Neutral Citation Number: [2011] IEHC 377

THE HIGH COURT

2010 4993 P

BETWEEN

RICHARD BENNETT

PLAINTIFF

AND

JOHN EGAN, THE COMMISSIONER OF AN GARDA SÍOCHÁNA,

AN GARDA SÍOCHÁNA COMPLAINTS BOARD,

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered the 10th October 2011

Introduction

1. This is an application to strike out the action as against the third named defendant, the Garda Síochána Complaints Board.

2. The plenary summons is dated the 25th May, 2010. The plaintiff delivered a Statement of Claim on the 14th June, 2010. The State defendants, that is, all the defendants other than the first named defendant, John Egan, issued a notice of motion dated the 18th November, 2010, to strike out the claim. Pursuant to an order of this Court, the plaintiff delivered an amended Statement of Claim on the 14th March, 2011. The third defendant, the Garda Síochána Complaints Board, filed an affidavit dated the 9th June, 2011, in support of an application to strike out the amended claim as against the Board. The plaintiff filed a replying affidavit dated the 23rd June, 2011.

3. The application on behalf of the Board is that the claim should be struck out because it is frivolous, vexatious, an abuse of process and bound to fail.

4. The grounding affidavit sets out as follows the ground that a proceeding by way of plenary summons is not the appropriate mode of challenging decisions made by the Board, which it contends ought to be done by way of appeal under the statutory scheme or judicial review. –

> "I say that it is inappropriate to issue plenary proceedings against the third named defendant in respect of the manner in which the body carries out its duties. Any grievance the plaintiff has in respect of a decision or decisions made by the third named defendant should be brought by way of appeal or judicial review, and the within proceedings should be struck out as against the third named defendant accordingly."

5. The affidavit goes on to say that the proceedings would appear to be statute barred.

6. The case against An Garda Síochána Complaints Board is contained at paras. 25 to 51 inclusive of the new Statement of Claim.

7. The background to this case as it appears from the Statement of Claim is that an incident occurred at the first defendant's public house in which the plaintiff was involved and which was investigated by the Gardaí. At a later date the plaintiff made a complaint to the Gardai about Mr Egan. The plaintiff was dissatisfied with the actions of the investigating Gardaí and the conduct of the investigation. He complained to the Garda Síochána Complaints Board. The Chief Executive of the Board made a report, the result of which was notified to the plaintiff. He sought and obtained a copy of the report which was sent to him in redacted form. He was dissatisfied with the report and also because some information was withheld from him.

8. The plaintiff did not appeal the findings of the report under the relevant statutory scheme and neither did he seek judicial review. The plaintiff's claim concerning the Garda Complaints Board relates generally to alleged failures in the investigation of his complaint of Garda misconduct and to alleged defamation in the report of the Chief Executive. Among the complaints is that the Board "wilfully neglected" its duty and was "recklessly indifferent" to missing evidence. The Statement of Claim expressed in separate and discrete paragraphs, rather a series of factual statements leading to a concluding claim or prayer for legal relief. It is not, in other words, in a form where it says what are the facts that the plaintiff relies on and then claims appropriate relief. Rather it consists of a series of allegations or conclusions without factual underpinning.

Striking Out

9. In *Barry v. Buckley* [1981] 1.R. 306, Costello J. said that the jurisdiction to strike out arose in two ways, the first under O. 19, r. 28 and secondly, in the inherent jurisdiction of the court. Order 19, rule 28 provides that the court may order a pleading to be struck out because (a) it discloses no reasonable cause of action or (b) the action is shown by the pleadings to be frivolous or vexatious. Whether the claim disclosed by the pleadings is frivolous or vexatious is to be decided by reference only to the particular pleading, in this case the Statement of Claim. Extrinsic evidence is not relevant on this question. Costello J. at p. 308 explains the second basis on which a court may strike out proceedings.

> "But, apart from O. 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see Wylie's *Judicature Acts* (1906) at pp. 34-37 and *The Supreme Court Practice* (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will

be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L.J. in *Goodson v. Grierson* at page 765."

10. In considering abuse of process, including a case that the plaintiff's claim must fail, the contents of the affidavits can be referred to. In this category is a point about privileged communications between the investigating officer and the Chief Executive and between the Chief Executive and the Board. Whereas on the Statement of Claim alone it would not be possible to say that the claim disclosed no cause of action or was frivolous or vexatious, in light of the affidavit as to the circumstances and the consideration of the matter by the Board, one can reach a conclusion about privilege.

Immunity from suit

11. Can the Garda Complaints Board be held liable in tort for its decisions? In *Beatty v Rent Tribunal* [2006] 2 I.R. 191 the Supreme Court unanimously held that the Rent Tribunal was a statutory body exercising statutory adjudicative duties in the public interest and could not be sued in negligence. The protection arose from common law and was not a matter that had to be provided for in the Act establishing the tribunal. Although the Act did not say that the tribunal had immunity or did not owe a duty of care, it enjoyed protection at common law. The court however was divided on the legal foundation of the exclusion of liability. The majority view was expressed in the judgment of Geoghegan J. who held that this was a common law immunity that applied to courts and tribunals exercising statutory adjudicative functions. The minority judgments of Fennelly J. and McCracken J. preferred the concept of the duty of care and whether it was reasonable to impose such a duty in the circumstances of a tribunal exercising statutory functions. Geoghegan J. was unhappy with including the protection of a tribunal in the general law of negligence and thought it important to assert the immunity, as such, of statutory adjudicative bodies.

