THE HIGH COURT

[2013 No. 5473 P.]

BETWEEN

RICHARD WILSON

PLAINTIFF

AND

VODAFONE IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 10th day of April, 2018

Background Facts

1. The plaintiff is a taxi driver who resides in Dundalk, Co. Louth. The defendant is a provider of mobile telephone services in the State. In June, 2009 the plaintiff entered into a contract with the defendant for the supply of such services. The plaintiff is married to Mrs. Caroline Wilson (nee O'Meara).

2. In his statement of claim, the plaintiff pleads that on 15th February, 2010, the plaintiff's father-in-law, Patrick O'Meara senior showed his daughter Mrs. Wilson a text message from an employee of the defendant, a Ms. Jolene Hatzer. This disclosed data relating to telephone calls made by the plaintiff to and calls received from a mobile telephone number which Ms. Hatzer told Mr. O'Meara senior was registered to the News of the World newspaper. It would appear that on the previous day, the 14th February, 2010, the News of the World published a story concerning Patrick O'Meara junior, the son of Patrick O'Meara senior and the plaintiff's brother-in-law, which alleged that Mr. O'Meara junior was accused of ramming a PSNI vehicle in Northern Ireland and when informed of that fact by the newspaper, Mr. O'Meara junior's employer, a taxi firm in the Republic, dismissed him.

3. The statement of claim pleads that Mr. O'Meara senior asserted to Mrs. Wilson that Ms. Hatzer had accessed the plaintiff's personal data and had established that the plaintiff was "the rat" who had "shopped" Patrick O'Meara junior to the PSNI and "the tout" who had contacted the News of the World newspaper to this effect. It is further alleged that Mr. O'Meara senior had printouts of the plaintiff's mobile telephone records with the defendant. The plaintiff pleads that this disclosure of his personal data constituted a breach of the contract between him and the defendant which has caused him loss and damage.

4. He further pleads that the information was disclosed negligently and in breach of the defendant's duty to him. He pleads that as a result of the wrongs committed by the defendant, the plaintiff's marriage has been placed under strain and he was forced to leave the family home at his wife's insistence although they were reconciled subsequently. However both he and his wife have been ostracised by his wife's family. He complains that he has been subjected to a sustained and relentless campaign of harassment, threats, intimidation and abuse conducted and orchestrated by Messrs. Patrick O'Meara senior and junior. In consequence the plaintiff's physical and mental health has deteriorated and his ability to earn a livelihood has been affected. He alleges that he has developed high blood pressure and chest pain. He claims damages including aggravated and exemplary damages for all of these matters.

5. The plaintiff commenced these proceedings by the issue of a plenary summons on 29th May, 2013. A statement of claim was delivered some two years later on 18th May, 2015 and a defence on 22nd October, 2015. The defence is a complete traverse of the plaintiff's claim and puts the plaintiff on proof of all matters, including the allegation in the statement of claim that Ms. Hatzer was an employee of the defendant at the material time. Ms. Hatzer appears to be a cousin of Mrs. Wilson.

6. The defence also includes a plea that the plaintiff is estopped from maintaining the claim by virtue of a waiver agreement entered into between him and the defendant on 8th November, 2010. That waiver is alleged to have been in the following terms:

> "To whom it might concern,
>
> I Richard Wilson wish to withdraw the allegation that I made against Vodafone and its staff member Jolene Hatzer. This allegation was that Jolene had accessed my mobile phone records and passed them on to a third party. I am satisfied that there is no evidence to suggest that any records were accessed and I will not be pursuing this matter any further. Also I will not be taking any further *(sic)* against Vodafone or Jolene Hatzer."

7. This document was discovered in an affidavit of discovery sworn on behalf of the defendant on 9th December, 2015 by James Faughnan who is described as the defendant's investigation and disclosure manager.

