THE COURT OF APPEAL

Record No. 2015 518

Peart J.
Irvine J.
Mahon J.

Between/

Catherine Jules Thomas

Plaintiff/Appellant

- and –

The Commissioner of An Garda Síochána and The Minister for Justice, Equality and Law Forum, Ireland and The Attorney General

Defendants/Respondents

JUDGMENT of Mr. Justice Mahon delivered on the 6th day of day of July 2016

1. By order of the High Court (Hedigan J.), dated 6th October 2015 (perfected 7th October 2015), it was directed that certain issues arising in these proceedings be the subject of preliminary trial namely:-

> (1) Whether the plaintiff's claim was barred by operation of the Statue of Limitations and / or whether the claim should be dismissed for want of prosecution and / or for inordinate and inexcusable delay insofar as the said claim relates to matters touching upon and concerning the taking of a hair sample from the plaintiff in early 1997 including all alleged actions of the defendants associated therewith.
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> (2) Whether the plaintiff's claim is statue barred by operation of the Statute of Limitations and / or whether the claim should be dismissed for want of prosecution and / or for inordinate and inexcusable delay insofar as the said claim relates to matters touching upon and concerning the arrest and detention of the plaintiff on 10th February 1997 including all alleged actions of the defendants associated therewith.
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> (3) Whether the plaintiff's claim is barred by operation of the Statute of Limitations and/ or whether the claim should be dismissed for want of prosecution and / or for inordinate and inexcusable delay insofar as the said claim relates to matters touching upon and concerning the allegation that the defendants were the source of certain "rumours" alleged to have been in circulation as pleaded at para. 9 of the Statement of Claim herein.
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> (4) Whether the plaintiff's claim is barred by operation of the Statute of Limitations and / or whether the claim should be dismissed for want of prosecution and / or for inordinate and inexcusable delay insofar as the said claim relates to all and any phone calls allegedly made by the defendants to the plaintiff as pleaded at para. 9 of the Statement of Claim herein.
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> (5) Whether the plaintiff's claim is barred by operation of the Statute of Limitations and / or whether the claim should be dismissed for want of prosecution and / or for inordinate and inexcusable delay insofar as the said claim relates to the allegations that the defendants inappropriately offered substantial sums of monies and other inducements to Martin Graham as pleaded at para. 9 of the Statement of Claim herein.
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> (6) Whether the plaintiff's claim is barred by operation of the Statute of Limitations and / or whether the claim should be dismissed for want of prosecution and / or for inordinate and inexcusable delay insofar as the said claim relates to the search of the plaintiff's home by the defendants on 21st September 2000, including all alleged actions of the defendants associated therewith.
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> (7) Whether the plaintiff's claim is barred by operation of the Statute of Limitations and / or whether the claim should be dismissed for want of prosecution and / or for inordinate and inexcusable delay insofar as the said claim relates to matters touching upon and concerning the arrest and detention of the plaintiff on 22nd September 2000 including all alleged actions of the defendants associated therewith.

2. The costs of the application were reserved to the hearing of the preliminary issue.

3. It was further ordered that *any application by the plaintiff to amend the pleadings herein be issued within two weeks of the date hereof*. Such an application was brought within the time specified and is currently awaiting determination before the High Court.

4. This is the appellant's appeal against the said order and the judgment of Hedigan J. dated 9th October 2015 delivered *ex tempore* following extensive oral submissions from both parties.

5. The background to these proceedings is, in general terms, well known publically and is shared to a significant extent with separate High Court proceedings as between the appellant's partner, Mr. Ian Bailey, and the same defendants. Those proceedings concluded unsuccessfully for Mr. Bailey in the High Court in 2015 after a lengthy jury trial and are currently the subject of an appeal to this court. It is nevertheless appropriate that a brief account of the salient facts of the plaintiff's claim which commenced by way of plenary summons on 16th May 2007, be set out.

6. The appellant claims that she was maliciously and wrongfully arrested, initially on 10th February 1997, and subsequently on 22nd September 2000, and 22nd September 2002, on suspicion of the murder of Sophie Tuscan du Plantier on 23rd December 1996. Ms. du Plantier was a French national with a holiday home near Schull in Co. Cork in which her body was discovered. The appellant's home was, and remains, in the same general area. The appellant's arrest and interrogation, which she maintains was conducted in an aggressive and intimidatory matter, was closely associated with the arrest and interrogation of her partner, Mr. Bailey, whom the

gardaí suspected was implicated in Ms. du Plantier's murder. Neither the appellant nor Mr. Bailey has ever been charged with the murder, or indeed, with any offence connected therewith.

