[2019] IEHC 934

THE HIGH COURT

RECORD NO. 2017/8715P

BETWEEN

PAULA MALONE

PLAINTIFF

AND

MICHAL FENLON AND OTHERS

DEFENDANT

Written Ruling delivered by Ms Justice Ní Raifeartaigh on 10th December, 2019

Nature of the case

1. This is a ruling on a motion brought by the defendants seeking an order pursuant to Order 19, Rule 28 of the Rules of the Superior Courts striking out the plaintiff's defamation proceedings on the ground that the plaintiff's claim discloses no reasonable cause of action and/or an order pursuant to the inherent jurisdiction of the Court striking out the proceedings on the grounds that they disclose no reasonable cause of action or that they are frivolous and vexatious. The issue which arises is whether, in proceedings which involve a claim for defamation, it is clear as a matter of law that a defence of absolute privilege applies in circumstances where the allegedly defamatory statement was made by the defendants to the Data Protection Commissioner ("the DPC") in the course of the latter's investigation of a complaint by the plaintiff and, more specifically, on foot of an express request by the DPC that the defendants write to the plaintiff and copy that letter to the DPC.

Background/chronology of the case

2. The plaintiff worked as a secretary in the National Association of Regional Game Councils ("the NARGC"). The first defendant is the chairman of the NARGC. On 5th May, 2016, the plaintiff resigned, giving four weeks' notice to her employer. Four days later, on 9th May, 2016, she was told that her contract was terminated with immediate effect and she was asked to surrender her phone and her laptop. These were taken the next day from her office. She asked for the return of her personal data which was contained on these devices but was unsuccessful.

3. In May 2017, the plaintiff brought plenary proceedings against her employer in proceedings entitled "*Malone v National Association of Regional Game Councils* 27/3917P", in which she sought damages for personal injuries arising from the treatment of her in her employment with the defendants.

4. On 28th June, 2016, the plaintiff made a complaint to the DPC in circumstances where her employer had failed to return the data in question or to respond to her request. Having received no response from the Commissioner either, she made another complaint to the DPC on 5th July, 2016. She then brought proceedings entitled "*Malone v Data Protection Commissioner*, High Court Record No. 2017/428JR" seeking mandamus to compel the Commissioner to deal with her complaint. The leave application in those proceedings was heard in May 2017 and made returnable for 18th July, 2017.

5. On 11th August, 2017, the DPC wrote a lengthy letter to the employer, directing that it should respond to the plaintiff. It said that it was satisfied that the issues disclosed by the complaint properly required investigation by the Office and that "the purpose of this letter is to notify you that the Commissioner will now proceed to investigate Ms. Malone's complaints on its merits". Later in the letter, under the heading "Immediate next steps", it requested the employer to write to Ms. Malone within a period of 10 days "responding to the substance of her access request" and requested that a copy of that letter be sent to the DPC office. The letter set out in detail what the letter from the employer to the plaintiff should address.

6. As a result of the above letter, the employer did write to the plaintiff and copied the letter in question - dated 21st August, 2017 - to the DPC. This letter is the communication alleged to contain the defamation of the plaintiff. The letter runs to over four pages and raises numerous issues, including:-

- Reference to the plaintiff's resignation letter; her High Court action; a request to clarify whether or not other persons were involved in writing her resignation letter; and a suggestion that her resignation letter was "contrived" and that certain matters "may amount to acts of illegality";

- Alleged difficulties obtaining access to her files and records and a description of them being a "badly disorganised state" when received;

- Doubts about whether the laptop retrieved by them was indeed that of the plaintiff and requests for information which would help to clarify this;

- Complaints about the broad scope of the plaintiff's data request; and

- Reference to the taping of conversations in the NARGC office, including a conversation with a government official, which is alleged to be "unlawful activity", and a request to clarify who had authorised these recordings.

7. The plaintiff issued these defamation proceedings by plenary summons dated 28th September, 2017 in respect of the letter of 21st August, 2017.

