THE HIGH COURT

[RECORD NO. 2015 8265 P]

BETWEEN

DENIS O'BRIEN

PLAINTIFF

AND

RED FLAG CONSULTING LTD., KARL BROPHY, SEAMUS CONBOY, GAVIN O'REILLY, BRID MURPHY AND KEVIN HINEY

DEFENDANTS

JUDGMENT of Ms. Justice O'Regan delivered on Thursday the 22nd day of March, 2018

Issues

1. The within matter came before the court on the 13th and 14th March, 2018, pursuant to a notice of motion on behalf of the plaintiff, bearing date the 29th January, 2018, wherein the plaintiff seeks an order pursuant to O. 15 r. 14 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court, joining Mr. Declan Ganley as a co-defendant and further seeks an order pursuant to O. 28 r. 6 of the Rules of the Superior Courts and/or the inherent jurisdiction permitting the plaintiff to amend the plenary summons and statement of claim issued herein, respectively dated the 13th October, 2015 and the 4th December, 2015.

Issue of joinder of Mr. Ganley

2. The thrust of the existing proceedings as against the existing defendants is to the effect that the defendants together with an unnamed client commissioned or compiled a report or dossier and undertook other activity with intent to injure the plaintiff. The plaintiff claims that the activity amounted to a conspiracy comprising both lawful conspiracy and unlawful conspiracy. In replies to particulars of the 8th February, 2016 the plaintiff confirmed that the unlawful conspiracy arises because of alleged publication of statements appearing in Schedule 2 of the statement of claim, namely defamation. There are several affidavits before the court; the principal on behalf of the plaintiff being that of Mr. Diarmuid Ó Comháin, sworn on the 8th December, 2017. The deponent is the plaintiff's solicitor. In para. 4 of the said affidavit, the deponent states that the plaintiff has until the recent past been unaware as to the identity of the client of the defendants. At para. 6 the deponent states that the information grounding the application to join Mr. Ganley was not provided to the plaintiff until the 13th October, 2017. In an affidavit of Mr. Colm Keaveney of the 4th December, 2017, at para. 2 thereof, he states that he believes that the client engaged by the defendants to prepare the relevant dossier referred to in the statement of claim is Mr. Declan Ganley.

3. Order 15, r. 14 provides that:

> *"Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court at any time before trial by motion or at the trial of the action in a summary manner."*

In O. 15 r. 13, it is provided

> *"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" inter alia*, the joinder of any party whose presence before the court *"may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter."*

4. Laffoy J. in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd* [1998] 2 IR 519, interpreted O. 15 r. 13 to the effect that the provision requires the plaintiff to demonstrate that he has a stateable case against the proposed new defendant and the proper approach is to determine whether it is a stateable case on the basis of the plaintiff's version of the disputed facts.

5. Clarke J. stated in *Cunningham v. Springside Properties Ltd. (In Receivership) & Ors* [2009] IEHC 454 that the joinder application will ordinarily be granted except where prejudice may occur to either the existing parties or the proposed new defendant.

6. Insofar as a proposed new defendant might claim that the asserted claim against the new defendant is statute barred, Clarke J. stated in *Hynes v. The Western Health Board* [2006] IEHC 55 that the court should ask itself whether the claim as against the proposed defendant is clearly statute barred. If there is any doubt whatsoever about that fact then the defendant should be joined. In that case, Clarke J. also stated that the prior matter *O'Reilly v. Granville* [1971] IR 90 was authority for the proposition that the court should not enter into an enquiry whether a claim may or may not be statute barred during the course of a joinder application.

7. The existing defendants remain neutral as to the joinder of Mr. Ganley.

8. Mr. Ganley has sworn an affidavit bearing date the 21st February, 2018, and at para. 6 thereof he says that he is not the client who engaged to the defendants.

9. Although, therefore, there is a dispute as between the parties as to whether or not Mr. Ganley is in fact the client referred to in the existing proceedings, nevertheless following on Laffoy J.'s judgment in *Allied Irish Coal Supplies Ltd*. aforesaid, insofar as this joinder application is concerned, the disputed facts must be resolved in favour of the plaintiff.

10. Mr. Ganley's resistance of the joinder is also based upon the fact that it is asserted that the entirety of the existing claim is based in defamation and in this regard reference is made to the comment of Ryan P. in *O'Brien v. Red Flag Consulting Ltd.* [2017] IECA 258 at para. 88 of the Court of Appeal judgment between the instant parties of the 13th day of October, 2017 to the effect:

"*This is really a case of defamation…*" and the defamation action is statute barred. Mr. Ganley relies on the time limit provided for by s. 38 of the Defamation Act, 2009, which in turn amended s. 11(c) of the Statute of Limitations 1957 to the effect that an action in defamation must be brought within a period of one year from the date of accrual of the cause of action or within a period of two years *inter alia* subject to liberty of the court. Mr. Ganley also relies on s. 11(6) of the Civil Liability Act 1961 to the effect that for the purposes of any enactment referring to a specific tort an action for a conspiracy to commit that tort shall be deemed to be an action for that tort. He argues therefore that any action in conspiracy (whether lawful or unlawful) is based upon *inter alia*, the tort of defamation in the within proceedings, and the two year period contemplated by the amendment created in the Defamation Act,

2009, expired at the latest by October, 2017.

