

THE HIGH COURT

[2013 No. 2649 P]

BETWEEN

LIAM DELANEY

PLAINTIFF

AND

THE DIRECTOR OF EUROPOL, THE COMMISSIONER OF AN GARDA SIOCHANA, DANIEL VICENTE, DENIS HENEGHAN, PADRAIC KING OTHERWISE PADRAIC KEANE OTHERWISE STEPHEN CARASS, THE MINISTER FOR JUSTICE AND EQUALITY, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered the 23rd day of October 2015.

1. The within motion is brought by the first and third named defendants (respectively "the Director" and "Mr. Vicente") seeking orders setting aside service of the plenary summons or alternatively striking out or dismissing or staying the proceedings on the grounds that they are immune from suit herein.

Background facts

2. In his statement of claim, the plaintiff alleges that, on the 31st of May, 2010, he was attending a business meeting at a portacabin in Borris-in-Ossory, County Laois when it was raided by armed Gardaí. The plaintiff claims he was assaulted, arrested and falsely imprisoned at Portlaoise Garda Station. Whilst there, he alleges that he became ill and required removal to hospital for treatment and thereafter was returned to the Garda Station where he underwent prolonged interrogation.

3. He further alleges that he was indicted on two counts and tried before the Special Criminal Court. His trial commenced on the 12th of June, 2012, until ultimately, on the 18th of July, 2012, the prosecution entered a *nolle prosequi* against the plaintiff.

4. Mr. Vicente is an officer of the Spanish police force who was, at the material time, employed on secondment to Europol. It would appear that Mr. Vicente, who is said to be expert in matters relating to Euro currency counterfeiting, was provided by Europol as an expert witness at the trial of the plaintiff. Mr. Vicente appears to have been asked to examine certain machinery with a view to giving evidence in relation to that machinery in the context of the production of counterfeit currency.

5. In his statement of claim, the plaintiff alleges that Mr. Vicente was, at all material times, the subordinate, servant or agent of the Director. Insofar as the Director and Mr. Vicente are concerned, the case pleaded against them in the statement of claim appears at para. 3.1:

"The first and second named defendants, their subordinates, servants or agents, particularly the third and fourth named defendants conspired with the fifth named defendants to procure a miscarriage of justice by creating or inducing or entrapping other persons to create an operation while incapable of producing counterfeit currency that could reasonably (sic) pass as genuine currency, would nevertheless sufficiently resemble such an operation as to be capable of convincing a court or a jury that it was an operation for the production of counterfeit currency capable of being passed as genuine."

6. Paragraph 3.4 pleads:

"The third and fourth named defendants wrongfully and unlawfully arranged for the violent, screaming entrance of the armed party in breach of Garda Síochána Regulations. They were further responsible for what occurred at the portacabin."

7. Arising out of the foregoing, an initiating letter of claim was written by the plaintiff's solicitors on the 16th of January, 2013, to both the Director and Mr. Vicente. These letters give little information on the nature of the claim other than that it is one for damages and arises out of proceedings entitled *DPP v. Liam Delaney, Kevin Flanagan, Richard Poole and Anthony Sloan*. These letters were not responded to and the plaintiff issued a plenary summons on the 13th of March, 2013, followed by the delivery of a statement of claim shortly thereafter on the 19th of March, 2013. An appearance was entered by the Director and Mr. Vicente on the 26th of April, 2013.

8. A notice for particulars was served on the 6th of September, 2013. In it, sixteen particulars were raised in relation to a number of matters including the alleged extent of the involvement of the first and third defendants in the arrest, detention and subsequent trial of the plaintiff. This notice for particulars was replied to by the plaintiff on the 19th of November, 2013. In the replies, the plaintiff effectively refused to answer any of the questions raised or to furnish any further information to the defendants on what was alleged against them on the grounds that they were not proper matters for particulars. The replies further indicated that the first and third defendants had access to records setting out all dealings between them and the fifth defendant and further that they were well aware of what part they played in the wrongs suffered by the plaintiff. The replies went on to allege that the service of the notice for particulars was a ploy to delay and impede the progress of the action. Accordingly, following receipt of this document, the defendants' knowledge of what was being alleged against them had advanced no further. The plaintiff has not explained how the Director, as opposed to Europol itself, could have vicarious liability for the actions of Mr. Vicente.

9. On the 23rd of December, 2013, the first and third defendants issued the within notice of motion grounded on an affidavit sworn by Dietrich Neumann, legal counsel for Europol, sworn on the 19th of December, 2013. A replying affidavit on behalf of the plaintiff was sworn by his solicitor, Brendan Hyland, on the 8th of April, 2014. A defence was delivered on the 9th of May, 2014, following a motion for judgment in default. Paragraph 1 of the defence pleads that the first and third defendants are immune from suit by virtue of the Protocol to the Treaty on the Functioning of the European Union or otherwise as a matter of law.

