Neutral Citation: [2014] IEHC 78

THE HIGH COURT

JUDICIAL REVIEW

[2001 No. 9223 P.]

BETWEEN

PERSONA DIGITAL TELEPHONY LIMITED AND SIGMA WIRELESS NETWORKS LIMITED

PLAINTIFFS

AND

THE MINISTER FOR PUBLIC ENTERPRISE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

MICHAEL LOWRY AND DENIS O'BRIEN

THIRD PARTIES

JUDGMENT of Mr. Justice Ryan delivered the 21st February, 2014

Introduction

1. This case is one of two that are proceeding towards being heard in this Court in which the plaintiffs seek damages and other reliefs arising out of the awarding of the State's second GSM phone licence to ESAT Digifone in 1996. The plaintiffs in the other case were some of the members of a consortium that entered the competition for the licence. The first plaintiff in this case, Persona, was also an applicant. The actions have many features in common, as well as some differences. They were together the subject of a judgment of this court in an application by the State defendants to strike them out on the ground of inordinate and inexcusable delay. The appeal to the Supreme Court was dealt with in composite form also and judgments were delivered under the titles of the two cases on the 17th October, 2012.

2. A feature of the applications before this Court and the Supreme Court was that the plaintiffs maintained that they were justified in holding back their proceedings while the Moriarty Tribunal investigated. That body had been set up to investigate urgent matters of public importance, to wit, payments allegedly made to politicians who included the Minister at the Department in charge of the GSM licence competition, Mr. Lowry. One of the topics explored at length in the Tribunal was the award of the GSM licence to ESAT. The Tribunal is referred to in the replying affidavit in this motion sworn by Mr. Boyle in opposition. The report is quoted in the Supreme Court judgments in the litigation above mentioned and I will refer to some of those citations later.

3. One of the differences between the cases is that the plaintiffs in the instant action have chosen to sue State defendants only, namely, the Minister for Public Enterprise, Ireland and the Attorney General. Unlike the other case, these plaintiffs have not sued ESAT Digifone and Mr. Denis O'Brien and neither have they named Mr. Lowry personally as a defendant. The plaintiffs say that they made a deliberate choice in that regard.

4. The State defendants successfully applied to join Mr. Lowry and Mr. O'Brien as third parties. Mr. O'Brien's solicitor, Mr. Meagher, later wrote to the plaintiffs' solicitors and the Chief State Solicitor asking for their consent to his client's being joined as a defendant, so altering his status in the litigation. The State consented, but the plaintiffs refused.

5. Then Mr. Meagher wrote a detailed letter on the 3rd May, 2013, in which he recited the fact that his client had been made a third party and set out the reasons why Mr. O'Brien should be made a defendant instead. The State gave formal consent by letter of the 14th June, 2013, but, somewhat surprisingly for this kind of litigation, the plaintiffs' solicitors simply did not reply, not even to acknowledge the correspondence.

The Rule

6. This motion was issued by notice dated the 2nd July, 2013. The application is brought under O. 15, r. 13, of the Rules of the Superior Courts ("RSC") which provide as follows:-

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."

7. Order 15, rule 13 gives the courts power to join a party as plaintiff or defendant in two situations. First, there is a party "who ought to have been joined" and, secondly, where the party's presence before the court is necessary to enable the court to decide all the questions in the case effectually and completely. The first of these powers is invoked by Mr. O'Brien in regard to the conspiracy claim. Mr. O'Callaghan S.C., on behalf of Mr. O'Brien, the applicant, makes the point that it is acceptable practice to plead that a defendant conspired with persons unknown, when the identity of the other wrongdoers is not known to the plaintiff, but he submits

that it is not acceptable to do that when the plaintiff knows the identity of the person he is accusing. On this test the question is:

> "Is Denis O'Brien a party who ought to have been joined as a defendant?

When the other limb of the rule is reduced to its essential elements so far as relevant to the motion, the question can be stated thus:-

> "Is Denis O'Brien's presence before the court necessary to enable the court effectually and completely to adjudicate on all the questions in the case?"

