THE HIGH COURT

[2001 No. 9223 P.]

BETWEEN

PERSONA DIGITAL TELEPHONY LIMITED AND

SIGMA WIRELESS NETWORKS LIMITED

PLAINTIFFS

AND

MINISTER FOR PUBLIC ENTERPRISE,

IRELAND, ATTORNEY GENERAL AND DENIS O'BRIEN

DEFENDANTS

AND

MICHAEL LOWRY

THIRD PARTY

JUDGMENT of Ms. Justice Pilkington delivered on the 8th day of May, 2019

1. This is an application by the plaintiffs ('Persona') pursuant to RSC Order 28 seeking leave to amend its statement of claim delivered on 21 April 2006 together with certain other consequential orders and reliefs.

2. The circumstances of this case concern the award of the State's second GSM mobile telephone licence to Esat Digifone (Esat Telecommunications Limited) in 1996. Persona was a losing competitor for the bid (the second named plaintiff being one of a number of companies within the Persona consortium). The grant or award of the licence to Esat Digifone generated significant controversy and the plaintiffs within these existing proceedings seeks damages, including exemplary damages for breach of duty, including statutory duty, breach of contract, misfeasance in public office, breach of legitimate expectation, breach of constitutional rights, deceit, conspiracy, misrepresentation, dishonest assistance, breach of the rights of the plaintiffs and each of them, together with other reliefs arising out of the awarding of the licence to Esat Digifone.

3. Another unsuccessful applicant for the licence has also issued proceedings styled 'The High Court record No 2001/9288P Between Comcast International Holdings Incorporated, Declan Ganley, Ganley International Limited and GCI Limited Plaintiffs and The Minister for Public Enterprise, Michael Lowry, Esat Telecommunications Limited, Denis O'Brien, Ireland and the Attorney General Defendants' ('the Comcast proceedings'). For a period of time these two sets of proceedings were dealt with collectively and the initial judgments of the Courts reflect this.

4. The chronology of this matter is important to the present application and requires to be set out in some detail. It is as follows: -

a) 15 June, 2001; Persona issues the above entitled proceedings. The Comcast proceedings are also issued on the same day.

b) December, 2002; the tribunal of inquiry known as the Moriarty Tribunal begins public hearings.

c) March, 2006; Persona files a notice of change of solicitor.

d) 21 April, 2006; arising from correspondence from the first to third named defendants ('the State defendants') threaten a motion to strike out proceedings for want of prosecution, thereafter Persona delivers its statement of claim within the timeline sought by those defendants.

e) 26 May, 2006; the State defendants issue a motion to strike out the Persona (and Comcast) proceedings for want of prosecution.

f) 13 July, 2007; by order of Gilligan J. the Persona and Comcast proceedings were struck out for want of prosecution (*Comcast International Holdings Inc & Ors. v. Minister for Public Enterprise & Ors.* [2007] IEHC 297).

g) 22 March, 2011; the Moriarty Tribunal reports on the GSM licence process.

h) 17 July, 2012; the Supreme Court allows the appeals of Persona and Comcast from the order of Gilligan J. and delivers its written judgment on 17 October, 2012 (*Comcast International Holdings Inc & Ors. v. Minister for Public Enterprise & Ors.* [2012] IESC 50).

i) 18 February, 2013; the State defendants obtain an order joining Michael Lowry and Denis O'Brien as third parties to the above entitled proceedings.

j) 19 February, 2013; the State defendants deliver a notice for particulars.

k) 2 July, 2013; a motion is issued on behalf of Denis O'Brien seeking to be joined as a co-defendant to the above entitled proceedings.

l) 21 February, 2014; Ryan J. orders that Denis O'Brien be joined as a co-defendant (*Personal Digital Telephony Limited & Ors. v. The Minister for Public Enterprise & Ors.* [2014] IEHC 78).

m) 6 November, 2014; Persona serves a notice of a change of solicitor together with a letter which states, *inter alia*, that it will be seeking directions regarding third party funding and will also serve an amended pleading.

