

BETWEEN

AB

PLAINTIFF

AND

WS, JOHN FLEMING, MAYO COUNTY COUNCIL, MINISTER FOR THE OFFICE OF PUBLIC WORKS, MINISTER FOR JUSTICE AND
EQUALITY, IRELAND AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 30th day of January, 2019

Background

1. The plaintiff, whose date of birth is 19 August 1983, alleges that between the period 1993 to 1999 she was subjected to severe sexual abuse by the first named defendant. This sexual abuse is alleged to have taken place in various locations including at the courthouse of a known location ("the courthouse").

2. The plaintiff alleges that at the material time the first named defendant was the key holder and caretaker of the courthouse. The third named defendant is sued in its capacity as owner and controller of the courthouse and employer of the first named defendant. In this capacity, the plaintiff alleges that the third named defendant was responsible and vicariously liable for the acts of the first named defendant.

Notices of motion

3. The third named defendant, in its notice of motion, claims the following reliefs:-

(i) an order pursuant to the provisions of O. 19, r. 28 of the Rules of the Superior Court dismissing the plaintiff's claim against the third named defendant on the grounds that the pleadings show no reasonable cause of action as against the third named defendant and is unsustainable in law and in fact; and

(ii) an order pursuant to the inherent jurisdiction of this Honourable Court dismissing the plaintiff's claim against the third named defendant on the grounds that it has no reasonable prospect of succeeding.

4. In response to this notice of motion, the plaintiff has issued her own notice of motion seeking an order pursuant to O. 40, r. 4 of the Rules of the Superior Courts and/or the inherent jurisdiction of the Court to strike out the third named defendant's grounding affidavit on the grounds that the affidavit relies exclusively upon hearsay evidence and is not confined to such facts as are within the knowledge of the deponent or within his ability to prove.

Applicable principles

5. In considering the third named defendant's motion, the Court has to examine the extent of the Court's jurisdiction to strike out proceedings in an action before it has come to trial, before any evidence has been heard, on the basis that the claim is unsustainable in law and has no reasonable prospect of success. This jurisdiction is an inherent jurisdiction but it also arises under the Rules of the Superior Courts ("RSC"). The Court also has to consider whether the third named defendant is entitled to rely upon the documentary evidence which it has exhibited.

6. Order 19, r. 28 of the RSC provides:-

"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement be entered accordingly, as may be just."

7. Order 40, r. 4 provides:-

"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, in which statements as to his belief, with the grounds thereof, may be admitted"

8. The jurisdiction of the Court to grant the relief being sought by the third named defendant is necessarily limited. This has been repeatedly emphasised in a number of authorities. In *Barry v. Buckley* [1981] I.R. 306, Costello J. stated at p. 308:-

"This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence"

9. In the instant case, the outcome is clearly not dependent upon the interpretation of a contract or agreed correspondence, rather the outcome depends upon the Court's assessment of the evidence to be given by witnesses during the hearing of the action. However, it does not automatically follow that the third named defendant is precluded from the reliefs sought herein. In a case such as this, I refer to the following passage of Clarke J. (as he then was) of the Supreme Court in *Keohane v. Hynes* [2014] IESC 66, where he states:-

"6.3 In like vein, Birmingham J., in *Burke & Anor v. Anglo Irish Bank Corporation PLC & Anor* [2011] IEHC 478, emphasised that a court cannot seek to resolve conflicts of fact in an application to dismiss as being bound to fail, but rather is required to accept the facts as deposed to on behalf of the plaintiff."

The jurisdiction of the Court under O. 19, r. 28 is limited to a close examination of the pleadings in the case. If, on the pleadings alone, it is clear to the Court that either the facts as pleaded do not give rise to a cause of action or the plaintiff could not prove the facts alleged, then the Court may make an order under O. 19, r. 28 RSC (see *Salthill Properties Limited v. Royal Bank of Scotland plc*

Consideration of issues

10. The third named defendant is not entitled to an order under O. 19, r. 28. It could not be said that the facts as pleaded in the statement of claim do not amount to a reasonable cause of action nor can I make a finding, at this stage, that the plaintiff will be unable to prove the facts she alleges.