12. The majority judgment relied on the English authorities but with an important distinction. At pp. 197/8 and at 198/9 Geoghegan J. cited with approval two passages from Lord Denning's judgment in *Sirros v. Moore* [1975] Q.B. 118. The difference is that Lord Denning conceived that even if a judge was actuated by malice in hearing a case, he was nevertheless immune from action. He could be prosecuted, he could be removed from office perhaps, he could be subject to other possible sanctions, but not liability in negligence or any other tort including, it would seem, misfeasance in public office. Lord Denning was clear about this and the reason he gave for the protection is that a judge had to be free of the fear of being sued and the fear of its being suggested that he was actuated by malice. Lord Denning says at p. 132 of the Q.B. report:-

> "No matter that the judge was under some gross error or ignorance or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a court of appeal or to apply for *habeas corpus*, or a writ of error or *certiorari*, or to take such step to reverse his ruling. Of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."

13. Geoghegan J. having cited the second paragraph that he relies upon, adds the following at p. 199 of the report:-

> "As there are some possible ambiguities in the two passages from the judgment of Lord Denning already cited, I want to make it clear that if a judge or tribunal was to knowingly engage in behaviour that was criminal or malicious I would consider that, for the reason given in the last sentence of the second passage, the immunity to a claim for damages for misfeasance of public office would not apply."

14. Lord Denning held that the only ground that could remove the immunity enjoyed by a judge or tribunal is the absence of belief that he had jurisdiction. If it could be shown that a tribunal or a judge did not believe that he had jurisdiction to do what he actually did, he would have no immunity. But that is the only circumstance that would deprive him of the immunity. The point Lord Denning is making, as I understand it, is that nothing the judge does exposes him to civil action, provided only he is of the belief that he is acting within jurisdiction.

15. The difference in the two views is that Geoghegan J. allows for liability under misfeasance in public office if it is shown that a tribunal behaves maliciously. The consequence of Lord Denning's approach is that a pleading in a case brought against a tribunal or judge can be struck out and indeed ought to be struck out as disclosing no reasonable cause of action. The same does not apply of course under the rule as stated by Geoghegan J., provided the plaintiff asserts that the conduct was knowingly wrongful, criminal, malicious or similar. But I think it is reasonable to say by inference from Geoghegan J.'s judgment in *Beatty* that it is not sufficient to put an adjudicative body to all the trouble of dealing with an action simply by adding the relevant epithets or adverbs in describing the behaviour that the plaintiff is challenging. If there is immunity assuming the person or body is acting within jurisdiction and *bona fides*, it is reasonable to infer that a plaintiff must set out some basic facts that could take the case outside the immunity. It may thus be concluded that this is an essential requirement and that a failure to provide the necessary factual information to ground the alleged malice means that there is no reasonable cause of action disclosed. Moreover, it would be an abuse of process to put a defendant in the position of establishing his *bona fides* as opposed to requiring a plaintiff to demonstrate the absence of *bona fides*.

16. Pleadings make a case based on facts. A Statement of Claim ought not to be permitted to relocate the burden of proof to the defendant by the simple device of adding a descriptive epithet or adverb. Facts not law, was the traditional way of saying what a Statement of Claim should contain.

The Plaintiff's Claim as Pleaded

17. The pleading relating to the Garda Complaints Board is comprised in paras. 25 to 51 inclusive of the Statement of Claim. The plaintiff makes the following complaints:-

Paragraph 25

The Chief Executive of the Garda Complaints Board restricted the scope of investigation and exonerated some of those complaints against him. This does not constitute a cause of action because the Chief Executive was required under the terms of the relevant legislation to determine admissibility in respect of a complaint received by the Board.

Paragraphs 26/27

The plaintiff complains that the copy report he received from the Board had names of individuals redacted "contrary to the Information Commissioner's opinion". That does not amount to a cause of action. Paragraph 27 goes on to say that the Board "wilfully neglected their duty to obtain the video evidence referred to at para. 15(g) and were recklessly indifferent to missing evidence when notified by the plaintiff. Paragraph 15(g) is as follows:-

> "(g) Abuse of authority on 2/3/2006 in recording investigative bias directed at the plaintiff on video while the plaintiff was under a legal incapacity."

The inference from this is that the plaintiff is alleging that the Board did not obtain what he considers to be relevant video evidence and did not respond in a manner agreeable to the plaintiff to some complaint that he made about missing evidence.

Paragraph 27 says that the Board "wilfully neglected their duty" and "were recklessly indifferent". These are complaints about the Board in respect of their carrying out of their statutory functions and it is clear that if they were acting bona fide in exercise of jurisdiction they are immune from suit: *Beatty v Rent Tribunal* [2006] 2 I.R. 191.

