THE HIGH COURT

[2014 No. 8629 P]

BETWEEN

GE CAPTIAL WOODCHESTER LIMITED AND GE CAPITAL WOODCHESTER FINANCE LIMITED TRADING AS GE MONEY

PLAINTIFF

AND

STAUNTON FISHER LIMITED

FIRST NAMED DEFENDANT

AND

DAVID COLEMAN AND CATHERINE COLEMAN PRACTICING UNDER THE STYLE AND TITLE OF COLEMAN LEGAL PARTNERS

SECOND AND THIRD NAMED DEFENDANTS

JUDGMENT of Ms. Justice O'Regan delivered on the 2nd day of March, 2016.

Introduction

1. The within proceedings come before the court on foot of a notice of motion dated November, 2014, of the second and third named defendants (hereinafter "CLP") and also on foot of a motion of the first named defendants (hereinafter "SF") dated the 16th July, 2015.

2. Both applications seek to strike out the plaintiff's (hereinafter "GE") claim which was brought by way of Plenary Summons and Statement of Claim both of which are dated the 10th October, 2014. Both applications are made pursuant to O. 19 r. 27 and/or 28 of the Rules of the Superior Courts and/or are on foot of the inherent jurisdiction of the court to strike out proceedings on the grounds that they are frivolous, vexatious and that they disclose no reasonable cause of action and that they constitute an abuse of process. Both applications are claiming, in the alternative, a stay of proceedings. SF seek a stay pending hearing of a particular case of John Mannion and CLP seek a stay pending determination of all claims referred to in the GE Statement of Claim.

3. At paragraph 8 of the Statement of Claim GE complains that, since May, 2013, it has been served with in excess of two hundred and twenty sets of District Court proceedings and one set of High Court proceedings, all issued by CLP, arising out of the sale of a financial product known as Payment Protection Insurance (hereinafter "PPI").

4. The Mannion proceedings referred to in the SF Notice of Motion commenced with a Plenary Summons dated the 11th February, 2014. They were described as a set of "path finder" proceedings on the basis that the determination of those proceedings would inform the balance of the proceedings listed before the District Court which, by Order of the District Court of the 31st October, 2014, have been stayed pending the outcome of the Mannion proceedings. In the events prior to the hearing of the Mannion proceedings, Mr. Mannion died and his proceedings, by way of path finder proceedings were replaced with what can be called the Healy proceedings and the Folan proceedings respectively. It was necessary to incorporate two such proceedings in lieu of the Mannion proceedings to deal with all issues which were in fact raised in the Mannion proceedings.

5. Although the new path finder proceedings have secured a date for hearing in May, 2016, CLP are apprehensive that this date will not be achieved due to outstanding discovery.

6. In the proceedings GE claims damages for abuse of process, maintenance and champerty; for conspiracy; for causing injury by unlawful means; for reputational harm; together with aggravated and/or exemplary damages. In addition, GE claims that agreements between the first named defendant and the individual PPI plaintiffs are void, contrary to public policy, illegal and unenforceable. GE seek an order restraining all of the defendants from participating in such PPI proceedings or indeed any future proceedings against GE together with an order compelling the defendants to discharge the plaintiff's costs of defending the existing PPI proceedings. The above notwithstanding, in written submissions made on behalf of GE it states that it has no difficulty with the PPI plaintiff claims continuing (and in this regard they have not processed an application for a strike out of such proceedings) provided the defendants in the GE proceedings are removed from the PPI claims.

7. The parties' respective positions might, in general terms, be summarised under the following respective subheadings.

Position of CLP

8. CLP's position might be summarised as follows:-

(i) The PPI plaintiff is entitled to be represented by a solicitor of his choosing.

(ii) The plaintiff's claim cannot be maintained and is misconceived.

(iii) The claim if any in champerty lies against SF.

(iv) There is no justification for the GE proceedings which are wholly premature and void of merit.