The Law

8. There is little disagreement between the parties as to the legal test to be applied under the rule. However, Mr. McEnroy S.C. for the plaintiffs argues for an interpretation of the provision in light of constitutional rights as to litigation. The rule gives the court the power to join a party as a defendant or as a plaintiff at any stage of the proceedings and "either upon or without the application of either party, and on such terms as may appear to the court to be just", so the consent of a plaintiff to joining a defendant is not a necessary precondition. However, an application to join a defendant against the wishes of a plaintiff will only be granted in exceptional circumstances. There is a clear exposition of this principle in *Fincoriz SAS v. Ansbacher Limited* [1987] IEHC 19, where Lynch J. said that:-

> "*Prima facie* a plaintiff is entitled to sue whomsoever he wishes and is entitled not to have to sue a person that he does not wish to sue."

He also said:-

> "In order that a person may be joined as a defendant without the consent and, a *fortiori*, against the wishes of the plaintiff there must be some exceptional circumstances."

The exceptional circumstances are that it is necessary to enable the court effectually and completely to adjudicate all the questions in the case, such necessity being established as a matter of probability, as Lynch J. held.

9. In *Amon v. Raphael Tuck & Sons Ltd* [1956] 1 Q.B. 357 Devlin J. (as he then was), said at p. 371 in a passage that has been endorsed in this jurisdiction and in England that the test is:-

> '"May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal right?' It is not, on this view, enough that the plaintiffs rights and the rights which the intervener wishes to assert should be connected with the same subject-matter. Nor is it enough that the intervener's commercial interests may be affected by an order made in the action."

Devlin J also said at pp. 386- 387:-

> "The construction of the rule is, and must be, the same in all circumstances; but the test that is appropriate to determine whether a party is necessary or not may vary according to the circumstances."

10. In *Barlow & Others v. Fanning and UCC* [2002] 2 I.R. 593, the plaintiffs originally sued the first defendant but subsequently served notice of discontinuance against him. The first defendant applied to be re-joined. The Supreme Court ruled that there were no exceptional circumstances and allowed the appeal against the High Court order rejoining that defendant. The case is unusual and different from the present in that there was opposition to the first defendant's application, not merely from the defendant but from the plaintiff. Keane C.J. endorsed remarks of Viscount Dilhome in *Vandervell Trustees Limited -v- White and Ors* [1971] AC 912, when he said of the corresponding words in the English rule which were the same as ours:-

> "I cannot construe the language of the rule as meaning that a party can be added whenever it is just or convenient to do so. That could have been simply stated if the rule was intended to mean that. However wide an interpretation is given, it must be an interpretation of the language used. The rule does not give power to add a party whenever it is just or convenient to do so. It gives power to do so only if he ought to be joined as a party or if his presence is necessary for the effectual and complete determination and adjudication upon all matters in dispute in the cause or matter."

The rule in England was subsequently widened very considerably. Keane C.J. also said:-

> "It is no doubt the case that, if the plaintiffs succeed in the present action, the good name and reputation of Professor Fanning may be adversely affected, since, for the most part, the establishment of the plaintiff's case against the University necessitates the proof by them of damaging allegations against Professor Fanning. However, that can often be the case in litigation where a party elects to sue one defendant in reliance on his vicarious liability for the wrongdoing of another who is not sued. Thus, the owner of a vehicle is frequently sued as being vicariously responsible for the negligence of a person driving the vehicle with his consent. If the submissions advanced on behalf of Professor Fanning were well founded, it would be necessary in every such case for the High Court, on the application of the driver, to join him as a defendant in the proceedings because his good name and reputation might be adversely affected by what was said during the course of the case or, indeed by the findings of the trial judge."