8. The judicial review proceedings in respect of the DPC were struck out with no order on 5th December, 2017.

9. By motion dated 15th May, 2018 the plaintiff sought to consolidate the defamation proceedings against the employer with the personal injuries proceedings.

10. The plaintiff's statement of claim in the defamation proceedings was delivered on 5th November, 2018. At paragraph 13 of her statement of claim, she set out the allegedly defamatory meanings as follows:-

(1) An allegation that the plaintiff was pursuing a fraudulent High Court action against NARGC;

(2) An allegation that the plaintiff appropriated and/or stole NARGC property; and

(3) An allegation that the plaintiff was a participant in an illegal recording of a Government official.

11. The defendants filed a motion on 30th January, 2019 seeking a strike out of the defamation proceedings on the grounds already set out above. This was grounded on an affidavit of Mark Connellan, solicitor on behalf of the defendants, sworn on 24th January, 2019. At paragraph 10 of his affidavit, he said that the letter complained of (the letter of 21st August, 2017) was written to the plaintiff herself in compliance with an "express direction" from the DPC to write to the plaintiff. At paragraph 17, it was pleaded that the allegedly defamatory statement was protected by absolute privilege which arises at common law and/or by virtue of the provisions of s.17 of the Defamation Act, 2009, as amended ("the Act of 2009"). This affidavit was replied to by affidavit of Ms. Egan-Langley sworn on 21st February, 2019.

Section 17 of the Defamation Act 2009

12. Section 17 provides:

"17(1) It shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought would, if it had been made immediately before the commencement of this section, have been considered under the law in force immediately before such commencement as having been made on an occasion of absolute privilege.

(2) Subject to section 11(2) of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997, and without prejudice to the generality of subsection (1), it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought was –

...

(g) made by a party, witness, legal representative or juror in the course of proceedings presided over by a judge, or other person, performing a judicial function,

(h) made in the course of proceedings involving the exercise of limited functions and powers of a judicial nature in accordance with Article 37 of the Constitution, where the statement is connected with those proceedings."

13. Obviously, where absolute privilege applies, malice does not destroy the privilege; this is the key difference between absolute privilege and qualified privilege. The inclusion of the words "where the statement is connected with those proceedings" in s.17(2)(h) may be contrasted with their absence from s.17(2)(g). Thus where the s.17(2)(g) privilege applies, it is broad enough to cover statements unconnected with the proceedings. The key words in s.17(2)(g) are the words "performing a judicial function", about which more will be said below.

The submissions on behalf of the defendants

14. The defendants contended that absolute privilege at common law encompassed the occasion of the allegedly defamatory statement in the present case and that the common law privilege was carried through by s.17(1) of the Act of 2009. In the alternative, it was submitted that the occasion was encompassed by the statutory privilege provided for in s.17(2)(g) and (h) of the Act of 2009, with emphasis being laid upon s.17(2)(g) in particular, i.e. that the statement was made "in the course of proceedings presided over by a judge or other person performing a judicial function".

15. The defendants submitted that all of the criteria (of proceedings involving the performance of a judicial function) set out in *Trapp v Mackie* [1979] 1 WLR 377 had been fulfilled, and drew the Court's attention to a discussion of those criteria in the textbook *Defamation Law and Practice* (Cox and McCullough, Clarus Press 2014).

16. They pointed to certain features of the office of the DPC and its investigations. It was established by law, namely by s. 9 of the Data Protection Act, 1988, and the Commissioner was obliged to decide the plaintiff's complaint under s.10(b)(ii) of the Data Protection Act, 1988 (as amended). If a breach of the legislation is found, the DPC is entitled to serve an enforcement notice on the data controller requiring that certain steps be taken. The DPC has broad powers including the right to appoint individuals to enter and inspect premises, to produce material, to copy material and to compel information. It was submitted that the question to be decided as between the parties was in the nature of a dispute between parties and that it affected the status of parties, and that the power was given for the benefit of the public. Although the DPC did not conduct adversarial hearings, the carrying out of an investigative or inquisitorial function may be sufficient to satisfy the relevant criteria and the defendants relied in particular on the decision in *Grey v Avadis* [2003] EWHC 1830 (QB). They submitted that the DPC was in a position to make a final determination subject only to an appeal to the Circuit Court, and that any steps required in an enforcement notice were also subject to an appeal to the Circuit Court. They submitted that in light of the above features, the only reasonable conclusion was that the DPC was exercising a judicial function sufficient for it be equated with a court for the purpose of absolute privilege under Common law and by extension under s.17 (1) of the Act of 2009, or for the purpose of s. 17(2)(g) of the same Act.