(v) The GE proceedings comprise a collateral attack on the PPI plaintiffs and amounts to an abuse of process.

(vi) No cause of action is disclosed as against CLP.

(vii) The proceedings are frivolous and/or vexatious and the true motivation thereof is to stifle the PPI proceedings.

(viii) Injunctive relief is not available to the plaintiffs and even if it were the claim at para. 7 is particularly excessive as it relates to all future proceedings against GE.

(ix) CLP relies on and refers to the admissions made by GE in its defence of the Mannion proceedings at paras. 19 and 20 thereof.

(x) CLP refers to the fact that there is no suggestion of a lack of *bona fides* on the part of the PPI plaintiffs.

(xi) The GE proceedings, if any, can be maintained after the Mannion proceedings and all of the District Court proceedings are concluded.

Position of SF

9. SF adopts all the grounds identified by CLP and further asserts:-

(i) Because the PPI plaintiffs are not a party to the proceedings of GE, the GE proceedings must fail.

(ii) There is manifestly no cause of action for the reliefs claimed at paragraphs 6, 7 and 8 of the pleadings.

(iii) The GE proceedings amount to an abuse of process because they are designed to attack or stifle the claims of the PPI plaintiffs.

(iv) There is an absence of special or actual damage incurred by the plaintiffs rendering the claim premature.

(v) Even at the height of the plaintiff's claim no right to secure injunctive relief as sought is available.

Position of GE

10. GE's position might be summarised as follows:-

(i) It is for the defendants to establish that the GE claim is frivolous and/or vexatious and/or unstatable.

(ii) Case law demonstrates that the within type of application is difficult and it is only in rare cases that such orders might be made.

(iii) The plaintiff has supported in the body of the statement of claim grounds for each and all of the reliefs claimed.

(iv) Special damage has already accrued.

(v) An entitlement to claim an injunction does arise at law.

(vi) GE has a statable case for each of the reliefs claimed.

(vii) GE has instigated one set of proceedings only and therefore cannot be said to have created a multiplicity of proceedings.

(viii) There is no necessity for the PPI plaintiffs to be a party to the GE proceedings to enable GE to succeed.

Legal issues

Maintenance and champerty

11. All parties agree that the case of *O'Keeffe v. Scales* [1998] 1 IR 290, being a judgment of the Supreme Court is of particular significance. It is the view of the Court that the judgment of Lynch J. was to the effect that the law in this area must not deprive a plaintiff of a right to litigate a statable claim and therefore would not be a valid ground to dismiss such a claim before hearing. Significantly, at page 297 of the judgment Lynch J. states:-

> "If at the plenary trial, however, the appellant were successful in her defence and it was established, notwithstanding this judgment on the motion to dismiss or stay in advance of the plenary trial, that these proceedings had been maintained in a champertous manner by Mr. Murnaghan, then it would be open to the appellant to sue Mr .Murnaghan for all the damaged suffered by her, including any cost awarded to her and not recovered or recoverable from the respondents owning to their want of means….

It is clear to the Court from this judgment that the damages which might be suffered are not limited to the costs of the action but might include "all the damaged suffered by her."

Lynch J. also stated at p. 295 of his judgment:-

> "While the law relating to maintenance and champerty therefore undoubtedly still subsists in this jurisdiction, it must not be extended in such a way as to deprive people of their constitutional right of access to the courts to litigate reasonably stateable claims. In the present case the appellant seeks to stifle the respondents' action before any plenary hearing and consequently she would have to make out a clear case if she were to succeed, analogous to the onus on a party bringing a motion to dismiss an action on the basis that the Statement of Claim discloses no cause of action or that the proceedings are frivolous and/or vexatious.
>
> In this case, even assuming that Mr. Murnaghan is maintaining the respondents' action in a champertous and unlawful manner, I doubt if that would in itself amount to a defence to the respondents' action, much less entitle the appellant to stifle the respondents' claim *in limine* on this motion to stay or dismiss in advance of a plenary trial."