11. In *Duignan v Dudgeon* [2005] IEHC 348, Kelly J, said at pages 8- 10:-

> "The essence of the plaintiffs claim is that the trustees were wrong to refuse to transfer his pension entitlements from the fund to another pension scheme. The trustees made that determination on foot of information received by them to the effect that the plaintiff had retired from his position in Arnotts. If he retired he was not entitled to have his pension funds transferred. The plaintiff asserts that no such retirement took place. Whether his departure from Arnotts was by means of retirement or not is a matter between him and Arnotts. It cannot be a matter between the plaintiff and the trustees for they were not his employers.
>
> . . . .In my opinion it is entirely artificial to suggest, as the plaintiff does, that his departure from Arnotts is not the main issue in the proceedings. It is, in many respects, at the forefront of the proceedings and the Plaintiff himself has made it so by his positive assertion that he did not retire from his position. The crucial question of whether that is correct or not

can only be decided with Arnotts being joined as a defendant.

In my view it makes no sense for the action to proceed without this issue being properly addressed. The action as constituted at present cannot effectually and completely adjudicate upon and settle that crucial question."

The Plaintiffs' Claim
12. The statement of claim seeks damages including exemplary damages under many headings including misfeasance in public office, breach of duty, breach of contract, breach of legitimate expectation, breach of constitutional rights, deceit, conspiracy, misrepresentation including fraudulent misrepresentation and dishonest assistance, as well as some other reliefs. In particulars of the various wrongs, it is alleged inter-alia that the Minister, identified as Mr. Lowry, manipulated the GSM competition to ensure that the licence went to Esat Digifone and did so for a secret profit and commission and thereby corrupted the competition for the license. The plaintiffs plead that the Minister conspired with Esat Digifone to promote an inevitable competition result and in furtherance of the conspiracy "the parties thereto infiltrated or penetrated the competition and/or in the alternative ignored or disregard of the competition process and/or in the alternative utilised the process for the purpose of concealment and thereby ensuring the granting of a second GSM licence to Esat Digifone." The plaintiffs plead that the implied terms of the contractual arrangements in relation to the competition included one that the Minister would not accept a bribe from one of the applicants. It is clear, therefore, that the plaintiffs' essential, if not exclusive case, is that the successful applicant won the competition by bribing the Minister. Although it is obvious that the only way that a company can conspire or do anything else is by human agency, the statement of claim does not name any alleged actor as having done wrongful acts to secure the license for Esat.

The Affidavits and the Arguments
13. In two affidavits, Mr. O'Brien's solicitor, Mr. Meagher, sets out the case on which the application is based and which he previously put into writing in the long letter that he sent to the solicitors for the plaintiffs. He asserts that there are exceptional circumstances in this case that make it necessary for Mr. O'Brien to be joined as a defendant in the action. It is not sufficient that he should be a third party, answerable only to the defendant in respect of that party's liability. Mr. Meagher quotes the statement of claim to show the extensive nature of the allegations of wrongdoing and the importance that Mr. O'Brien should be in a position to answer them.

14. The affidavits argue the case pro and con. The Persona affidavit by Mr. Boyle includes claims that the applicant has not made out his case to be joined as a defendant, that Mr. O'Brien is guilty of delay, that the plaintiffs are entitled to sue whomsoever they choose and that they should not be put into a position where they are obliged to make a case against a party whom they have not sued. These are central points submitted by Mr. McEnroy in his argument opposing the motion on behalf of the plaintiffs.

15. Mr. O'Callaghan points out that the State defendants obtained an order from the court joining Mr. O'Brien and Mr. Lowry as third parties on the basis, as stated in the affidavit grounding that application, that "if the alleged or any wrongful corrupt acts occurred (which is denied) the proposed third parties were at all times the persons responsible for the alleged wrongful and/or corrupt acts which allegedly ensured the competition process was corrupted so as to ensure an inevitable Esat Digifone win and/or to enable the realisation of a corrupt financial benefit to Esat Digifone and/or Mr. O'Brien and/or Mr. Lowry."

16. Counsel cites authorities in this and other common law jurisdictions. He says that the fact that Mr. O'Brien has already been joined as a third party is implicit recognition that his presence is necessary for the court to adjudicate all matters arising in the action but in that capacity his client is severely restricted in his defence because he can only answer the claim as made by the State defendants against him and he is powerless and without remedy in respect of the claim made by the plaintiffs against the State defendants.