11. The third named defendant's application relies upon the inherent jurisdiction of the Court and is grounded on the affidavits of Mr. John Condon, County Secretary of the third named defendant. Mr. Condon, who does not claim to have direct or first-hand knowledge of the facts alleged by the plaintiff, concerning the first named defendant's access to the courthouse, exhibits documentation from the records of the third named defendant. This documentation seeks to establish: -

(i) From November 1955 until her death in November 1997, at the age of 89, PC (sometimes referred to by two other names) was the caretaker of the courthouse employed by the third named defendant.

(ii) In May 1995 the third named defendant leased the courthouse to a company of which the first named defendant was the secretary.

(iii) In a letter dated 19 October 2000 the third named defendant appointed the first named defendant part-time caretaker of the courthouse with effect from 1 September 2000.

12. Mr. Condon exhibits an internal memo of the third named defendant, dated 11 October 2000, which reads: -

"[A]s you are aware, a vacancy currently exists for a part time caretaker in [the courthouse]. [The first named defendant], has expressed an interest in this part time vacancy.

Mr. Connelly has stated that he has been responsible for the maintenance of the courthouse for a considerable length of time on a voluntary basis and I consider it reasonable to agree to his request to regularise the ad hoc arrangement currently in place. Mr. Connelly's place of residence also makes him a suitable candidate for the position"

13. It appears to me that the reference to "Mr. Connelly" ought correctly have referred to the first named defendant. This would be consistent with the earlier documentation that had passed between the first and third named defendants.

14. Arising from this documentation, Mr. Condon claims that the first named defendant was not employed by the third named defendant in any capacity in 1994 or 1995 and that he was neither caretaker nor key holder of the courthouse. Mr. Condon further states in his affidavit:-

"11. While the late [PC] was the key holder, the premises were made available to members of the local community for community purposes. If, as alleged, the first named defendant entered the premises for unlawful purposes in 1994, he did so without the consent of the third named defendant and was trespassing."

15. In her replying affidavit, the plaintiff states:-

"7. [A]s is pleaded in the statement of claim, the first named defendant sought me out on multiple occasions and ordered me to accompany him to the courthouse. I would follow him there out of fear, wherein he proceeded to unlock the door to the courthouse and would then perpetrate these acts of sexual abuse against me inside the courthouse. On these occasions, I had the distinct impression that the first named defendant was expressly permitted to be present at the courthouse. He did not appear to me to be anxious or fearful that he would be discovered. It was clear to me on those occasions that the first named defendant knew that no one else would attend the courthouse who may catch him during these acts of abuse, and, therefore, I do not believe that he was trespassing on the said property..."

and: -

"8. In particular response to para. 8 of Mr. Condon's affidavit, wherein he alleges that the first named defendant was not employed by the third named defendant and was not either a caretaker or a key holder of the courthouse ... in the years 1994 and 1995, I say that it is specifically pleaded in the statement of claim that I witnessed the first named defendant unlock the courthouse door with his set of keys. I say that there is clearly a dispute as to fact in relation to the issue of whether or not the first named defendant was a key holder to the said courthouse at the time the incidents occurred."

16. As to the claim by the third named defendant that at the material time PC was the key holder and caretaker the plaintiff states:-

"10. ...I say that [PC] was an elderly lady who would have been approximately 85 or 86 years of age during the years 1994 and 1995 when I was assaulted by the first named defendant at the courthouse... While Mr. Condon alleges that [PC] was the key holder of the courthouse up until the month of her death in November 1997 at the age of 89 years, the claim does not prove that no other person, including the first named defendant, did not have the keys to the courthouse and, further, that there was no other person employed for the purpose of acting as caretaker and/or supplementing her role, providing cover during PC's holidays and/or sick days or undertaking the more laborious tasks involving heavy manual labour or maintenance issues which may not be appropriate to expect an elderly lady to carry out a loan. Further, it may be the case that PC was not in good health during these years and may not have been physically capable of carrying out all relevant caretaking duties, and in particular, the laborious tasks in the courthouse. I can say from my own observations PC was very feeble towards the end of her life and would have found it difficult to walk to the courthouse let alone carry out any caretaking duties there"