Is it sufficient for the plaintiff to overcome the obstacle presented by the Beatty immunity (or non-liability for negligence because no duty of care, according to the minority of the Supreme Court who assented in the result of *Beatty*) for him simply to plead wilfulness or recklessness? I do not think that the mere characterisation of the decisions and behaviour of the Board which the plaintiff wishes to challenge as being deliberate or reckless is sufficient. The plaintiff is obliged to provide a factual basis on which he could succeed if the matters alleged in his Statement of Claim are accepted by the court. That means that if he is making a case that the defendant behaved deliberately or recklessly, he must show a factual basis from which the inference might be drawn as to the state of mind that he relies upon, in respect of these allegations and particularly the crucial adverbial exacerbations but no facts whatsoever are set out in these paragraphs.

Paragraph 28
This is a meaningless litany of wrongs which does not disclose a cause of action:

> "The published documents were occasioned, contributed to or facilitated by the acts and omissions of servants or agents of the State, which acts and omissions amounted to conspiracy, misfeasance in public office, libel and infringements of data protection and the plaintiff has been injured in his credit, character, and reputation and suffered loss, damage and expense, mental distress, mental anguish and sorrow."

Paragraphs 29 - 30
Paragraph 29 alleges unspecified steps in connection with untruthful statements. Paragraph 30 refers to "another serious matter" that is unrevealed and is wholly mysterious. These pleas also do not disclose a cause of action.

Paragraphs 31 and 32
These do not disclose any cause of action. It also appears that the allegation here is inferentially related to the behaviour of others, not the Garda Complaints Board or any servant or agent.

Paragraphs 33 and 34
Mr. Bennett pleads that the investigator appointed by the Garda Complaints Board made mistakes in reporting on the case. At para. 33, he pleads that the investigator failed to notice or realise that there was "a subtle variation" in a statement of evidence that was transcribed into another statement. At para. 34, the plaintiff refers to the contradiction of an alibi that he says the investigator did not pick up. The plaintiff then characterises these alleged errors as being misconduct amounting to deliberate corruption, reckless indifference or gross negligence. However, there is no factual basis for this description of the alleged errors; therefore these characterisations are no more than freestanding conclusions unsupported by any alleged fact. It is not enough simply to analyse the documents in a case, in this instance the redacted report of the Chief Executive and accompanying materials, and then to characterise any areas that a person disagrees with or errors that he may perceive to be present as being corruptly produced without in any way asserting facts that might be relevant and which would establish the crucial allegation of corruption that changes the nature of the conduct complained of and also materially alters the availability of legal remedies.

It is abuse of process in such circumstances simply to attach these descriptive words to categories of behaviour without tying them in to any specific facts.

Paragraphs 35 and 36
These paragraphs contain an allegation of libel. However, the words complained of are not defamatory. It is not even alleged that they are untrue. The occasion in which they were recorded was manifestly a privileged one, if not absolute then qualified and no circumstances are alleged that would remove it. There is no cause of action disclosed in these paragraphs.

Paragraphs 37 to 41
Again, no cause of action is disclosed. The allegedly offending material is contained in the report of the investigator appointed by the Board to report on his inquires into the complaint made by the plaintiff. The occasion was obviously privileged, either absolute or qualified and again without any material basis for removing the protection in the event that it is the latter form of immunity.

Paragraphs 42 and 43
The paragraphs appear to relate to the conduct of persons other than the Garda Complaints Board or its servants or agents. No cause of action is disclosed.

Paragraphs 44 to 47
These paragraphs complain about material in the Chief Executive's report to the Board. The comments made above on the subject of the alleged defamation apply here similarly.

Paragraphs 48 and 49
These paragraphs do not disclose any cause of action. The plea is no more than a disagreement with the inference that was drawn by two persons.

Paragraphs 50 and 51
These do not disclose any cause of action.

Decision
18. It is immaterial to this decision that the Garda Complaints Board has gone out of existence or is going to do so once these and another set of proceedings have been disposed of. I think that the imminent dissolution of the Board and the fact that it has to continue albeit in attenuated form in order to deal with this case merely highlights the practical importance of the issue that the Board has raised in this motion.

19. I take into account the fact that the plaintiff is a lay litigant, although he possesses considerable facility in using legal vocabulary of considerable complexity. A court has to be careful in dealing with a lay litigant to make sure that a defect in procedural steps does not shut out a genuine claim. On the other hand, litigation is a serious matter and broad allegations of corruption and fraud and serious misconduct ought not to be made without some foundation of fact.

20. The plaintiff's claim about the Board is an unfounded scattergun attack couched in terms of sweeping allegations of misconduct. No facts are pleaded that could establish malicious motive. If the grievances came about by reason of negligence, that would not be actionable. The plaintiff seeks to escape the consequences of this rule by the simple expedient of adding allegations of malice. To permit the case to proceed on this basis would be to reverse the onus of proof.

21. I propose to accede to the application made by the Garda Síochána Complaints Board to have this claim struck out as against the Board.