n) 20 March, 2015; Persona issues a motion seeking declaratory reliefs that, in entering into a proposed litigation funding arrangement, such actions did not constitute an abuse of process and/or were not contravening rules on maintenance and champerty ('the third party funding arrangements').

o) 20 April, 2016; Donnelly J. refuses the reliefs sought by the plaintiffs holding that third party funding arrangements cannot be viewed as being consistent with public policy in this jurisdiction, that maintenance and champerty remain as torts and offences within it (*Personal Digital Telephony Limited & Ors. v. The Minister for Public Enterprise & Ors*. [2016] IEHC 187).

p) 23 May, 2017; following the plaintiffs' being granted leave to appeal to the Supreme Court, that appeal is dismissed (*Personal Digital Telephony Limited & Ors. v. The Minister for Public Enterprise & Ors*. [2017] IESC 27).

q) 15 February, 2018; the plaintiffs' solicitors furnish an amended statement of claim and seek the consent of the other parties to its delivery. The solicitors for the fourth named defendant refuse consent, the State defendants refusal of consent is received after this motion issues.

r) 1 June, 2018; the plaintiffs issue this motion.

5. In my view the chronology can be divided as follows;

a) The first time period is from Persona issuing its proceedings in 2001 up to the institution of the strike out proceedings by the State defendants in May 2006 .

b) The second is the time dealing with that strike out application from 2006 up to the decision of the Supreme Court to uphold the appeal against the decision of Gilligan J., notified in July 2012 with judgment delivered on the 17th of October, 2012. In the interim the Moriarty Tribunal had delivered its report in 2011.

c) The third begins in 2013 with the application for the joinder of Messrs O'Brien and Lowry as third parties and the application thereafter by Mr. O'Brien seeking to be joined as a co-defendant culminating in the judgment of Ryan J. in February 2014.

d) The fourth is the application seeking certain declaratory reliefs for third party funding in March, 2015 and post May 2017 (the Supreme Court judgment), the letter of 15 February, 2018, furnishing, in the usual way, an amended statement of claim and seeking the consent of the defendants to the amendment and service of that document.

6. In my view the first period of time has now been overtaken by events and itself culminated in the strike out application, which then effectively dealt with matters up to the end of the second period, being the adjudication of that issue by the Supreme Court. In my view, up to the delivery of judgment by the Supreme Court in October 2012 it was not realistic to expect Persona to pursue this action pending that determination.

7. Accordingly, the issues of which the State defendants now complain can only be considered after the judgment of the Supreme Court on the 17th of October, 2012.

8. In seeking to have the plaintiffs' motion struck out, all defendants correctly point out that even if the reliefs sought are refused the Persona proceedings will still continue; in other words, these plaintiffs do not lose their entitlement to deal with the issues which it says arises from the award of the GSM mobile telephone licence to Esat Digiphone, but simply cannot be permitted to make the amendments sought.

9. It is clear that the amendments sought are substantial with the majority arising consequent upon the findings of the Moriarty Tribunal in March, 2011.

10. The requirements of RSC O. 28 r. 1 are well known and state:-

"The court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

11. In a judgment of Birmingham J. in *Rossmore Properties Limited v. Electricity Supply Board* [2014] IEHC 159, in determining the applicable principles in respect of any application to amend pleadings (in that instance a statement of claim), states as follows:

"As might be expected, there have been many occasions over the years when the courts have been called on to consider applications for amendments with the result that there are a very considerable number of authorities in this area and I have been referred to many of them.

Counsel on behalf of the plaintiff has sought to summarise the particulars that emerge from these authorities and has done so as follows:-

1. The parties enjoy complete freedom of pleading. This is a reference to the fact that in the ordinary course of events a plaintiff is at large as to how he pleads his or her case. Absent pleas that are scandalous or vexatious or the like, the plaintiff cannot be dictated to as to how to formulate and present his or her claim.

2. Order 28 of the Rules of the Superior Courts which is the rule that deals with amendments is intended to be applied liberally.