17. In the alternative, the defendants submitted that the letter was sent "during the currency" of the plaintiff's judicial review proceedings (the proceedings seeking to compel the DPC to investigate her complaint) and therefore that the complaint may also be viewed as having being made "in the course of" the plaintiff's proceedings for judicial review such that it falls under s.17(2)(g) of the Act in that regard.

18. The defendant also complained that the manner of pleading the defamatory imputation was inadequate and that:

> "the action is not sufficiently coherently pleaded to allow the defendants to know the defamatory imputation upon which the plaintiff sues".

They submitted that the plaintiff's claim would require further particularisation of meanings, if not full amendment of the statement of claim, in order for the defendants to deliver a defence.

The submissions on behalf of the plaintiff

19. In the first instance, the plaintiff referred the Court to the authorities in which it was stressed that the jurisdiction to strike out pleadings was one which should be exercised sparingly, including *Bula Holdings v Roche* [2008] IEHC 208, *IBRC v Purcell* [2014] IEHC 525, *Barry v Buckley* [1981] IR 306, *Sun Fat Chan* [1992] 1 IR 425 and *Salthill Properties Limited v Royal Bank of Scotland* [2009] IEHC 207.

20. The plaintiff in its written submissions cited *McKeogh v O'Brien Moran* [1927] IR 348 for the proposition that a statement irrelevant to and unconnected with the purpose of absolute privilege might destroy the privilege. However, it seems to me that the passage in the judgment upon which they relied must be read in the context that this was a judgment concerning the defence of qualified privilege rather than absolute privilege. This is also true of *Horrocks v Lowe* [1975] AC 135, which they also cited.

21. At the oral hearing, the plaintiff's primary submission was that, given the far-reaching nature of the defence of absolute privilege, a court would in due course have to engage in a careful balancing exercise as between Article 6 of the European Convention and s.17 of the Defamation Act, 2009, as pointed out in *Gray v Avadis*, in order to reach a determination on whether or not absolute privilege applied to the DPC investigation. It was submitted that this legal point had never arisen before, and was novel and potentially far-reaching in its consequences, and that it was clearly unsuited to a determination on a motion to dismiss.

Discussion in Cox & McCullough

22. In *Defamation Law and Practice* (Cox and McCullough, Clarus Press 2014) the authors discuss the defence of absolute privilege and s.17 of the Defamation Act, 2009. At paragraph 7-03, the authors comment as follows:-

> "The *extraordinary aspect* of the defence of absolute privilege, which makes it stand out from all other defences, is that neither the truth of the statement nor, more significantly, the publisher's belief in such truth are conditions for an application. Thus, as it is discussed at 8-02 *et seq,* whereas the defence of qualified privilege will be defeated by malice (which will arise if the publisher abuses the occasion of privilege – typically where s/he does not believe in the truth of the publication in question), there is no such qualification where the defence of absolute privilege is concerned. On such occasions it has been suggested that, in reality, and because of the importance of the occasion of publication, the publisher, if s/he can prove that publication arose on occasion of absolute privilege, has immunity from any legal consequences flowing from the publication. As was mentioned above, the rationale behind this *extraordinary protection is that publication occurs in a context which is regarded as so significant, from a public policy perspective, that there should be no fetter or chill on the speech* even though this may, on occasion, result in the

publication of a statement about an individual that is untrue and defamatory. In other words, it is an instance of the law saying that the needs of the individual in a particular case must be subservient to the needs of the public." (emphasis added, footnotes omitted)

23. The above comment therefore emphasises both the extraordinary nature of the defence of absolute privilege and the public policy rationale underlying the defence. Later in the same paragraph, the authors comment:-

> "It is, therefore, unsurprising that the number of circumstances in which the law recognises this absolute privilege is extremely limited".

