

## THE HIGH COURT

2005 No. 4481 P

BETWEEN

STEPHEN COSTELLO AND KAREN COSTELLO

PLAINTIFFS

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

DEFENDANT

**Judgment of Miss Justice Laffoy delivered on 3rd October, 2007.****The procedural background**

1. In these proceedings, which were commenced by plenary summons which issued on 21st December, 2005, the plaintiffs claim, *inter alia*, the following reliefs:

- (a) damages for trespass to the person in the form of harassment, watching and besetting and intimidation;
- (b) damages for the repeated unlawful arrest of the first named plaintiff based on an allegation that the defendant "misused in a colourable and illegal fashion" provisions of the road traffic and narcotics legislation;
- (c) damages for criminal slander; and
- (d) certain permanent injunctive relief, including a permanent injunction restraining the defendant from watching and besetting the plaintiffs at their home.

2. There is in being an interlocutory injunction made on 29th December, 2005 by consent of the parties, wherein it was ordered that the defendant, his servants or agents, be restrained pending the trial of the action or until further order from entering the plaintiffs' home except under authority of a warrant or at the request of a member of the household. That order also provided for expedition in the delivery of pleadings.

3. Unfortunately, an expeditious disposition of this matter has not been achieved. The plaintiffs delivered their statement of claim on 13th January, 2006. In para. 6 thereof the plaintiffs alleged that they had been subjected to watching and besetting, harassment and intimidation over the previous ten years. Thirty-two instances of the alleged wrongful behaviour were then set out. In para. 8 the plaintiffs alleged the exacerbation and elevation of the unlawful campaign through the course of 2005 and particularised fourteen instances of the behaviour complained of. In a notice for particulars dated 26th January, 2006 the defendants sought particulars of certain matters alleged in the statement of claim, items 1 to 98 whereof focused exclusively on the allegations in para. 6 of the statement of claim. Replies to the particulars were furnished on 8th March, 2006. The defendant's defence, which was delivered on 22nd March, 2006 raised, by way of preliminary points, the following matters of defence:

- (1) insofar as the plaintiffs complain of the matters set out in para. 6 of the statement of claim, the claims are so unclear, vague and imprecise as to prejudice the defendant in the conduct of the action and that the plaintiffs are thereby precluded or estopped from maintaining any cause of action in the proceedings in respect thereof;
- (2) insofar as the plaintiffs complain of matters pre-dating 22nd December, 1999, any possible cause of action arising therefrom as claimed in the proceedings is statute barred by virtue of s. 11 of the Statute of Limitations, 1957 (the Act of 1957), as amended; and
- (3) insofar as the plaintiffs complain of matters pre-dating 22nd December, 2002 to ground a claim of damages for slander, any such cause of action as pleaded is statute barred by virtue of s. 11 of the Act of 1957.

**The application**

4. Two applications came on for hearing on 12th June, 2007. The first, chronologically, was the plaintiff's motion for discovery against the defendant. That motion was dealt with on 12th June, 2007.

5. The second was the defendant's application on foot of a notice of motion of 4th May, 2006 seeking the following orders:

- (i) An order pursuant to O. 19, r. 27, of the Rules of the Superior Courts, 1986 (the Rules) striking out para. 6 of the statement of claim either in its entirety or in part.
- (ii) An order striking out those parts of para. 6 of the statement of claim which relate to matters which pre-date 22nd December, 1999, as any possible cause of action arising therefrom as claimed in the proceedings is statute barred by virtue of s. 11 of the Act of 1957.
- (iii) An order striking out those parts of para. 6 of the statement of claim which relate to matters which ground a claim for damages for slander which pre-date 22nd December, 2002, as any possible cause of action arising therefrom as claimed in the proceedings is statute barred by virtue of s. 11 of the Act of 1957.

6. It is that second application which is the subject of this judgment. The application was grounded on the affidavit of Garda Superintendent Seamus Kane, sworn on 3rd May, 2006, which helpfully collated the information contained in the statement of claim and in the reply to the notice for particulars in relation to each of the incidents complained of in para. 6. The information was analysed in the affidavit in which it was pointed out that, in relation to twenty five incidents of alleged harassment no date was given, other than that they related to a time span of ten years prior to the initiation of the proceedings, and, in relation to seven of those incidents, the location of the incident was not identified.

7. The plaintiffs did not file an affidavit in response to the affidavit of Superintendent Kane. However, in the affidavit grounding the plaintiffs' application for discovery, which was an affidavit sworn on 11th April, 2006 by the plaintiffs' solicitor, Sean Costello, the defendant's motion was anticipated. This occurred because the defendant was constrained to bring a motion seeking an extension of

time for delivering its defence and in the proceedings on that motion the court was apprised of the defendant's intention to bring an application to strike out certain parts of the statement of claim. The order made on that motion by Clarke J. on 27th March, 2006 gave directions as to the time frame governing the issue of any further notice of motion. As it happened, the plaintiff's motion for discovery issued before the defendant's motion to strike out. What I consider to be of relevance for present purposes is the line adopted by the plaintiffs to the anticipated motion. It was that it amounted to an abuse of process, in that the defendant had not raised rejoinders on the replies to the notice for particulars with a view to eliminating the vagueness complained of. That point had been made by the plaintiffs' solicitors in a letter of 23rd March, 2006, a copy of which was exhibited in Mr. Costello's affidavit, which was filed before the defendant's motion issued.