3. Amendments shall be made for the purposes of determining the real questions in controversy between the parties.

4. Amendments should not be permitted when doing so could cause real or actual prejudice to other parties.

5. Amendments should be allowed if all that is present is litigation prejudice which is capable of being dealt with by

orders for costs or other directions by way of case management.

6. There is no rule that per se precludes radical amendments.

7. There is no rule against introduction of a new cause of action if it falls within the ambit of the original grievance.

I regard this summary as helpful and I am happy to adopt it."

12. Equally, I am happy to do as a helpful distillation of the authorities on this point.

13. Clarke J. in *Woori Bank & Hanvit LSP Finance Limited v. KDB Ireland Limited* [2006] IEHC 156, having firstly considered the judgment of the Supreme Court in *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383, to the effect that pleadings should be amended so as to ensure that the real questions of controversy between the parties should be determined within the litigation and that this principle was subject to the limitation that amendments should not be made where to allow same would cause prejudice to the other party, thereafter considers the question of prejudice in the following terms:-

> "Firstly a party resisting the amendment may be able to satisfy the court that, by virtue of the absence of the amended plea in the first place, steps have been taken which now make it impossible or significantly more difficult to deal with the case should the amendment be allowed. No such prejudice is contended for in this case.
>
> Secondly a party may be able to persuade the court that what I might call logistical prejudice would occur if the amendment is allowed. This will particularly be the case where the amendment is sought at a very late stage and could have the effect of significantly disrupting the intended proceedings."

14. It is clear that the first criteria has been invoked in this case by all defendants (albeit for slightly different reasons) but no serious logistical prejudice arises as (again a complaint common to all defendants), the proceedings whilst initiated in 2001 are still only in their infancy.

15. In *Porterridge Trading Limited v. First Active plc* [2007] IEHC 313, Clarke J. pointed out in that case, following this reasoning in the earlier Woori decision:-

> "…subject to the proceedings being frivolous or vexatious or being bound to fail, a party has, in most cases, an entitlement to plead the proceedings in whatever way it wishes. In those circumstances no leave of court is required. Subject only, therefore, to prejudice, it is difficult to see why a party who could have pleaded the case in the manner now sought to be achieved by amendment, should not be entitled to bring about such a situation by virtue of an amendment without the court engaging in significant scrutiny as to the merits of the case which, if the amendment be allowed, would now require to be litigated."

16. At a later point in the judgment, the court stated:

> "There will, in almost all cases, be some degree of prejudice resulting from any amendment which occurs at any significant time after the original pleading is delivered. The parties will have conducted preparation for the litigation on the basis of the case as then pleaded and it follows that some additional element of effort and expense will, even in the simplest of cases, inevitably result from an alteration in the course of the proceedings. To the extent that extra legal costs are incurred then the court can deal with same by making an appropriate order as to such costs. However, there will always be an effect on the party itself which will not give rise to formal legal costs and which will not, therefore, be capable of being compensated. The extent of any such effect is part of the balancing exercise that needs to be taken into account. Set against such considerations will also be the extent to which there is any reasonable basis for the failure to plead the case properly in the first place. That is not to suggest that it is an issue upon which any great weight ought to be placed, save where there is a fine balance involved in assessing the competing interests of justice arising. In substance if it is clear that the amendment is necessary to allow the true issues between the parties to be determined and if there is no prejudice which is not capable of being substantially met by appropriate orders or directions in the proceedings, then the amendment should ordinarily be allowed."

17. In this case, the plaintiffs are clear that the necessity for the substantial amendment to the statement of claim arises squarely from the report of the Moriarty Tribunal in 2011. Complaint was made against that proposition, in part, by virtue of the fact that there was sufficient evidential material available at the conclusion of the hearing of that module to enable any amendments to be made at that time.

18. Whilst it is clear that as a general proposition the courts consider it preferable to permit amendments to pleadings in order to ensure that all matters are litigated together nevertheless the separate grounds advanced by the defendants require to be considered.