24. In the same text, there is a detailed analysis of the criteria referred to in *Trapp v. Mackie* [1979] 1 WLR 377, where Lord Diplock said that amongst the relevant factors that should be considered are (1) the authority under which the body acted, (2) the nature of the question into which it was its duty to enquire, (3) the procedure adopted by it in carrying out the enquiry, and (4) the legal consequences of the conclusion reached by the tribunal as a result of its inquiry.

25. As regards the first two criteria identified, it seems to me unlikely that it would be disputed that they are fulfilled by the process at issue in the present case. More challenging is the third criterion, namely the question of the procedure being adopted. On the subject of this criterion, the authors comment at para 7-72 that:-

> "A body will more likely to be regarded as benefitting from the defence of absolute privilege if the procedures that it adopts resemble those used in courts",

citing *Trapp v. Mackie* itself, a number of other English decisions and the decision in *Desmond v. Riordan* [1999] IEHC 237 (a decision of the High Court in relation to the immunity attaching to coroners in Ireland). They continue:

> "This is both because of the simple fact that in following court procedures a body will more closely resemble a court…and also because of the reasons why absolute privilege attaches to court proceedings is that the stringencies of court procedures will mean that the harm to a good name that flows from the operation of the defence will be minimised.
>
> This does not mean that all of the panoply of procedures that are adopted by courts (administering an oath, compelling witnesses or awarding costs, for example) must necessarily be followed if a body is to attract the defence – though clearly if such procedures *do* apply they will be indicators of the fact that the body is sufficiently judicial in nature. On the other hand, the mere fact that a body is charged with the determination of a matter – even where it is obliged to act fairly in making such determination – will not *per se* mean that it can be regarded as a quasi-judicial body that will attract the defence of absolute privilege. So, for example, in *Higgins v Bank of Ireland*, O'Keeffe J implicitly held that statements made in the course of a

workplace disciplinary investigation would benefit from the defence of *qualified* privilege, nor was there any suggestion (nor does it appear to have been pleaded) that this was a situation to which the defence of *absolute* privilege would apply." (footnotes omitted)

26. Moving on to the fourth criteria, the consequences of the determination by the relevant body, the authors comment at para 7-74:

> "Whereas the fact that the body will make a binding determination on the relevant point is a strong indicator that it is sufficiently judicial in nature to be privileged, it is not a pre-requisite to such a conclusion. Thus, for example, a body was held to be a quasi-judicial tribunal in circumstances where it merely produced a report that enabled another party to make such a determination. On the other hand, a body that is engaged in a preliminary investigation into a matter, or is engaged in purely administrative and not judicial activity (for example, renewals of music or drinks licences) will typically not attract absolute privilege."

27. Later, at para 13-21, they say:-

> "In determining whether the procedure resembles that of a court of justice, due regard must be paid in modern conditions to the fact that the procedure of courts operating under the civil law may differ markedly from that usual under the common law. Furthermore, the fact the body has an investigatory or inquisitional function does not mean that it cannot be equated with a court for this purpose. That the body has the power to compel the presence of witnesses is very relevant and whether or not it holds its proceedings in public is a fact of great importance. But the procedure need not correspond exactly to that of a court of law, and the mere fact that a tribunal cannot compel witnesses to attend and give evidence, or that it has no power to administer an oath, or that it may exclude the parties and the public during the hearing for the purpose of conferring upon any question affecting its decision, or that it has its hearings in private and gives it finding and order publicly, or even that there is no oral hearing at all, the procedures being conducted on paper, is not conclusive as showing that its functions are not judicial. If the proceedings are otherwise sufficiently like those of a court, the mere fact that a party whose rights are in question is not personally before the tribunal will not make any difference to the question of privilege. The fact that the tribunal must have regard to the principles of natural justice in arriving at a decision does not indicate that it is to be regarded as performing a judicial function because many purely administrative decisions attract those principles." (footnotes and internal quotations omitted).