8. On the 4th November, 2016, the plaintiff served a Notice to Admit Facts on the defendant. The facts, the admission of which was sought, included:

> "9. That an employee of the defendant, namely one Jolene Hatzer, accessed the plaintiff's customer information, personal information and personal data including traffic data held by the defendant, in or about the month of February, 2010.
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> 10. That an employee of the defendant, namely one Jolene Hatzer, accessed the News of the World's (News International) customer information, personal information and personal data including traffic data, held by the defendant, in or about the month of February, 2010.
>
> 11. That an employee of the defendant, namely one Jolene Hatzer, accessed customer information and traffic data concerning phone number 087 9853542 [*alleged to be the News of the World number*] held by the defendant, in or about the month of February, 2010…"

9. The defendants replied with an Admission of Facts pursuant to Notice dated 24th November, 2016 and responded to the foregoing requests as follows:

> "9. As above. Vodafone cannot (sic) neither confirm nor deny re Ms. Jolene Hatzer. The inclusion of Ms. Hatzer's name arises solely from the pleadings made in the plaintiff's statement of claim.

10. Vodafone has consulted its HR records and can neither confirm nor deny whether Ms. Hatzer was an employee of the defendant in or about February, 2010.

11. Paragraph 13 is denied."

10. A further letter seeking voluntary discovery was served on 13th January, 2017 by the plaintiff and in response, Mr. Faughnan swore a further affidavit of discovery on 8th February, 2017. One of the categories sought was "all documentation in the defendant's power, possession or procurement relating to and/or concerning its servant or agent Ms. Jolene Hatzer." Mr. Faughnan in his affidavit responded to this category in the following terms:

> "I consulted with the Human Resources Department in this regard and I say and am advised that they have not been able to find any employee records relating to Ms. Jolene Hatzer whatsoever. I have therefore listed this in the second schedule hereto. It is to be noted that the inclusion of the name 'Ms. Jolene Hatzer' in the plaintiff's statement of claim was the first mention that I ever saw of such a name from the plaintiff in relation to these proceedings".

11. It will immediately be seen that the latter statement of Mr. Faughnan cannot have been correct as Ms. Hatzer's name appeared several times in the waiver agreement apparently drawn up by him in November, 2010.

The Motions before the Court

12. Three separate motions were listed before the court and were heard together. The first in time was a motion brought by the plaintiff to strike out the defendant's defence for failing to make proper discovery or alternatively for further and better discovery. The second motion was a motion brought by the defendant seeking to compel the plaintiff to reply satisfactorily to a notice for particulars. The third motion was a motion seeking to amend the defence.

13. The first motion was grounded on a lengthy affidavit sworn by the plaintiff's solicitor, Neil Buckley, and verified by the plaintiff and his wife. A number of things emerge from that affidavit. The first is that Mrs. Wilson rang her cousin Ms. Hatzer on 15th February, 2010, after her father had confronted her with the information above referred to. Mr. Buckley avers in his affidavit that Mrs. Wilson has given him instructions in relation to that conversation.

14. Secondly, Mr. Buckley avers that both the plaintiff and his wife met Ms. Hatzer in August, 2010, by chance when the entire matter was evidently discussed in detail. The plaintiff says that Ms. Hatzer broke down in tears and admitted that she had accessed his records and passed on the information and printouts of his phone records to the plaintiff's in-laws. Thirdly, Mr. Buckley says that on 6th December, 2016, he was informed by the defendant's solicitor that Ms. Hatzer did not in fact work for the defendant but rather a company called Rigney Dolphin which operates call centres for the defendant.

15. Further, Mr Buckley avers that the statement in Mr. Faughnan's affidavit to which I have referred was deliberately untruthful for the reasons I have already identified.

16. In a replying affidavit sworn on 2nd November, 2017, Mr. Faughnan avers that as a result of the matters outlined in Mr. Buckley's affidavit, significant further documentation in the possession of Rigney Dolphin was discovered and is the subject matter of a supplemental affidavit of discovery sworn on the same date. With regard to the allegation that he was being deliberately untruthful, Mr. Faughnan says that he simply made an error.