19. The State defendants primarily urge the strike-out of this motion on the grounds of delay and consequential prejudice occasioned to it. Under the delay criteria, they also contend that there has been a failure on the part of the plaintiffs to provide a satisfactory explanation for their initial failure to plead the matters now sought within their proposed amendments. They accept that the primary focus of the Court must be as to whether the amendments are necessary for determining the real questions of controversy in the litigation and it is their contention that they do not.

20. The grounds of consequential prejudice arise in the main from the allegations regarding those specific identifiable persons detailed within the proposed amended statement of claim within the State defendants. The State defendants point to the fact that these witnesses may be required to give evidence in respect of matters, by the time any trial is reached, which took place prior to the award of the licence in 1996. They say that they are prejudiced by, if the amendments are permitted, having to adduce such evidence at this remove and also the ability of these witnesses to recall matters at such remove.

21. I understand in respect of the amendments to the Comcast proceedings (again occasioned by certain findings by the Moriarty Tribunal), that the amended statement of claim was served in 2015 and without objection by the State defendants. Whilst I appreciate that this pleading was served three years ago it seems that there may be a degree of duplication in the witnesses required within the Comcast proceedings as in the Persona proceedings. I appreciate that in considering this motion that those witnesses will at least have the comfort of their statements to the Moriarty Tribunal and presumably the documentation in support of those

statements made available to them as required.

22. With regard to the question of delay, the State defendants contend that the plaintiffs were or should have been in a position to amend their pleading after the report of the Moriarty Tribunal in March 2011. They point to the decision of the Supreme Court given in open court in July 2012 and that effectively no additional steps were taken until March 2015 when the plaintiff made its third party funding application. They point out that any steps taken in that intervening period were taken solely by the State defendants (in the issuing of a notice for particulars and the joinder of Mr. Lowry as a third party in February 2013). In my view given that Mr. Denis O'Brien himself sought to be joined as a co-defendant to these proceedings (albeit with the consent of the State defendants), must also be considered in that regard. That process was not complete until February 2014.

23. Thereafter, complaint is raised by the failure, upon the judgment of Ryan J. in February 2014, to take an additional twelve months before the third party funding application is instituted and thereafter a further twelve months after adjudication by the Supreme Court to now seek to amend the statement of claim. In addition, they point to the para. in the Supreme Court Judgment by Clarke J. in the strike out proceedings as follows: -

> " . . . the difficulties which such parties may encounter cannot be allowed to be an excuse for procedural inaction. It is equally the case that persons facing the kind of serious allegations which are frequently at the heart of covert wrongdoing claims are just as entitled as any other party facing a serious allegation to have the allegation concerned heard and determined in a timely manner…. Such a party is obliged to take all reasonable steps to progress their claim. However, the speed at which the claim progresses must be judged, provided that all reasonable steps are taken, against the backdrop that it may, nonetheless, be difficult to progress such a claim in as expeditious a way as the type of claim where most of the information necessary for the formulation of the claim in question will be available to the claimant".

24. Clarke J. continued: -

> "The views expressed by a tribunal may be of considerable public importance. However, those views could have no bearing on civil proceedings. It follows that, while the parties might, undoubtedly, be very interested to hear the conclusions of the tribunal, those conclusions could have no effect on civil proceedings and therefore awaiting the result of the tribunal's findings could not provide any justification for delaying the progress of civil proceedings. What is, at least in general terms, potentially justified, is waiting to see what information may become available through the exercise by the tribunal of its powers of compellability. Any such waiting would necessarily only justify delay up to the conclusion of the evidence hearing process for, after that time, there could be no reasonable expectation of any further material developments which could have a bearing on the proceedings".

25. As to the question of logistical prejudice the State defendants claim that they have delivered a lengthy notice for particulars which one assumes will require amendment (although it is noteworthy that it appears that no letter or motion seeking to compel replies was ever issued) and that a draft defence has also been prepared to the existing statement of claim. None has been served prior to the initiation of this motion. Neither ground of logistical prejudice advanced would in my view prevent the amendments sought.