17. In a further affidavit, on behalf of the third named defendant, Mr. Condon states that the people who would have been directly involved in the management and maintenance of the courthouse had either died or retired or "by reason of a dim recollection are on the whole not in a position to assist". Mr. Condon goes on to state that, owing to the lapse of time, the maintenance of the proceedings is "unfair, unjust and contrary to the principles of natural and constitutional justice".

18. I would make a number of observations on these averments. Firstly, Mr. Condon appears to confirm that there are persons available to the third named defendant who can give evidence albeit that it may not be of much assistance. He neither identifies these people nor indicates the extent of their knowledge. Rather, Mr. Condon states that the records are the best available evidence.

Mr. Condon may well be correct in this but in the absence of an application to strike out the proceedings by reason of lapse of time, I cannot determine whether or not this is correct. Therefore, as matters stand, the third named defendant is seeking to rely upon hearsay evidence. In an application such as this, where the third named defendant is seeking orders which would bring the plaintiff's action to an end, I am satisfied that it is not permissible to rely upon hearsay evidence (see *Trafalgar Developments Limited, Instantania Holdings Limited & Ors v. Dmitry Mazepin & Ors* [2017] IEHC 721). Were it to be established that this hearsay evidence was the only evidence available to the third named defendant to defend the action, then different considerations would apply.

19. The plaintiff has deposed in her affidavit that she was sexually abused by the first named defendant who appeared to her to have unfettered access to a premises under the control of the third named defendant. As against this, the third named defendant has exhibited documentation which appear to show that at the relevant times the first named defendant was either not the caretaker or that the courthouse was leased to a third party and therefore not under the control of the third named defendant. Thus there is a conflict. Applying the principles which I have set out at paras. 8 and 9 above, I am satisfied that the third named defendant is not entitled to the relief sought.

20. The third named defendant advances a further ground upon which it seeks the Court to dismiss the plaintiff's action. The plaintiff alleges that the third named defendant is vicariously liable for the actions of the first named defendant. The third named defendant relies on the test now applied by the courts in finding an employer vicariously liable for his/her employee. This test, described as the "close connection" test, was outlined by the Supreme Court in *O'Keeffe v. Hickey, Minister for Education and Science, Ireland and Attorney General* [2009] 2 I.R. 302. In his judgment, Fennelly J., having extensively reviewed and analysed the law in other jurisdictions, referred to the decision of the Supreme Court of Canada in *Bazley v. Curry* (1999) 174 D.L.R. (4th) 45, (1999) 2 S.C.R. 534, wherein McLachlin J. stated: -

"The appropriate inquiry in a case such as this is whether the employee's wrongful act was so closely connected to the employment relationship that the imposition of vicarious liability is justified in policy and principle."

21. At p. 378 of the judgment, Fennelly J. held: -

"[243] 62. Ultimately, I am satisfied that it is appropriate to adopt a test based on a close connection between the acts which the employee is engaged to perform and which fall truly within the scope of his employment and the tortious act of which complaint is made."

22. The third named defendant submits, assuming that at the relevant time the first named defendant was a caretaker of the courthouse, that the serious acts of sexual abuse which the plaintiff alleges he perpetrated against her are not "closely connected" with the acts which he was employed to perform, thus a court could not impose vicarious liability on the third named defendant. This submission may turn out to be well founded but, at this stage in the proceedings, I cannot accept it without making findings of fact. In the absence of evidence, this Court is not in a position to make findings of fact. To support such a finding, there would have to be evidence as to the nature and extent of the caretaking duties and what contact, if any, the first named defendant would have had with children. Therefore, I will not grant the relief sought on this ground.

Conclusion

23. By reason of the foregoing, I refuse the relief sought by the third named defendant.