17. When the discovery application came before me, in the light of the additional discovery now provided, the parties indicated that essentially the issue came down to one of costs and having heard the parties' submissions in that regard, I struck out the motion with an order for costs in favour of the plaintiff.

18. The second motion in relation to particulars was also dealt with on the hearing date.

19. Accordingly the only outstanding application before the court is the defendant's motion to amend its defence. The new pleas sought to be introduced by the defendant can broadly be summarised as follows:-

> 1 The plaintiff's claim is statute barred.
>
> 2 The plaintiff has not obtained an authorisation from the Personal Injuries Assessment Board and is not entitled to maintain the claim.
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> 3 If the conduct complained of by Ms. Hatzer did occur, it occurred in circumstances where she was on a frolic of her own acting contrary to express instructions given to her.
>
> 4 The defendant has no liability for the unlawful conduct of Messrs O'Meara senior and junior.
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> 5 By virtue of s. 35(1)(i) of the Civil Liability Act, 1961, the plaintiff is identified with any alleged wrong doing on the part of Ms. Hatzer, Rigney Dolphin Ltd and Messrs O'Meara senior and junior by virtue of his failure to institute proceedings against those parties.

20. The application is grounded upon an affidavit sworn by Gemma O'Farrell, a solicitor in the defendant's legal department. No replying affidavit has been sworn by the plaintiff. In the course of hearing all three motions, counsel for the plaintiff referred in particular to the content of the affidavit of Mr. Buckley sworn in the discovery motion to resist the amendment motion. Counsel for the defendant took objection to this course on the basis that the plaintiff ought to have sworn a replying affidavit in the amendment motion to which the defendant could have replied. However, I took the view that all matters were fully before the court and each party's position set out comprehensively in the affidavits in all three applications. Accordingly instead of adjourning the matter to enable more affidavits to be delivered in the amendment motion, in the interests of expediency and limitation of unnecessary costs, I felt it appropriate to deal with the matter.

21. The essence of the objection made by the plaintiff to the amendments is that they are prejudicial to him and ought not be allowed because if they are, he is now too late to institute proceedings against any other party. Counsel submitted that the six year limitation applied to the claim for damages for breach of contract and thus when the defence was originally delivered, the plaintiff would still at that stage have been in time to join other parties to the proceedings. Counsel also relied strongly on the fact that the defendant had been deliberately evasive in relation to Ms. Hatzer's employment and when they finally disclosed the true position, it was too late. The plaintiff had been deliberately misled by the defendant's conduct. That was a prejudice that could not now be

remedied if the amendments were allowed.

22. Counsel for the defendant submitted that in reality, this is clearly a personal injuries claim or at the very least a personal injuries claim in combination with a separate claim for loss and damage from a breach of contract. Either way, the limitation period is two years so that the claim was already statute barred when the original defence was delivered. Therefore no new prejudice could be said to arise from the amendments. It was further submitted that if the plaintiff had failed to sue the correct parties from the outset, that was not something for which the defendant could be responsible.

Discussion

23. I think the authorities are at one in demonstrating that, in general, the amendment of pleadings should be allowed by the court so that the real issues in controversy between the parties can be determined. I think it is also clear that an application to amend cannot be resisted on the basis of a prejudice arising from the amendment itself as distinct from the pre-existing state of affairs. In Aer Rianta v. Walsh Western (unreported Supreme Court 28th November, 1996), Murphy J. giving the judgment of the majority in the Supreme Court, said the following (at p. 8):-

> "In *Ketteman v Hansel Properties Ltd* [1987] AC 189, Lord Keith of Kinkel explained the nature of an injury to one party resulting from an amendment to pleadings that would render liberty in that behalf an injustice to the other party. He explained the position (at p. 203 of the report) as follows:-
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> > 'The sort of injury which is herein contemplated is something which places the other party in a worse position from the point of view of presentation of his case then he would have been if his opponent had pleaded the subject matter of the proposed amendments at the proper time. If he would suffer no prejudice from that point of view, then an award of costs is sufficient to prevent him from suffering injury and the amendment should be allowed.
> >
> > It is not a relevant type of prejudice that allowance of the amendment will or may deprive him of a success which he would achieve if the amendment were not to be allowed.'