10. In his affidavit, Mr. Neumann sets out the background to the creation of Europol, the legal framework under which it operates and

its various functions.

11. He says that although Europol's origins go back to 1975, the legal arrangements underpinning Europol were revised in 2009 as a result of EU Council Decision 2009/371/JHA of the 6th of April, 2009. The legal status of Europol in this jurisdiction is recognised by the provisions of the Europol Act 2012. He says that Article 51 of the Council Decision provides that the Protocol on the Privileges and Immunities of the European Communities applies to the Director of Europol and its staff.

12. He refers to the fact that Article 11 of the Protocol provides immunity to EU officials and staff from legal proceedings in respect of acts performed by them in their official capacity. He also refers to the fact that Article 17 of the Protocol requires each institution of the EU to waive the immunity wherever it considers that such waiver is not contrary to the interests of the Union.

13. At para. 21 of his affidavit, Mr. Neumann avers that Europol considered the waiver of immunity and came to the view that it was not appropriate in this case. He says that, arising out of the pleadings and particulars, he is satisfied that the sole concrete claim against Mr. Vicente appears to relate to his testimony at the plaintiff's trial, which was clearly carried out in the performance of his functions and while in office. He notes that there are no direct allegations made against the Director. He further avers, at para. 23, that both the Director and Mr. Vicente were sued in these proceedings solely in respect of acts performed by them in their official capacity as officers or staff of Europol and in no other capacity. At para. 24 he avers that neither Europol nor any officer or servant of Europol had any active involvement in the execution of the operation by An Garda Síochána mentioned in the statement of claim in which the plaintiff was arrested. Similarly, he says that neither Europol nor any officer or servant of Europol had any involvement in the questioning of the plaintiff or in the decision to prosecute him.

14. At para. 25, he states that Mr. Vicente was sent to Ireland to conduct an examination of the equipment which had been seized and to report his conclusions arising from the examination of the equipment, which he duly did. He was subsequently requested to give evidence in relation to the examination and conclusions at the trial of the plaintiff. Finally, at para. 26, Mr. Neumann avers that Europol is satisfied that Mr. Vicente, while present in Ireland to conduct an examination of the seized equipment and to give evidence in the trial, performed the duties assigned to him by Europol properly and fully in accordance with law. Europol is also satisfied that the evidence which he gave to the Special Criminal Court was honest and truthful.

15. In his replying affidavit, Mr. Hyland essentially puts forward the case that the first and third defendants have entered an unconditional appearance in these proceedings and have taken a number of steps in the action up to and including the delivery of a defence. In essence, he suggests that the first and third defendants have submitted to the jurisdiction of this court and having done so cannot now raise the issue of immunity.

16. He further avers that the plaintiff brought a motion for judgment in default of defence which came on for hearing on the 25th of November, 2013, and at that stage, counsel for the first and third defendant did not raise the issue of immunity but simply sought time in which to deliver a defence. He further says that the first and third defendants' participation in the proceedings to date estops them from claiming immunity now. Further he argues that the participation in the proceedings by the first and third defendants amounts to a waiver of the immunity.

Submissions

17. Ms. Tighe B.L., on behalf of the Director and Mr. Vicente, submitted that her clients' immunity from suit was clearly provided for in the relevant Council Decision and Protocol and that effectively was the end of the matter. She said that the authorities relied upon by the plaintiff regarding submission to jurisdiction related to cases under the Brussels Convention and were in any event irrelevant as this matter concerns immunity, not jurisdiction.

18. She further submitted that, as a matter of law, there was no basis upon which the director of Europol, as distinct from Europol itself, could have vicarious liability for the acts of Mr. Vicente. She said that the sole case against Mr. Vicente related to the giving of evidence by him at the plaintiff's trial before the Special Criminal Court and, as such, the authorities established that his evidence enjoyed absolute privilege and no proceedings could lie in respect of it.

19. Mr. Peart S.C. for the plaintiff submitted that the entering of an unconditional appearance and all the subsequent steps in the action taken by the first and third defendants meant that they could not now be heard to raise the issue of immunity. He said they should have claimed it at the outset when written to in January, 2013. Instead they had not responded to that correspondence, entered an unconditional appearance and sought time to put in a defence, all without mentioning any issue of immunity. He said they therefore ought not to be permitted to raise it now.

20. Alternatively he said that Mr. Vicente's evidence had been shown to be patently false at the trial and part and parcel of a conspiracy with the Gardaí against his client to secure the conviction of the plaintiff and his co-accused. He said that it was possible that Mr. Vicente's involvement in the conspiracy went considerably further than simply giving evidence against the plaintiff. He said that they were still awaiting inspection of documents discovered by An Garda Síochána which might well reveal the extent of Mr. Vicente's involvement in the conspiracy and it would be unfair to dismiss the claim at this stage.