26. Whilst the Moriarty Tribunal reported in 2011 in my view it is relevant to note that at that time these proceedings stood struck out by order of Gilligan J. In my view the joinder of an additional co-defendant is a factor to which this Court has had regard. Thereafter the possibility of a third party funding application was a matter that was very carefully considered both by the High and Supreme Courts (all five members of the Court delivering judgments). At no point was it suggested that such an application was considered as a form of delaying tactic or in any sense frivolous or vexatious, quite the contrary. Whilst the application was ultimately refused nevertheless it was afforded serious and detailed consideration throughout.

27. As a matter of practicality therefore, I must have regard to the proposition that the third party funding application was in and of itself linked to the plaintiffs' ability to maintain this litigation. It was confirmed by senior counsel for the plaintiffs that that matter was not one that will now trouble the court but gave no further details. However in my view there is no doubt as to the *bona fide* nature of the application for third party funding that took place between 2015 and 2017.

28. The position of the fourth named defendant is of course different in that he was joined as a co-defendant at a much later point in proceedings and cannot (and did not) seek to complain of matters prior to his joinder.

29. The fourth named defendant asserts his prejudice as he contends that the new claims are now being sought to be made long after the expiration of the relevant limitation periods. With regard to the issue of delay, he complains that the plaintiffs have delayed considerably since 2012, post the Supreme Court judgment and thereafter since the fourth named defendant was joined to proceedings in February 2014.

30. The fourth named defendants point to the well-established law that the findings of a tribunal of inquiry do not have legal effect and from the cases of *Goodman v. Hamilton* [1992] 2 IR 542, Lawlor v. Flood [1999] 3 IR 107 and decision in *Re Bovale Developments* [2007] IEHC 365 where Irvine J. stated as follows: -

> " …it is clear that the applicant may well decide to use the Tribunal report as a source to assist him in finding admissible evidence to put before the Court in these proceedings. What the applicant is not entitled to do is to produce to this Court the report of the Tribunal as proof of any facts allegedly found therein. Neither can the Court take into account the opinion of the Chairperson of the Tribunal regarding any wrongdoing on the part of the respondents for the purposes of these s. 160 proceedings. Further, the Court is not entitled to admit the findings of the tribunal into evidence as corroboration of any wrongdoing allegedly put before the Court by Mr. Lacy from his own investigations. Finally, the Court cannot attach any weight to any findings of the Tribunal when reaching its conclusions in this action".

31. In affirming this decision in the Supreme Court Hardiman J. stated [2011] IESC 24 : -

> "I conclude, accordingly, that the decisions in *Goodman* provide the only conceivable basis on which the constitutionality of a tribunal of inquiry could be preserved. All the constitutional guarantees in relation to the administration of justice and fair procedures would be vain if it were possible for the government to set up simulacrum or a "parallel process" which would have all the consequences of criminal conviction other than actual imprisonment."

32. It is submitted on behalf of the fourth named defendant that the use to which the plaintiffs wished to put the findings of the Moriarty Tribunal within the proposed amendments to its statement of claim by the explicit and express reference to the contents of

the report they have sought to "tip the balance" in respect of the delicate balance adopted by the Supreme Court in its jurisprudence relating to the degree to which the findings of any tribunal of inquiry might be dealt with in any subsequent proceedings.

33. Insofar as the fourth named defendant is concerned, it is also suggested that the additional reliefs sought specifically against it, being a claim at proposed amended paragraphs 18 and 19 of the reliefs as orders for restitution for unjust enrichment together with an order for an account of profits are not relevant to any of the issues to which the plaintiff seeks reliefs pursuant to its amended statement of claim.

34. As noted by Donnelly J. in her judgment, the third party funding application within the Persona proceedings are noteworthy as it is the first case to come before the courts in Ireland directly concerning the acceptability of professional third party litigation funding. At paragraph 16, Donnelly J. accepted that there was a real and substantial question to be tried and not merely a theoretical one being adduced by the plaintiffs.