28. The authors also refer to the case of *Hasselblad (GB) v. Orbinson* [1985] QB 475 where the procedures of an investigation and adjudication by the Commissioner of the European Communities on a complaint of behaviour infringing Articles 85 and 86 of the EC Treaty were in issue and where the view was taken that the Commission was acting in a manner dissimilar to a court of justice.

The decision in *Gray v. Avadis*

29. The judgment in *Gray v. Avadis* [2003] EWHC 1830 (QB) considered whether or not absolute privilege applied to an investigation conducted under the auspices of the (English) Law Society, specifically the Office for the Supervision of Solicitors ("the OSS"). The plaintiff had instructed the defendant solicitor to represent him in family law proceedings, but the defendant ceased to act for the plaintiff and a complaint was made to the Law Society by the plaintiff. In two responses by the defendant solicitor to communications from the OSS, he said that the plaintiff suffered from mental illness. The plaintiff brought defamation proceedings, and the defendant brought a motion seeking to have the plaintiff's case struck out because it disclosed no reasonable grounds for bringing the claim and constituted an abuse of process. From paragraph 22 of the judgment onwards, the issue of absolute privilege was addressed by Tugendhat J. He quoted from *Trapp v. Mackie* [1979] 1 WLR 377 and *Roy v. Prior* [1971] AC 470 with regard to absolute privilege in judicial proceedings, and commented that these leading cases now needed to be considered in light of the European Convention on Human Rights. He said as follows at para 26:-

> "Immunities from civil liability have also now to be considered in the light of Article 6 of the European Convention of Human Rights. No submissions were made to me on this. Because the claimant has appeared in person, I have also considered for myself the decision in A v United Kingdom (Application no 35373/97) judgment 17 December 2002. That case concerned the absolute immunity or privilege protecting statements made in Parliament. The Court recognised (para 74) that such immunity can be compatible with Article 6 if conferring the immunity pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The Court held those conditions to be fulfilled in relation to the absolute privilege in issue."

30. He went on to examine the procedure adopted by the OSS and said that while it carried out an investigatory or inquisitional role not normally carried out in courts of justice, this was of little significance. He noted that it had the power to compel the production of documents, and that failure give an explanation might have made the defendant subject to the sanction of a refusal of a practicing certificate. He noted that the procedures adopted were designed to ensure compliance with standards of fairness which may be applicable in courts of law. He said that the possible legal consequences of the conclusion reached by the Society as a result of the inquiry would be indistinguishable from the consequences of a determination of a court of law insofar as they included a determination of the question at issue and relief in the form of compensation and costs. He noted that the proceedings were not being held in public but said that this was not essential and that courts did not always sit in public. He noted that there were no oral proceedings but again took the view that this was not essential since courts commonly proceed on written material alone. Commenting on the fact that the words complained of were not published to anyone other than officials of the OSS who would also hear the claimant's response to the allegation, he commented that this meant that "a remedy in the form of a public libel action may well be worse than the disease". He noted that the

plaintiff had submitted that, in courts of law, there is a sanction of the offence of perjury for false statements but he commented that there was also a sanction for giving false information to the Society and for a failure to comply with direction and he took the view that deliberately making false statements would also be regarded as misconduct by the tribunal. Taking into account all of those matters, he concluded that the plea of absolute privilege did apply in that context, that the plea of privilege was bound to succeed and that the plaintiff's action was bound to fail.

Decision

31. The defendants contend that the law is manifestly clear that absolute privilege, and not qualified privilege, applies to the allegedly defamatory communication in issue in these proceedings. Four different sources for absolute privilege were put forward by the defendants as applying to the present context of an investigation by the Data Protection Commissioner: (1) by virtue of the judicial review proceedings brought by the plaintiff; (2) at common law and as carried through by s.17(1) of the Act of 2009; (3) under statute by virtue of s.17 (2)(g) of the Act of 2009; and (4) under statute by virtue of s.17(2)(h) of the Act of 2009. As this is a motion to strike out the plaintiff's claim, the test to be applied by me is as set out in the authorities cited by the plaintiff. I must be confident that the plaintiff's claim cannot succeed and, in the circumstances of this case, this means that I must be satisfied that the law is clear that absolute privilege applies to the allegedly defamatory statements.