21. He submitted that his client should be afforded the opportunity of considering the discovery documents and leading evidence at the trial of the action including the cross examination of Mr. Vicente before the court should reach any conclusion as to the applicability of immunity. This would be particularly so in the event that the court was satisfied, having heard all the evidence, that Mr. Vicente's behaviour was such that it could not be regarded as having occurred lawfully within the scope of his employment or in the course of his official duty as a Europol employee. He said that the plaintiff had not delivered a Reply as yet because they were still awaiting the discovery to see what emerged before joining issue with the first and third defendants and possibly pleading additional matters that might undermine the claim for immunity.

Discussion

22. Protocol (7) on the Privileges and Immunities of the European Union of the 9th of May, 2008, provides at Article 11 thereof as follows:

"In the territory of each Member State and whatever their nationality, officials and other servants of the Union shall:

(a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Union and, on the other hand, to the jurisdiction of the Court of Justice of the European Union in disputes between the Union and its officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office...."

23. The Council Decision of the 6th of April, 2009, establishing the European Police Office (Europol) (2009/371/JHA) provides at Article 51 as follows:

“ Privileges and Immunities

1. The Protocol on the Privileges and Immunities of the European Communities and a specific Regulation to be adopted on the basis of Article 16 of the Protocol on the Privileges and Immunities of the European Communities shall apply to the Director and Deputy Directors of Europol and to Europol staff.

2. The Protocol on the Privileges and Immunities of the European Communities shall apply to Europol...”

24. Prima facie therefore, it is clear that the Director and Mr. Vicente are immune from legal proceedings in respect of acts performed by them in their official capacity. There is nothing pleaded in this case in the statement of claim or elsewhere to suggest that at any material time, the Director or Mr. Vicente were not acting in their official capacity. Mr. Peart suggests that if Mr. Vicente, as the plaintiff alleges, was acting unlawfully in the course of a conspiracy against his client, he cannot have been acting in an official capacity. The first point to note about that is if it were correct, the Director could not in any event have any vicarious liability for Mr. Vicente's unlawful actions. However, it seems to me that no basis has been demonstrated for the proposition that acting unlawfully removes the immunity. Immunity from legal proceedings would be of little value if it were to relate purely to “lawful” actions. Insofar as any civil wrong could be claimed to be an “unlawful” act, the logical consequence would be that immunity could not be claimed in such circumstances and plainly that cannot be the case. Indeed it might even be said that the immunity could only arise in circumstances where some form of unlawful act is alleged to have occurred.

25. In my view, the plaintiff's reliance on the entering of an unconditional appearance and the further steps taken in the action which are said to amount to a submission to jurisdiction is misconceived. The jurisdiction of this court is not in issue in this application. Indeed, the defendants invoke it to seek a determination on what might be regarded as the preliminary issue of immunity. In my opinion therefore, the authorities relied upon in this respect by the plaintiff are not of assistance.

26. With regard to the allegation of giving false evidence against Mr. Vicente, the immunity from suit of a witness in respect of oral evidence given in court proceedings, be they civil or criminal, is well established – see *W. J. Prendergast & Son Ltd v. Carlow County Council* [2007] 4 I.R. 362 and *Looney v. Bank of Ireland* (Supreme Court unreported 9th of May 1997). The only exception is where a witness seeks to take advantage of his position to utter something defamatory having no reference to the cause or matter of enquiry but introduced maliciously for his own purpose – see the dicta of O'Dalaigh C.J. in *In re Haughey* [1971] I.R. 217 at p. 264. Nothing of that nature is alleged here.

27. Counsel for the plaintiff submits that it would be unfair to dismiss the case at this stage in circumstances where, by the process of discovery, his client may be able to discover further wrongs or complicity in the alleged conspiracy by Mr. Vicente which could potentially undermine the claim for immunity. I cannot accept that submission. It is well settled that a party to litigation cannot, in general, seek to establish if he might have a cause of action against another party by the use of the process of discovery – see *Galvin v Graham Twomey* [1994] 2 ILRM 315.

28. In any event, there is before the court the uncontroverted evidence of Mr. Neumann that the only cause of action of which the defendants have any knowledge is related to the evidence given by him at the plaintiff's trial. Further, Mr. Neumann has sworn that neither Europol nor any of its officers or servants had any involvement in the Garda operation of which the plaintiff complains. That too remains uncontroverted despite the fact that Mr. Neumann's affidavit has been in the plaintiff's possession for the best part of two years and none of the averments I have referred to have been contradicted in a replying affidavit.

Conclusion

29. It seems to me that the plaintiff has had more than ample opportunity to make whatever case he wishes to make against the first and third defendants and it would be quite unjust to those defendants to require them to remain in the litigation and incur the very substantial costs of a trial even if there were some prospect that at some unspecified time in the future, the plaintiff may posit some claim against them as yet undefined.

30. Quite apart from that however, I am satisfied that, as a matter of law, the first and third defendants enjoy immunity from suit in respect of the subject matter of these proceedings and accordingly I will make an order dismissing same as against the first and third named defendants.