12. The House of Lords decision, in the case of *Neville v. London Express Newspaper Limited* [1919] AC 368, was opened by both GE and SF. This case is authority for the proposition that the claim in maintenance is one that can be sustained only if special damage has been occasioned to the plaintiff by the maintenance.

13. GE relies on this case as authority for the proposition that an injunction might be sought. At page 383 of the judgment of Lord Finlay it is stated:

> "That the offence of maintenance was irrespective of the rights or wrongs of the particular suit in which it took place would appear to be indicated by the fact that a writ might be obtained to restrain the maintainer from going on with the maintenance. It would, of course, have been impossible on such an application to try the case in which maintenance occurred upon its merits, but as the maintenance was wrongful, whether the suit maintained ultimately turned out to be right or wrong, it might at once be restrained."

The above case is one hundred years old, is authority of the jurisdiction of England and Wales, and further, the above quote is obiter.

14. SF relies on the case of *R. (Factortame Ltd and Ors) v. Secretary of State for Transport and Ors (No. 8)* [2003] QB 381 to the effect that the court is required to consider:-

> "…whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise undermine the ends of justice."

15. Although the plaintiff has certainly not made out a claim which would satisfy the test in the case of *R. (Factortame Ltd and Ors)* above, nevertheless it does appear to me that there is ample authority in Ireland to determine the issues between the parties and this will be a preferable course of action given the divergence between the law in England and Wales and Irish law on the topic.

16. In the case of *Greenclean Waste Management Ltd. v. Leahy (No. 2)* [2014] IEHC 314, Hogan J., in the High Court, stated, at para. 24:-

> "As Lynch J. made clear in *O'Keffee*, the law in relation to maintenance and champerty must be viewed - and, if necessary, modified - in the light of these modern principles and general constitutional understanding. One of these principles is that the courts should not place any unnecessary obstacles in the path of those with a legitimate claim." [sic]

17. The plaintiff relies on the case of *SPV Osus Limited v. HSBC International Trust Services (Ireland) Limited* [2015] IEHC 602 where Costello J. made an order for the dismissal of proceedings; however, significantly, in that matter, there was a clear assignment of a cause of action to the plaintiff, a fact which is not alleged in the within proceedings and indeed in any event did not happen as Mr. Mannion progressed his claim as opposed to SF being the reputed plaintiff to progress the claim.

18. In the case of *Thema International Fund plc. v. HSBC International Trust Services (Ireland) Limited* [2011] IEHC 357 Clarke J. confirmed the subsistence of the actionable torts of maintenance and champerty in Irish law. However, he refused an order requested by the defendant that the plaintiff disclose the identity of the maintainer, prior to a determination at trial stage.

Conspiracy

19. It is clear to the Court that there exists a tort of conspiracy and indeed it is referred to in s. 11 of the Civil Liability Act 1961 relied upon by CLP. At s. 11(2) it is provided that persons may become concurrent wrongdoers as a result of the vicarious liability of one for the other, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage.

20. Under O. 19 r.5 of the Rules of the Superior Courts it is provided that certain categories of claims must be adequately particularised in pleadings. In the Court of Appeal decision of *O'Flynn and Ors. v. Carbon Finance Limited and Ors*. [2015] IECA 93, at para. 72, it is stated that:-

> "While Order 19 does not specifically refer to allegations of conspiracy…such torts are clearly similar in nature to the types of allegations specifically mentioned in r. 5(2)."

21. The court went on further at para. 82 of its judgment to state:-

> "The court is satisfied that the plaintiffs have furnished such particulars as can reasonably be expected at this stage of the proceedings given the nature of the allegations made and the circumstances of the case. It follows that they are not in breach of their obligations and for these reasons this appeal was dismissed."