7. The appellant claims damages (including aggravated or exemplary damages) for *inter alia* unlawful arrest, false imprisonment, conspiracy, personal injury and breach of her constitutional rights.

8. The respondents have delivered a full defence. They include in their defence a plea that the appellant's claim is barred by virtue of the operation of the Statute of Limitations, and that the appellant is guilty of inordinate and inexcusable delay and / or laches in and about the institution and prosecution of these proceedings. Essentially, these are the issues which are the subject of the High Court order of 6th October 2015.

9. The application to amend the appellant's statement of claim, which is currently awaiting determination in the High Court may, if fully successful, alter and extend the appellant's claims as against the respondents. This court has been advised that the appellant's application to amend her statement of claim is being fully contested.

10. The appellant's primary objection to the order directing that certain preliminary issues be tried is based on her contention that:-

> (a) The conspiracy alleged was, and is, ongoing.
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> (b) The resolution of the conspiracy claim is dependant upon a full plenary hearing of the evidence related to all, or almost all, the issues arising in the proceedings, and it is therefore inappropriate that the trial of such preliminary issues be ordered.
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> (c) For the reasons articulated in the preceding para. (b), the determination of the directed preliminary issues will have no positive or practical consequences for either the appellant or the respondents irrespective of the outcome therefrom.
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> (d) It will not be possible to agree facts to facilitate a preliminary trial of issues, such is the nature and complexity of those issues, and the evidence required to be heard to determine them.

11. The appellant contends that the issue as to whether all or most of the appellant's claim may be statute barred will be impossible to determine in the absence of a full hearing of almost the entire case. Essentially, this contention is based on the fact that the main issues in the proceedings are not what might be described as "single date" incidents, but rather, they relate to matters spread out over time, and continuing, over many years, and, indeed, in some respects, up to the present day. While the appellant denies that her proceedings are statute barred she is adamant that the issue as to whether or not they are statute barred can only be determined by a full and extensive hearing of evidence such as would, if tried as a preliminary hearing, result in no time or cost saving.

12. The appellant also maintains that a necessary pre requisite to the trial of preliminary issues as ordered by the High Court, namely that it be undertaken in the context of agreed or established facts is impossible to satisfy. They point to the decision in *Tara Exploration and Development Company Limited v. Minister for Industry and Commerce* [1975] I.R. 242, and the judgment of Kenny J. when he dismissed the defendant's application pursuant to O. 34, r. 2 for an order that certain questions of law be determined as a preliminary issue, because the proposed questions could not be answered without reference to the relevant facts, and these were still undetermined.

13. Kenny J.'s judgment in *Tara Exploration* was approved by the Supreme Court. In his judgment, O'Higgins C.J. stated:-

> *"The infrequent use of this procedure may be explained by the restricted field in which it can operate. First of all, there must be a question of law which can be identified amongst the issues in the action. Further, this question of law must be such that it can be decided before any evidence is given. If special facts have to be proved, or if facts are in dispute, the rule does not apply. In addition, it must appear to the court to be convenient to try such question of law before any evidence is given. This will involve a consideration of the effect on other issues in the case and whether its resolution will reduce these significantly, or shorten the hearing. Convenience in this respect must also be considered in the light of what appears fair, proper and just in the circumstances."*

14. The appellant heavily relies on the judgment of McKechnie J. in *Champion v. Tipperary County Council* [2015] IESC 79 as authority for the appropriate principles governing the trial of a preliminary issue and which were outlined in that judgment as follows:-