17. Order 15, rule 13 RSC envisages the precise situation that arises here, namely, where a plaintiff does not consent to having a defendant joined. Their test is whether the involvement of the intended party is necessary to enable the court to resolve the issues. An order in favour of the plaintiffs and made in the main action, assuming he was not made a party, would adversely affect Mr. O'Brien's rights. It is clear in the circumstances that this is an exceptional case calling for the application of the power contained in the rule.

18. Mr. O'Callaghan submits that the statement of claim contains allegations that are specific and directed implicitly at Mr. O'Brien as the actor on behalf of Esat although he is not actually named. Therefore as the party implicitly alleged to be the payer, Mr. O'Brien should be a defendant because his interests: legal, proprietary and reputational, are directly affected. The allegations are extremely grave. He argues that the plaintiffs have not been able to assert any real prejudice but, by contrast, Mr. O'Brien is severely prejudiced if he is confined to his role as a third-party. Specifically, Mr. O'Brien cannot defend the conspiracy claim or the allegations of corrupt payments; he cannot raise a notice for particulars of any part of the claim; he cannot make a counterclaim; he is limited in his capacity to obtain discovery of documents from the plaintiffs; and finally, there is no assurance that the third-party issue involving him will be heard at the same time as the action between the plaintiffs and defendants.

19. Mr. McEnroy says that his clients have a constitutional right that is in the nature of a property right to litigate their civil claims and the proposed application, if permitted, will interfere with that right. The circumstances in which that is permissible must be truly exceptional. He cautions against adopting too readily the jurisprudence of other common law countries that do not have constitutional protection of access to the courts. The plaintiffs have a constitutional and legal right to decide whom to sue.

20. Counsel argues that Mr. O'Brien is not Esat Digifone and does not have any *locus standi* in his personal capacity. Although he may have been chairman or director or shareholder or all three, that does not affect the separate corporate personality of the company.

21. The claim for damages in the statement of claim is set out under thirteen heads of liability and when the court hearing the case decides liability in respect of the defendants, it will not go further and explore other elements behind that liability. It is inappropriate as Counsel argues to focus on the count of conspiracy to the exclusion of the other heads of claim.

22. The plaintiffs submit that the applicant Mr. O'Brien has not established any exceptional circumstances on the evidence put forward in this motion. There is no evidence of the corporate structure and management of Esat Digifone.

23. The plaintiffs are not seeking any order against Mr. O'Brien and he has not said that he has any claim against the plaintiffs. The State did not deal with individuals in the GSM licence competition.

24. It would be inconvenient and costly for the order sought to be made. The effect would be to increase the costs massively and to introduce collateral legal issues that are more appropriate to a tribunal than to a court.

25. Mr. McEnroy submits that even if the Court came to the conclusion that there were indeed exceptional circumstances in this case, it should exercise its discretion not to join Mr. O'Brien as a defendant.

The Moriarty Tribunal
26. The Supreme Court judgments in *Comcast International Holdings Inc. & Ors v. Minister for Public Enterprise & Ors; Persona Digital Telephony Ltd & anor. v. Minister for Public Enterprise & Ors.* [2012] IESC] 50, and the associated Comcast action that allowed the appeals by the plaintiffs and permitted the cases to proceed are of relevance in revealing the issues in the cases as they appeared to the judges and the relevance of the tribunal and its proceedings in the history of this and the Comcast litigation. Denham C.J. records the evidence before the High Court and the Supreme Court at para. 38:-

> "that the primary reason for the delay in the proceedings was a decision taken by Comcast and personal matter will wait the completion of the investigation section of the tribunal into the granting of the licence."

Persona followed the evidence that unfolded at the tribunal.

27. Hardiman J. noted that although there were differences in the parties between the two actions at p. 1:-

> "the essential issues are the same in each of the cases."

The judge set out the background to the Comcast case, at page 5 of the judgment, as being the allegations inter-alia that the minister had been corrupted by Mr. O'Brien "by the promise or expectation of payments to him of money or moneys worth" and had ensured the award of the license "to Mr O'Brien's consortium." At page 8, Hardiman J. cited paragraph 60.01 of the Tribunal Report which referred to evidence of clandestine payments by Mr. O'Brien to Mr. Lowry.