8. The course normally adopted by a litigant in civil litigation, if the opposing party fails to furnish replies to a notice for particulars, is to bring a motion under O. 19, r. 7, of the Rules to compel the opponent to furnish replies. Indeed, in footnote 86 on p. 147 of *Delaney and McGrath on Civil Procedure in the Superior Courts* it is pointed out that the proper course of action is to bring a motion to compel replies rather than a motion to strike out the pleading on the grounds that it fails to disclose a reasonable cause of action, citing *Tromso Sparebank v. Beirne* (the High Court, Costello J., Unreported, 14th March, 1988). Accordingly having heard the defendant's application on 12th June, 2007, on 13th June, 2007 I made an order that the plaintiffs should have until 20th July, 2007 to furnish further and better particulars of the incidents itemised in para. 6 of the statement of claim and I adjourned the defendant's application to 31st July, 2007.

9. In their further replies, which were dated 20th July, 2007, the plaintiffs gave some further particulars in relation to some of the incidents itemised.

10. The purpose of this judgment is to rule on the defendant's application in the light of those further replies.

#### **Conclusions on application to strike out on ground claims statute barred**

11. As I indicated at the hearing on 12th June, 2006, in my view, the application to strike out on the ground that whatever claims may arise out of para. 6 of the statement of claim are statute barred is misconceived.

12. A plea that a claim is statute barred is a matter of defence. It can be dealt with in one of two ways. It can be disposed of by way of the trial of a preliminary issue of law under O. 25, r. 1 of the Rules or under O. 34, r. 2 of the Rules provided the relevant facts are agreed or established. The alternative is that the plea is dealt with in the course of the trial of the action.

13. Accordingly, insofar as the defendant seeks to strike out in reliance on the Act of 1957, the application is refused.

#### **Conclusions on application to strike out pursuant to O. 19, r. 27.**

14. Order 19, r. 27 provides as follows:

"The court may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; ..."

15. As is pointed out in a passage in *Delaney and McGrath* (at p.191) relied on by counsel for the defendant, although the rule is broadly drafted, it is directed towards three main problems: where a party pleads unnecessary matters; scandalous pleadings; and prejudicial pleadings, i.e. pleadings which may delay, embarrass or otherwise prejudice the fair trial of an action, as, for example, where a party fails to plead his case with sufficient clarity and particularity such that the opposing party does not know the case that he has to meet. As is pointed out by *Delaney and McGrath* (at p. 192) a pleading may also be embarrassing where it introduces wholly immaterial matters which would lead to the introduction of irrelevant evidence at the trial of the action.

16. At the commencement of the hearing on 12th June, 2007, counsel for the defendant informed the court that he had been told by counsel for the plaintiffs that, while the plaintiffs intended adducing evidence of the non-particularised incidents complained of in para. 6, they are not pursuing any a claim in respect thereof. Counsel for the defendant properly pointed out that no such distinction was apparent on the pleading. Counsel for the plaintiffs informed the court that he was in a position to concede that, in relation to the portions of para. 6 which offend the Act of 1957, claims are not being pursued. However, he was not in a position to identify such portions. Counsel for the defendant's response was that, insofar as the plaintiffs are making allegations as part of the factual matrix, whether the allegations are the subject of claims or not, the defendant is entitled to particulars of them, so that the defendant is in a position to deal with the allegations.

17. The concession mooted by counsel for the plaintiffs is utterly meaningless, given that the plaintiffs are not in a position to identify which of the non-particularised incidents itemised in para. 6 of the statement of claim are acknowledged to have occurred outside the relevant prescribed limitation period. The defendant is entitled to sufficient particulars of every allegation of wrongdoing which the plaintiffs assert in the statement of claim to enable the defendant to make the decisions involved in the proper defence of the action, for example, by distinguishing between allegations it will have to address and allegations it may not have to address on the ground that the claims are statute barred. In relation to a particular incident of alleged wrongdoing, it is not sufficient for the plaintiffs merely to fix the incident in a time frame of ten years prior to the commencement of the proceedings.

18. In the case of sub-paras. (i), (ii), (iii), (iv), (vi), (vii), (viii), (ix), (xiii), (xiv), (xvi), (xvii), (xviii), (xix), (xx), (xxi), (xxii), (xxiv), (xxv), (xxvi), (xxviii), (xxix), (xxx), (xxxi), and (xxxii), of para. 6, the date of the incident has not been identified even by reference to the year in which it is alleged to have taken place. In my view, because of that lack of particularity, the fair trial of the action is likely to be prejudiced. Therefore, those portions of para. 6 of the statement of claim must be struck out.

19. In relation to the remainder of the incidents itemised in para. 6, in my view, the plaintiffs have particularised each incident sufficiently to enable the defendant to decide on how to deal with the relevant allegation, either by taking procedural steps in advance of the trial or at the trial. Therefore, those sub-paragraphs must stand, unless the plaintiffs consent to some of them being struck out. With a view to avoiding further pre-trial procedures and the risk of costs, the plaintiffs may consider it prudent to consent to some of those sub-paragraphs being struck out. However, that is a matter for them.