22. That judgment followed the earlier judgment of Clarke J. in *National Educational Welfare Board v. Ryan* [2008] 2 IR 816 wherein he stated:-

> "Where, however, a party in its pleadings, specifies, in sufficient, albeit general, terms the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a *prima facie* case to that effect, then such a party should not be required, prior to defence and, thus, prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contented for, and establishes a prima facie case to that effect, the defendant should be required to put in his defence..."

GE suggests that the combination of CLP acting on a "no foal, no fee" basis and its knowledge of the arrangement as between the PPI plaintiffs and SF amounts to a conspiracy as against GE.

Constitutional right of the PPI plaintiffs to choose a solicitor

23. CLP relies on the case of *Law Society of Ireland v. The Competition Authority* [2005] IEHC 455 in support of the assertion that the PPI plaintiffs have a constitutional right to choose their solicitor. In that case O'Neill J. stated, at para. 50:-

> "I am satisfied that a person facing a tribunal in respect of which it is appropriate to have legal representation does, as an incident or aspect of the right to fair procedures, have a constitutional right, pursuant to Article 40.3 of the

> Constitution of Ireland 1937, to freely select the lawyer that will represent him or her from the relevant pool of lawyers willing to accept instructions."

24. GE does not argue with the proposition aforesaid, however, it states that a choice of lawyer is not absolute, for example, a solicitor will be restrained from acting for a plaintiff who perhaps has already acted for the defendant and acquired knowledge which would be prejudicial to the defendant, if made available to the plaintiff. The case of Bo*lkiah v. KPMG* [1999] 2 AC 222, a decision of the House of Lords, is relied upon where it is stated at page 234:-

> "The case is authority for two propositions: (i) that there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; and (ii) that a solicitor may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client."

No assertion has been made by or on behalf of GE to suggest that the continued involvement of CLP or SF would give rise to a significant risk of disclosure or misuse of confidential information.

Right to an injunction
25. GE relies on the aforesaid decision of *Neville v. London Express Newspaper Limited* in support of the contention that an injunction might be sought to prevent the continuance of a maintenance claim. As aforesaid, the above case is one hundred years old, the quote cited is *obiter* and the case is authority of England and Wales.

26. In addition GE refers to McGregor, *McGregor on Damages*, 19th Ed., (London, 2014) at para. 11-029 thereof wherein it is stated:-

> "Apart from any question of damages, equity has power to award an injunction, or in the case of contract specific performance, were there is a continuing wrong, thus dealing with the matter of the future."

27. Although GE relies on McGregor aforesaid it does appear to the Court significant that the statement arose in the context of nuisance proceedings which is not pleaded in the instant proceedings nor, in the Court's view, significantly, is there any interim or interlocutory relief sought.

Prematurity
28. The defendant's contention is to the effect that GE might be entitled in the future, but not now, or at least not until a final determination of one of the PPI claims, to damages. GE counters that it has already obtained an award of costs; however, the defendants assert that GE has not yet attempted to execute on foot of such an order as to costs.

29. It appears to the Court, given the statement of Lynch J. in *O'Keeffe v Scales*, above recited, that damages sustained by a party in order to trigger a right to commence proceedings based on maintenance is not confined to measured or tax costs, but appears to encompass other potential forms of damages. The assertion made by the defendants to the effect that GE has not attempted to execute on foot of the order for costs is not necessarily sufficient to assert that no cause of action has yet arisen.

Striking out or staying proceedings
30. All parties agree:-

> (i) that the plaintiff's claim must be taken at its height;
>
> (ii) that the plaintiff's claim must disclose no reasonable cause of action and are bound to fail and/or is a frivolous and/or vexatious claim;
>
> (iii) in dealing with the inherent jurisdiction of the court, and as stated in the case of *Barry v. Buckley* [1981] 1 IR 306, the jurisdiction should be exercised sparingly to enable the court to avoid injustice and strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant; and,
>
> (iv) where an application is made under O. 19, r. 27 of the Rules of the Superior Courts it must be established that the GE proceedings are unnecessary or scandalous or tend to prejudice, embarrass or delay the fair trial of the action. The alternative claim under O. 19, r. 28 is to establish that the claim discloses no reasonable cause of action or is frivolous or vexatious whereupon the court may order the action to be stayed or dismissed.