35. In the Supreme Court's judgment Denham C.J. stated: -

> "However, I do have a concern that the defendants and third party who vigorously opposed the plaintiffs' motion are beneficiaries if the case does not proceed. This may be a matter for consideration at another time and place".

36. Clarke J. stated in considering this appeal: -

> "However, it is difficult to take an overview of the circumstances of this case without a significant feeling of disquiet. Serious allegations are made against the State and others. Indeed, in a previous judgment delivered by me in an appeal brought in these and related proceedings…. I suggested that should the allegations made come to be proven in a court of competent jurisdiction they would amount to amongst the most serious factual findings that would have been made by a court in this jurisdiction since the foundation of the State. In addition, given the findings of the so-called Moriarty Tribunal, there is at least a basis for suggesting that the allegations might be capable of being established. It would, of course, be for the trial court to consider whatever evidence may be presented, apply the rules of evidence and its own judgment to all of the materials properly before the Court, and come to a conclusion in accordance with that evidence and the law.

However, the source of disquiet which arises on this appeal stems from the very real possibility that this case might not go to trial because of the difficulties encountered by the plaintiff/appellant (' Persona') in being able to run the case without third party funding. It is in that context that I feel that a number of observations are required."

37. Of course, the Supreme Court was dealing there with a very different issue to the present application. However, it does serve to highlight the unique circumstances of this application and various matters which have coalesced to make or affect the chronology as set out above. In my view, whilst I can see within that chronology as set out above that there has been a certain "slippage" or delay I cannot see, taking the matter as a whole and looking at all of the issues to be considered, that that delay in the unique circumstances of the chronology of this case, can be said to be excessive. Whilst there is undoubtedly a prejudice to the State defendants in being required to defend proceedings at this remove, nevertheless in my view that prejudice does not outweigh the necessity to ensure that this litigation is now heard and heard speedily. I note (of course in entirely separate proceedings) that the difficulties these State defendants state that will affect them in these proceedings will affect them in other proceedings also dealing with the outcome of the award of the mobile telephone licence to Esat Digifone.

38. As to the position of the fourth named defendant, in my view, many of the submissions made by it as to the entitlement to rely upon tribunal findings within this civil litigation is more a matter for the trial judge than in this application for the amendment of pleadings. The fourth named defendant takes specific issue with regard to the amendments proposed to be made in respect of a claim for an account of profits and in respect of unjust enrichment. With regard to the unjust enrichment claim, that will be a matter for the trial judge as to whether such a claim can be advanced on the facts of this case but I do not for the moment see that it cannot be pleaded. With regard to the account of profits, the original statement of claim seeks the more generic and general claim of an account of profits, and it seems to me that the amendment is a slight refinement of a matter that is already pleaded before the court.

39. I also note that the fourth named defendant chose of its own motion to seek to be joined as a co-defendant to these proceedings. That does not mean that it must therefore accept or ignore any delay that has been incurred thereafter but the delay that occurred after the joinder of the fourth named defendant as a co-defendant in February 2014 is largely explicable by the plaintiffs' third party funding arrangement application. In my view it is a fair interpretation of the decisions by the High and Supreme Court that all considered it a reasonable, proper and important application to be brought raising matters of significant importance which required adjudication.

40. It is undoubtedly the case that this is significant litigation. As it appears that no amended statement of claim has been served consequent upon the joinder of the fourth named defendant an amendment would be required in any event. In my view given that the existing unamended statement of claim has been served on the State defendants then this matter could therefore proceed to a hearing on foot of that pleading it is preferable, on balance, that all of the issues should be placed before the court in order that all matters regarding this litigation can now be dealt with. That in my view is the court's overriding consideration upon the unique facts and circumstances of this case.

41. Accordingly, for the reasons set out above, I propose to grant the relief sought by the plaintiffs in its notice of motion and to permit it to amend its statement of claim delivered on 21 April 2006.

42. I will hear the parties as to any consequential orders that may be required including any orders for costs.