> *(i) The caution which I have urged as being appropriate when deciding whether or not to adopt the preliminary process stems from litigation experience which shows that it may be very difficult in some cases to predict in advance of the hearing which facts might be critical in determining the issues which they potentially give rise to. The same problem may even exist as to what the established facts mean, either in a primary or secondary sense. Whilst the various procedural tools of pre trial investigation are designed to eliminate differences in this regard and insofar as possible to eliminate them, nevertheless the evidence of witnesses, even that as anticipated, frequently gives rise to some variations even in the most thoroughly prepared of cases.*
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> *(ii) From another perspective, sometimes the reliefs claimed and the issues of law involved, when discussed at trial, may give rise to the necessity to further explore a factual context which previously might not have been considered as relevant. Hence, the necessity in order to avoid those difficulties, for certain well established certainty on the factual situation, before a point of law under the preliminary process can be safely dealt with. The most frequent example given of the type of issue which confidentially can be disposed in this way, is one arising under the Statute of Limitations (Delaney and McGrath, 3rd Edition, para. 14.13). Even though, however, such may be problematic, if for example, some controversy exists with regard to a person's state of knowledge. Whilst undoubtedly there are certain issues which appropriately can be disposed of in this way, nonetheless there will be many or others which cannot be. Therefore, careful consideration must be given to each such issue, as raised.*
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> *(iii) These views are also well supported by authority, an example of which is to be found in the judgment of Kenny J. in Tara Exploration (High Court) where the learned judge said at p. 249:-*
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> > *"When this procedure is adopted the answers to the questions of law usually have to be qualified in so many ways that they do not lead to expedition or, indeed, to clarity. Answering the questions may be an interesting academic*

exercise but the questions of law which have to be decided are usually conditioned by the facts."

(iv) A more recent expression of the necessity for prudence in this regard is to be found in the judgment of Hardiman J in BTF v. The DPP [2005] 2 ILRM 367, where at p. 565, the learned judge stated:-

> *It is often a difficult and delicate decision as to whether to try a particular issue as a preliminary matter. In a case where a point is raised which in and of itself and without regard to anything else may terminate the whole proceedings, clearly a strong case can be made for its trial as a preliminary issue. The classic example is whether the Statute of Limitations is pleaded. In other cases, however, the position may be much less clear."*

(v) In addition, I respectfully agree with para. 14.3 of Civil Procedure in Superior Courts Delaney and McGrath (3rd Ed.), where the authors point out that such a procedure normally "..will only be ordered in limited circumstances where a discreet issue or issues arise in proceedings that can be conveniently tried by reference to agreed facts and the determination of which may dispose, or substantially dispose, of the entire action".

(vi) All of these statements and observations can therefore betaken as inviting the court, which is asked to provide for a preliminary issue, to evaluate the underlying circumstances with care, and to ensure as far as possible that any order so made will ultimately satisfy the purposes which underpin the rules and practices in this regard.

(vii) Finally, in accordance with Article 34.4.3 of the Constitution, an appeal can be taken to this court from an order of the High Court on any application seeking the trial of a preliminary issue. This right has now been modified following the passing of the 33rd Amendment of the Constitution and the enactment of the Court of Appeal Act 2014, neither of which apply to this case. As the making of such an order is discretionary in nature, this court when exercising its appellate jurisdiction, as with all similar orders, will give due and proper respect to the decision made by the trial judge and the reasons therefore, even where that decision has been arrived at solely on affidavit evidence. The situation might be different if for example the High Court had a type of policy by which such applications were determined; that is not the situation in the instant case. Subject however to that consideration of influence this court can substitute its own views for those of the High Court, if it thinks it appropriate or necessary to do so (in the goods of Morelli, deceased: Vella v. Morelli [1968] 1 I.R. 11)

15. Provision for a trial of a preliminary issue in proceedings is to be found in Orders 25 and 34 of the Rules of the Superior Courts. There is little difference between the two, other than that Order 25, r. 2 is couched in more general terms than Order 34, r. 2.

16. Order 25, r. 2 provides:-

> *"If, in the opinion of the Court, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court may thereupon dismiss the action or make such other order therein as may be just."*

17. Order 34, r. 2:provides-

> *"If it appear to the Court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."*

18. Essentially, the purpose behind the procedure for determining a preliminary issue is to save time and costs, in the interests of both parties, and the administration of justice generally. In this case the issues in the proceedings are complex. They cover many years and their resolution will require evidence from many witnesses in addition to evidence relating to documents and communications between different people including the gardaí. A full hearing of these issues will be both lengthy and costly. It is not surprising therefore that the respondents, faced with such complex lengthy and costly proceedings, would seek to identify legal issues suitable for determination by way of preliminary trial in circumstances where such determination might save time and money.

19. Undoubtedly, in these proceedings, a crucial issue, if not the crucial issue, is the Statute of Limitations and the extent to which the proceedings, or significant aspects of the proceedings, may be statute barred.