31. The concept of frivolous and vexatious was defined by Barron J. in *Farley v. Ireland* (Unreported, *ex tempore*, Supreme Court, Barron J., 1st May, 1997) in the following terms:-

> "It is merely a question of saying that so far as the plaintiff is concerned if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious."

32. In the subsequent case of *Fay v. Tegral Pipes* [2005] 2 IR 261, McCracken J. stated that the real purpose included that litigants would not be asked to defend a claim which cannot succeed.

33. In the case of *Aer Rianta cpt v. Ryanair Ltd* [2004] 1 IR 506, the defendant brought an application to strike out three paragraphs of the plaintiff's Statement of Claim on the basis that they disclosed no reasonable cause of action. The plaintiff submitted that O. 19, r. 28 applied to a pleading in its entirety and not only part of a pleading. The defendant's application was refused in the High Court and the defendant appealed to the Supreme Court were the appeal was dismissed. It was held that the plain meaning of O. 19, r. 28 was that the rule applied to a pleading in its entirety and therefore a court had jurisdiction to strike out an entire pleading but not a portion thereof. It is also clear from the same case that the court is not similarly constrained when dealing with an application under O. 19, r. 27 or the court's inherent jurisdiction.

34. In dealing with an application under O. 19, r. 28 the court is to refer to pleadings only and it is not to consider the application before it having regard to the context or background of the proceedings. In this regard see *Ryan v. KBC Bank (Ireland) plc* [2015] IEHC 194.

35. The court, in exercising its inherent jurisdiction, can review matters in a more global manner and the test aforesaid, as contained in *Barry v. Buckley*, has since been approved and applied in subsequent decisions of the court, as late as *Ryan v. KBC Bank (Ireland) plc* aforesaid.

Conclusion
36. Taking the plaintiff's claim at its height, it appears to the Court that Claims 1 – 5 inclusive are reasonably statable claims and therefore should be allowed continue.

37. GE has not claimed or asserted that, by allowing SF or CLP to continue acting for the PPI plaintiffs, there would be a real or significant risk of disclosure or misuse of confidential information. In addition, as GE would apparently be happy for the PPI plaintiffs to continue with their action but merely want SF and CLP to be removed therefrom, there is no advantage whatsoever to GE by such removal and no claim of prejudice arises. Accordingly, the claim sought at para.7 of the Statement of Claim is a punitive claim and would not serve any purpose.

38. Furthermore, aside from the fact that claiming damages was the only remedy identified by the Supreme Court in *O'Keeffe v. Scales,* it was also clear that establishing a claim in maintenance and champerty was not sufficient to interfere with the plaintiff's claim although it is noted in this regard there is an exception namely when there is an assignment of a bare cause of action.

39. The Court is not satisfied that the judgment in *Neville v. London Express Newspaper Limited* advances GE's position given its vintage and the fact that the relevant comments were made *obiter dicta* and further because of the development of the law in Ireland since the decision as identified in *Greenclean Waste Management Ltd. v. Leahy (No. 2).*

40. Insofar as GE seeks an order compelling the defendants to discharge the plaintiff's costs of defending all of the PPI claims is concerned, it is the view of the Court that the issue of costs is a matter for the trial judge in each of the individual cases and that no persuasive argument has been made on behalf of GE to suggest that this Court should now predetermine the matter of costs thereby effectively excluding a portion of a trial judge's authority and/or discretion.

41. The Court's view, therefore, is that the claim of GE before this Court to award costs now, of proceedings not yet heard before another court, is unstatable and should be dismissed. In the circumstances, the Court will make an order striking out the plaintiff's claim contained at paras. 7 and 8.