28. Clarke J. referred to the allegations made in the proceedings and which formed the subject of the findings of the Moriarty Tribunal, including allegations that the Minister, Mr. Lowry, was paid money by Mr. O'Brien to influence the competition for the licence.

29. A consideration in this application is the source of information about the role of Denis O'Brien and his connection with the issues in the case. Persona's counsel protests about any general information about Denis O'Brien's role and the Tribunal being used in this application. He insists that only information contained in the affidavits can be considered by the Court. However, in this connection, it is noteworthy that Mr. Boyle's affidavit in opposition to the motion refers to the Moriarty Tribunal and the Supreme Court judgments contain multiple references. It is not that anything contentious arises, merely the subject of investigation and/or the fact of what was determined are the relevant matters. The Court is entitled if not required to notice the fact that a major public inquiry was established under statutory authority to investigate urgent matters of public importance.

Issues in the Case
30. An analysis of the Statement of Claim reveals that central questions in the case are or must include the following:-

> (a) Did the Minister conspire with Esat to corrupt the competition?
>
> (b) Did Esat bribe Minister Lowry?
>
> (c) If the plaintiffs succeed, is Denis O'Brien liable to the defendants for an indemnity or contribution?
>
> (d) Are those questions really asking whether the Minister conspired with Denis O'Brien or whether Denis O'Brien bribed the Minister?
>
> (e) Irrespective of how question (c) is answered, can the central questions as identified above be adjudicated on effectually and completely without having Denis O'Brien as an active participant as a defendant in the plaintiffs' claim?

Discussion
31. The question of delay can be disposed of briefly. The application should not fail on that ground. If the interest of justice requires that the applicant's status in the action be changed from third party to defendant, it would be wholly inconsistent to defeat the application for delay in the special, even unique, circumstances of this litigation. The motion was brought after the defendants' third party procedure. The history of the proceedings, the decision of the Supreme Court in the State's dismissal motion and the observations of the judges all support this position. Furthermore, all the jurisprudence on delay posits a test of the interest of justice in cases of inordinate and inexcusable delay.

32. The fundamental question is what is the just procedural decision in the circumstances of the case? Is it the case that Denis O'Brien ought to have been joined? Or is his "presence before the Court necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter?"

33. It is obvious that Denis O'Brien is a necessary party in some capacity to the actions that have arisen out of the granting of the GSM licence. He is named as a defendant in the Comcast actions and in this Persona case, he has been brought in as a third party. There is no question about his centrality to the fundamental issues. It is impossible to think that the actions could proceed to a conclusion in which all the questions involved would be effectually and completely decided without his being a leading participant. It is equally difficult to conceive how his interests, whether legal, proprietary or as to good name will not be materially affected by the outcome of the litigation.

34. Mr. O'Brien's position is wholly different from those of the applicants who unsuccessfully applied to be joined in the cases cited above. The Supreme Court in its decision on the issue of delay highlighted the immense importance of the issues raised in the cases and actually declared that the litigation of which this case forms a part is quite unique. The position of Mr. O'Brien in respect of this unique litigation is also practically unique.

35. There is considerable force in the argument that Mr. O'Brien ought to have been joined as a defendant in this case because he is alleged by the plaintiffs to have conspired with the Minister to achieve a corrupt outcome of the licence competition. It is true that he is not named, but he is implicitly identified. Although it is permissible to plead a conspiracy between some named persons and persons unknown, I do not know of any practice that permits a conspiracy to be alleged against persons known to the pleader without actually naming them.

36. If Mr. O'Brien is not joined as a defendant and is left to stand by as the plaintiffs' claim is presented against the State defendants only, he and the Court will be observing a drama unfold in which he is the central participant but without any entitlement to intervene. The case alleging misconduct of the most serious nature will proceed without any involvement of the person alleged to be the major wrongdoer.

37. Another possibility may be mentioned to illustrate the injustice as well as the irrationality of such a position. Suppose the plaintiffs succeed in their action against the State defendants and the latter proceed to claim indemnity/contribution and Mr. O'Brien succeeds in his defence of the State's claim. That result may be considered improbable but I am not concerned at this point with the result of the action but rather with a consideration of the consequence of leaving Mr. O'Brien merely as a third party.