> *20. There is, in general terms, a judicial apprehension to direct the trial of a preliminary issue in circumstances where, because of the complexity of the issue or the extent of evidence necessary to resolve it, or for some other reason, there is a risk that little time will be saved in the process. In Windsor Refrigeration Co. Ltd. v. Branch Nominees Ltd. [1961] Ch 375, Lord Evershed M.R. observed that:-*

"..The course which this matter has taken emphasises as clearly as any case in my experience has emphasised, the extreme unwisdom - save in very exceptional cases - of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round."

21. This observation was echoed by Clarke J. in *Cork Plastics (Manufacturing) v. Ineos Compound U.K. Ltd.* [2008] IEHC 93, when he said:-

> *"Experience has shown that the formal separation out of a preliminary issue can often make the apparent shortest route, the longest way home."*

22. In *BTF v. Director of Public Prosecutions* [2005] 2 ILRM 367, the Supreme Court reversed the decision of the High Court to try the issue of delay as a preliminary issue. In his judgment, Hardiman J. stated:-

> *"It is often a difficult and delicate decision as to whether to try a preliminary issue as a preliminary matter. In a case where a point is raised which in and of itself and without regard to anything else may terminate the whole proceedings, clearly a strong case can be made for its trial as a preliminary issue. The classic example is whether the Statute of Limitations is pleaded. In other cases, however, the position may be much less clear*

23. In this case the Statute of Limitations issue is clearly of great significance. Senior counsel for the respondents accepted that the

trial of the preliminary issues as directed by the High Court might be redundant if the application to amend the pleadings is entirely successfully. He contended, however, that the direction for the trial of a preliminary issue was an appropriate order to make at the time of the respondent's application to the High Court, as at that point in time, no order permitting the amendment of the appellant's pleadings had been made, and indeed a notice of motion seeking such amendment had not even been served. Counsel for the appellant observed that at the time the application to the High Court was made, and in the course of the hearing of that application, it was clear that an application to amend the pleadings was imminent.

24. In the course of oral argument before this court, the question arose as to whether the term "pleadings" includes such further and better particulars of a claim as may later be delivered by a plaintiff. In this regard counsel for the appellant maintained that the order of Hedigan J. refers only to the facts as pleaded in the Statement of Claim, and that it was unjust to exclude the detailed particulars which were subsequently furnished.

25. Order 125, r. 1 of the Rules of the Superior Courts defines pleading as *including "an originating summons, Statement of Claim, defence, counter claim, reply, petition or answer"*.

26. In *Cooney v. Browne* [1985] I.R. 185 Hamilton J. (as he then was), referred to O. 19, r. 6(1) of the Rules of the Superior Courts which state:-

> *"A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered upon such terms, as to costs and otherwise, as may be just."*

27. Hamilton J. (as he then was):-

> *"The ordinary use and purpose of particulars is to define the issues between parties to any action or proceeding and thereby to prevent either party being taken by surprise and incidentally to limit as much as possible the length and expense of trials. Each party is entitled to know precisely what case the other party is going to make at the trial, and be enabled to prepare accordingly. It is, as stated in Gatley on Libel and Slander, 6th edition, p. 1105, an accepted rule that a party is entitled to an order for particulars only for the purpose of ascertaining the nature of his opponent's case that he has to meet, and not for the purpose of ascertaining the evidence by which his opponent proposes to prove it."*

28. In Civil Procedure in the Superior Courts (3rd Edition) (Delaney and McGrath), it is stated at p. 65:-

> *"In certain instances, the rules require a party to expand upon the bare material facts on which his claim or defence is based and provide particulars which clarify the nature of the case which he is making."*

29. This publication also states (at p. 278) that:-

> *"Any particulars furnished must fall within the four corners of the relevant pleading and, while they can clarify and elaborate upon the pleading, they cannot amplify or alter any claim made therein (Fahy v. Pullen [1968] IO2 ILTR81). If a party wishes to do this, then he will have to amend the underlying pleading."*

30. Particulars are not Pleadings. They will, however, often be inextricably linked to the extent that Particulars may assist in defining and explaining in greater detail the matters pleaded in the Statement of Claim. A failure to include a claim in the pleadings cannot be rectified by the later submission of Particulars. While it is a matter for decision in each individual case, a Reference in Particulars to a claim not pleaded in the Statement of Claim may assist a plaintiff in persuading a court to permit a subsequent amendment of the Statement of Claim.