Lord Keith of Kinkel was in fact delivering a minority judgment on the appeal to the House of Lords on the issue was to whether the defendants should have been given leave to amend their defence so as to plea the Statute of Limitations at a time when the proceedings had reached the stage at which counsel were making their closing address to the court. Nevertheless I do not doubt that the general observations of Lord Keith aforesaid represented the view of the House of Lords. Indeed it is inescapable that every amendment to a defence is intended to raise, and presumably will raise, further obstacles for a plaintiff." (Emphasis in original).

24. Similar views were expressed by Clarke J. (as he then was) in *Woori Bank v. KBB* [2006] IEHC 156 where he said (at para. 3.2):-

> "Where a party fails to include an appropriate plea it may be placed in a position of requiring a court order to amend. However the starting point for a consideration of whether to allow the amendment should be to have regard to the fact that the party could have included the plea in the first place without requiring any leave from the court. Prejudice needs to be seen against that background. The prejudice that needs to be established must be a prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered. The prejudice must stem, therefore, from the fact of the belated alteration in the pleadings rather than the presence (if allowed) of the amendment itself."

25. The starting point therefore must be that the defendant should be allowed to amend unless the plaintiff can demonstrate prejudice arising otherwise than from the amendments themselves. That prejudice is here said to be the loss of the opportunity to sue other parties.

26. The plaintiff's claim is pleaded on the basis that Ms. Hatzer was an employee of the defendant. The original defence traverses that allegation and puts the plaintiff on proof. Our law is of course predicated on the assumption that he who asserts must prove. When the plaintiff commenced these proceedings, he elected not to sue Ms. Hatzer but the party he considered to be her employer. Even before the defence was delivered, the plaintiff was not entitled to assume other than that he would be required to prove that fact. It was never safe to assume otherwise and the defendant certainly had no obligation to inform the plaintiff in this respect.

27. Certainly after the defence was delivered, the plaintiff can have been in no doubt as to the necessity for proving the employment relationship. He suggests that he was misled by the defendant's affidavit of discovery of December 2015 which referred to the waiver agreement describing Ms. Hatzer as a staff member of the defendant and he took comfort from that.

28. He argues that if proper discovery had been made at that time Ms. Hatzer's employment documents would have been disclosed and the true position revealed. However, the affidavit of discovery could just as easily have post dated the 15th February, 2016 when the claim would have been statute barred on any view even if the affidavit had disclosed the employment documents omitted originally. Of course none of this is relevant in any event if the claim is one for personal injuries which on its face, it clearly is, at least in part.

29. Aside from that, this is not a case where the plaintiff could not have established the true position without the assistance of the defendant. Ms. Hatzer is Mrs. Wilson's cousin. On the day the incident occurred, she had a conversation with Mrs. Wilson and some six months later, a meeting took place between Mr. and Mrs. Wilson and Ms. Hatzer where the entire matter appears to have been discussed in considerable detail. No reason has been advanced by the plaintiff why he or his wife could not have established from Ms. Hatzer the identity of her employer had they sought to do so.

30. It seems to me that the prejudice that the plaintiff now complains of arises in truth from his own failure, deliberate or otherwise, to sue the correct parties from the outset and to the extent that those parties were not known, from failing to make such enquiries as would have established their identity. In my view, none of this can in reality be laid at the door of the defendant.

31. It would in my view be quite unjust to the defendant to refuse the amendments sought for the reasons I have explained and I therefore propose to allow them subject to any consequential amendments which the plaintiff wishes to make to his pleadings.