plea, the case will be made that the first and second plaintiffs, insofar as they were parties to contracts with the

defendants, were so as agents for the third plaintiff.

Pleadings

In *McGee v. O'Reilly* [1996] 2 I.R. 229, Keane J. (as he then was) cited with approval from the decision of FitzGerald J. in *Mahon v. Celbridge Spinning Company Limited* [1967] I.R. 1, where he said:-

"The whole purpose of a pleading, be it a Statement of Claim, defence or reply, is to define the issues between the parties, to confine the evidence of the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at the trial."

There was nothing new in that statement. As far back as 1878, Cotton L.J in *Phillips v. Phillips* [1878] 4 QBD 127 said:-

"...it is absolutely essential that the pleadings, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they will have to meet when the case comes on for trial."

Ogden on *Civil Court Actions* (24th Ed.) para. 801 states that:-

"Material facts must be alleged with certainty. The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision. If vague and general statements were allowed nothing would be defined; the issue would be 'enlarged', as it is called; and neither party would know, when the case came on for trial, what was the real point to be discussed and decided."

These principles apply with particular force in cases which are dealt with in the Commercial List. Vague, uncertain or confusing pleadings and particulars are anathema to the very objective for which the Commercial List was established, namely a speedy, efficient and just determination of commercial disputes.

Conclusions

I am of opinion that, despite the volume of paper that has been produced, both by way of original Statement of Claim, the amendment to it and the variety of particulars which have been delivered, it is not possible to ascertain with the degree of certainty that is required the precise case which the plaintiffs wish to make in respect of this claim for a large sum of damages.

I propose to give the plaintiffs a final opportunity to make the case which they wish and to do so in a form that can be readily understood. I will grant leave for the delivery of a re-amended Statement of Claim. That document must set out the case which the plaintiffs wish to make and the facts which they propose to rely upon. It must be pleaded in such a way as to make any request for further particulars unnecessary. In other words, it must contain full particulars of all factual matters which will be relied upon as part of the plaintiff's case.

This determination is sufficient to dispose of the motion but in deference to arguments which were made to me during the course of the hearing, I ought to say a few words about pleas in the alternative and the rules applicable thereto.

Before doing so, I wish to make a brief comment on the "single economic unit" plea.

Counsel on behalf of the plaintiffs accepts that for corporate plaintiffs who are separate legal entities to be making the case that they are in fact one single economic unit is unusual. Such a case is more frequently made against defendants where an attempt is being made to pierce the corporate veil. It follows that the basis for this case must be pleaded with particularity so as to enable the defendant to know precisely the basis upon which this unusual case is sought to be made.

Alternative Pleas

Counsel for the plaintiffs also accepted that other pleas which have been or will be sought to be made, involve the making of alternative cases. I heard a good deal on the entitlement so to do and on an alleged lack of entitlement in circumstances where the alternative claims were inconsistent, one with the other. I also heard submissions as to the degree of particularity with which such alternative claims have to be made.

Nothing that I say here should be taken as in any way expressing a view as to the prospects of success of any of the various alternative claims which the plaintiffs wish to make. It may very well be that when the Statement of Claim in final form is delivered, the plaintiffs will be confronted with an application to strike out but nothing that I say should be regarded as in any way indicating a view on that aspect of the matter. Rather, I make these comments so as delineate the extent to which inconsistent alternative pleas may be made and the particulars that must be provided if such pleas are propounded.

The general rule is that either party may in a proper case include in its pleading two or more inconsistent sets of material facts and claim relief thereunder in the alternative.

A plaintiff is entitled to rely upon several different rights "alternatively, although they may be inconsistent" (*Phillips v. Phillips* [1878] 4 QBD 127). However, when a plaintiff does so, it runs the risk of facing an application to strike out on the basis that such alternative claims may be embarrassing. But a pleading is unlikely to be regarded as embarrassing simply because it sets up inconsistent claims.

In *Phonographic Performance Ireland Limited v. Cody* [1998] 4 I.R. 504, Keane J. (as he then was) said, *inter alia*:-

"...counsel for the plaintiff submitted that the defendants should not be allowed to maintain the wholly inconsistent posture, as he put it, of maintaining on the one hand that the plaintiff was not the owner or exclusive licensee of the copyright in any of the sound recordings played in the defendants' premises and on the other hand of contending that the amount of remuneration sought by the plaintiff was not equitable remuneration within the meaning of the Act of 1963... I am satisfied that the defendants are correct that there is nothing to prevent a defendant in a case such as this from relying on a number of alternative defences. This is a well accepted method of pleading which should not, of itself, be the cause of any prejudice, embarrassment or delay to the plaintiff within the meaning of O. 19, rule 27."

That said, if mutually contradictory claims are made then they must be properly expressed in the alternative and fully particularised. They are permissible unless one of the alternatives is unsupported by any evidence. This places an obligation on the pleader not to plead an inconsistent averment which he must know is untrue. In this regard, the observation of Reynolds J. in *Church v. Adler* 350 Ill.

App. 471 to the effect that "alternative pleading is not permitted when in the nature of things the pleader must know which of the inconsistent averments is true and which is false" seems correct.

With these few observations concerning pleading in the alternative, I propose to fix a time within which the plaintiffs should deliver their re-amended Statement of Claim.