31. A direction to try a particular matter by way of the preliminary issue procedure is an order made in the ordinary course of the management of litigation. While an appellate court retains the jurisdiction to review such directions and orders, it is, in general terms, slow to do so, and will only do so in the face of compelling reasons.

32. In the case of *Irish Life and Permanent plc and in the matter of the Credit Institutions (Stabilisation Act) 2012* [IESC 32] Clarke J. stated:-

> *"Both the Minister and ILP place reliance on the undoubted jurisprudence of this Court to the effect that an appellate court should be slow to interfere with case management directions made by the court of first instance. See for example P.J. Carroll & Co. Ltd. v. Minister for Health and Children [2005] 1 I.R. 294 and Dome Telecom Ltd. v. Eircom Ltd. [2008] 2 I.R. 726. While P.J. Carroll concerned case management in the Commercial List and Dome Telecom related to case management in the Competition List it seems to me that the general point made in both of those cases applies to any case which is being case managed either on a formal or informal basis. Case management only works if there is broad adherence to the directions given by the Court. The trial court must retain a very large measure of discretion over the directions which are appropriate and the measures to be adopted in the event of failure to comply. There would be no reality to the achievement of the undoubted advantages which flow from case management if this Court were, on anything remotely resembling a regular basis, to entertain appeals from parties who were dissatisfied with either the precise directions given or orders made by the Court arising out of failure to comply."*

33. Clarke J. also stated:-

> *"However, it seems to me that the test which should be applied by this Court in deciding whether to entertain an appeal against directions which concern the timing of the filing of documents necessary to allow the case to go ahead or the timing of the trial itself must involve a high threshold. Ordinarily, it would seem to me that it would be necessary for this Court to be satisfied that the relevant measures under appeal created a substantial risk of significant procedural unfairness coupled with the likelihood that no remedial action could be put in place either by the trial judge or by this Court on appeal which would have the effect of significantly remedying any unfairness which might be demonstrated to have occurred."*

34. Lord Roskill, in his judgment in *Ashmore v. Lloyds* [1992] 1 WLR 446, at pp. 448/9, said:-

> *"In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see that they are tried as expeditiously and as inexpensively as possible.*

> *It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only permitted to use so much of the trial judge's time as is necessary for the proper determination of the relevant issues."*

35. One of the criticisms made of the High Court order in this case is that the order made is likely to be rendered redundant if the application to amend the pleadings is ultimately successful. This may well be the case in the event that the application to amend the pleadings is ultimately successful, or largely successful. However, in that event, there is nothing to prevent a further application being made to the High Court to review, alter or amend the order of 6th October 2015 in the light of any permitted alternation or amendment of the Statement of Claim. The outcome of any such application may be a decision on the part of the respondents to abandon their right to the trial of any preliminary issue and to instead permit the action proceed to a full hearing in the usual way. Indeed, counsel for both parties and Hedigan J. contemplated such a possibility in the course of the following exchange at the conclusion of the hearing in the High Court:-

> *'Mr. Ó Braonáin S.C. My view, it would be better for any application to amend the pleadings to precede the hearing of the cases.*
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> *Hedigan J.: Okay, I can see the sense of that.*
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> *Mr. Lynn S.C: I have no difficulty with that.*
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> *Mr. Ó Braonáin S.C.: It is perhaps in ease of the plaintiff to say that, but I think that that is the position rather than obtaining for instance a determination on the issues and then to find that the pleadings are amended thereafter.'*

36. Hedigan J., having heard the detailed submissions made to him, exercised his discretion in directing a preliminary trial of certain issues. He did so with the considerable benefit of having heard detailed evidence over a prolonged period in Mr. Ian Bailey's action, a case which in broad terms and in many respects, involved similar evidence to the appellant's case, and also with the knowledge of a wide range of other relevant matters as a result of the fact that he "case managed" both actions. Thus Hedigan J. was particularly well placed to assess the likely benefit of directing the trial of the issues as sought by the respondents. As was stated by this court in *Collins v.The Minister for Justice* [2014] IECA 27 and MacMenamin J. in *Lismore Builders Limited (in receivership) v. Bank of Ireland Finance Limited* [2014] IESC p. 6) an appellate court should, in such circumstances, accord due deference to the decision of a trial judge made in the exercise of his or her discretion.

37. I would therefore dismiss the appeal.