32. As regards the first source of absolute privilege put forward on behalf of the defendants, the judicial review proceedings, I am satisfied that there is, at the very least, an issue to be tried as to whether absolute privilege stems from this source. Indeed, it seems to me rather unlikely that it applies at all; because, although it is true to say that the defendants' letter of 21st August, 2017 was written while the judicial review proceedings were still live, and was prompted by the DPC's own letter of 11th August, 2017, and that both letters could be said to have arisen *as a consequence* of the judicial review proceedings, I think it unlikely that it could be said that the letter as written '*in the course of*' the judicial review proceedings. This is only a provisional view of course, as this is not the substantive hearing, but it certainly could not be said that the point would be decided emphatically in favour of the defendants.

33. As regards sources (2) and (3) put forward on behalf of the defendants - s.17(1) and s.17(2)(g) - it seems to me that the core issue for analysis is probably identical in each of those cases, namely whether or not the proceedings involved the performance of a "judicial function". Given the test I have to apply on this motion, it is only if the criteria for the performance of a judicial function are so clearly applicable to a DPC investigation that the plaintiff's claim should be struck out. As noted above, the analysis of whether proceedings involve the exercise of a judicial function is quite a complex exercise and involves the close examination of a number of variables. Further, given the far-reaching nature of absolute privilege insofar as it encompasses not only malicious statements but also statements unconnected with the proceedings, the Court needs to conduct the analysis in the shadow of Article 6 of the European Convention on Human Rights and the

authorities of the European Court of Human Rights to consider matters such as proportionality and whether a Convention-compliant interpretation suggests one particular interpretation over another. Further, the distinction between bodies falling under s.17(2)(g) and s.17(2)(h) would need to be teased out in order to decide whether statements made in the course of the DPC investigation attract absolute privilege (encompassing even statements made which are unconnected with the occasion of the privilege). Although I am persuaded that the defendants have many arguments to make on the applicability of absolute privilege arising either from common law, and carried through by s.17(1), or from s.17(2)(g), I am not satisfied that the conclusion to be reached is at the level of clarity for the claim to be struck out at this stage of the proceedings, given its far-reaching nature and its novelty. The defence of absolute privilege is, as Cox and McCullough observed in the quotation set out above, an extraordinary defence based upon considerations of pressing public policy which justify an extraordinary latitude being given to the speech interest over and above the interests of a defamed person. It seems to me that whether the defence applies to a statement in the context of the present case merits considerably greater legal argument and consideration.

34. I accept the point made by counsel on behalf of the defendants in his oral argument that this is not a case where facts need to be teased out at a substantive hearing in relation to the matter because the point raised is one of law rather than fact, but it does seem to me that it would be appropriate that it proceed to fuller legal argument in light of all relevant authorities. It may be that it would be suitable to be heard as a preliminary legal issue in due course, perhaps, but on such an application the test would not be the same as the one I now have to apply on a motion to strike out.

35. Finally I should say that there was little argument in relation to s.17(2)(h) but again it would seem to me that it is not so self-evident either that the statements made (a) fall within this category and/or (b) that the statements were ‘connected’ with the proceedings, such that the claim should be struck out on that basis. As noted above, the precise demarcation between statements falling with s.17(2)(g) and (h) of the Act of 2009 also needs considerable attention.

36. Finally, regarding the defendants’ submission that the plaintiff’s claim was inadequately particularised, this is not a basis on which the case should be struck out, as appropriate amendments can be made if necessary in due course and/or particulars can be sought; *Sun Fat Chan v Osseous Ltd.* [1992] 1 IR 425.

37. I therefore refuse the relief sought on the motion to strike out.