38. It is clear that there must be very exceptional circumstances before the choice made by a plaintiff as to whom to sue will be interfered with by the addition of another defendant. Having said that, the rule envisages that the court will make a decision that is not dependent on the consent of the plaintiff. It follows that the absence of such consent is not determinative of the application. It is also relevant that the plaintiff is not deprived of his right to sue any defendant. The decision is concerned with what is necessary to do justice, that is, to decide all the questions involved in the case effectually and completely.

39. The constitutional right to litigate is not threatened by the jurisdiction under O. 15, r. 13 RSC. The plaintiffs made a tactical decision in this case and they are entitled to have that respected as far as practicable and as far as consistent with the interests of justice but no further. The plaintiffs' rights fall to be balanced against the interests of others and the requirements of justice in the determination of the issues that arise in the case. The right to decide whom to sue is not an absolute right and the entitlement of a party to retain tactical advantage is similarly, or even more subject to being set aside or adjusted to take account of other vital considerations.

40. In the result, it seems to me that the two tests embodied in r. 13 are met in this case. The second test is more amply established than the first. In other words, I think that the decision that Mr. O'Brien ought to have been joined is less securely established than that his presence before the court is necessary for the purposes stated in the rule.

41. My decision accordingly on the motion is that the applicant is entitled to be joined as a co-defendant to this action.

42. The rule provides that a party whose name is added as a defendant shall be served with the summons or notice and the proceedings are deemed to have begun only on the making of the order adding the party. Mr. McEnroy raised the possibility that Mr. O'Brien might rely on this provision to plead the Statute of Limitations in respect of the plaintiffs' claim, but that would appear to be a bizarre possibility and improbable in the highest degree in the circumstances of this application and, moreover, could be the subject of a condition in the order. Mr. O'Callaghan dismissed the possibility of such a plea.

43. If the plaintiffs do not wish to sue Mr. O'Brien to seek any relief that is a decision open to them. They cannot be forced to make a case that they do not want to make they cannot be obliged to change their pleadings so as to include a claim against the new added party. The point of joining a new defendant is in the interest of justice, in the court's interest in seeing that litigation is properly and effectively conducted and that its processes are operated in a way that is just and fair and also in the interest of the added party because of the impact of the litigation on his rights.

44. Mr. O'Brien as an added defendant might, depending on the attitude of the plaintiffs, be in a somewhat anomalous position. He might be a party in the case with the right to cross-examine all the plaintiffs' witnesses, but without being in danger of having any award made against him in favour of the plaintiff. That would be a consequence if the plaintiffs so decided but he would of course remain as a party liable to the defendants for any claim successfully made against the State on foot of the plaintiffs' claim and he would also be liable for costs.

45. It is unnecessary at this point for the Court to specify the precise procedural steps that follow from the decision that Mr. O'Brien should be joined as a co defendant. If the plaintiffs elect to make a case against him, he will have amended pleadings specifically addressed to him to which he will respond by way of defence. If the plaintiffs maintain their posture of not claiming against Mr. O'Brien, it will be a matter for him to define the areas of the claim that he challenges and then to file a defence expressing that. He will also be defending the State's claim for contribution or indemnity.

46. Finally, I should say something about a submission Mr. McEnroy made as to what should follow if the Court rejected his argument and ordered that Mr. O'Brien be joined as a defendant. He suggested that any such relief should come at a heavy price for the applicant. The order should be on terms of the most swingeing conditions as to costs being imposed on the added party in favour of the plaintiffs. I do not agree. If my conclusion is correct, the plaintiffs' tactical manoeuvre was wrong and was conducive to injustice. First, Mr. O'Brien ought to have been joined and second, his presence as a defendant is necessary. The plaintiffs do not have a sound basis for demanding tribute from the newly added party. Joining Mr. O'Brien is not an act of indulgence of his wishes, but rather a decision under the Rules of the Superior Courts as to what is required in the interest of justice.