11. The plaintiff, however, counters that s. 71(1) of the Statute of Limitations 1957 allows for an extension of time, where, *inter alia*, the action is based on the fraud of the defendant or his agent and the period of time would then not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. The plaintiff refers to a series of English cases dealing with the meaning of similar legislation in England on the concept of fraud and suggests what is contemplated is equitable fraud. Earlier cases in England required a special relationship between the two parties concerned however it appears that this special relationship was dispensed with in *King v. Victor Parsons & Co*. [1973] 1 WLR 29.

12. Mr. Ganley counters that there is no evidence that the special relationship aspect of the matter has been dispensed with in Ireland, however in *McBain v. McDonald* [1991] 1 IR 284, Morris J. was satisfied that the effective fraud could occur by stealth or silence or hiding the fact from the plaintiff and he adopted in the main the approach taken by Lord Denning in *King v. Victor Parsons*, aforesaid.

13. I am satisfied on the basis of the foregoing that there must be some doubt as to the application of the statute of limitations as against Mr. Ganley, therefore pursuant to the judgment of Clarke J. in *Hynes*, aforesaid, it is appropriate to accede to the request of the plaintiff to join Mr. Ganley as a co-defendant in the within action.

Issue of amendments to the existing pleadings

14. The substance of the proposed amendments are comprised in paras. 16(a) and 16(b) of the proposed amended statement of claim exhibited in the affidavit of Mr. Ó Comháin on the 8th December, 2017. The existing defendants are resisting the inclusion of s. 16(a), however have adopted a more neutral view as to the inclusion of para 16 (b).

15. Under O. 28 r. 6 of the Rules of the Superior Courts it is provided that application for leave to amend may be made by either party to the court before or at the trial of the action and such amendment may be allowed upon such terms as to costs or otherwise as may be just.

16. Order 28 r. 1 provides that the court may at any stage of the proceedings allow either party to amend in such manner and on such terms as may be just and all amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

17. According to Delany and McGrath on *Civil Procedure in the Superior Courts*, 3rd Ed., at para 5-153, there is a reluctance by the courts to abridge the constitutional right of a party to litigate and to have access to the courts by shutting him out from making the case he wants to make and accordingly a party will generally be entitled to amend his pleadings so as to achieve this provided prejudice is not suffered by the opposing party (see also *Cropper v. Smith* [1884] 26 ChD 700).

18. Both the plaintiff and the defendants refer to *Croke v. Waterford Crystal Ltd*. [2005] 2 IR 383 in support of their respective positions on the amendment issue. In that case the Supreme Court permitted the plaintiff to amend his claim against the first named defendant because the amended claim (based in fraud) had implicitly been made against the first named defendant from the outset and therefore it was appropriate for the plaintiff to make those claims in an explicit manner. However, the Supreme Court refused to allow the amendment in relation to the second named defendant because the original proceedings did not contain any factual basis to support a claim in fraud. Therefore, the claim as against the second named defendant would be radically altered by the inclusion of the amendment. Geoghegan J. referred to the rule as being a liberal rule, and he further indicated when refusing the amendments as against the second named defendant that having regard to the pleadings the plaintiff had not put forward any factual basis whatsoever to support a fraud of any kind as against the second named defendant. Geoghegan J. made specific reference to the statement of claim and replies to particulars.

19. Both parties also referred to the judgment of Clarke J. in *Woori Bank v. KDB Ireland Ltd.* [2006] IEHC 156. This case concerned an application by the defendant to amend its defence. During the course of his judgment Clarke J. referred to the Supreme Court decision in *Croke*, aforesaid, which supports the proposition that in an amendment application the principle to be considered was to the effect that the pleading should be amended so as to ensure the real questions of controversies between the parties should be determined in litigation provided same did not cause prejudice to the other party. Clarke J. considered it important to recollect that a party does not require any leave of the court to formulate its pleadings in any matter it chooses in the first place and such a party has a very wide discretion as to the manner in which it may plead its case. Accordingly, the starting point for consideration of whether or not to allow the amendment should be to have regard to the fact that the party could have included the plea in the first place without requiring leave from the court and prejudice needs to be seen against this background. The relevant prejudice must stem from the belated alteration of the pleadings rather than the presence, if allowed, of the amendment itself. At para. 5.2 of his judgment, Clarke J. indicated that a similar approach should be adopted by the court in respect of amendments to pleadings as applies in relation to the joinder of a further party. Clarke J. stated that the court should lean in favour of allowing an amendment if in the words of *Hynes*, it is otherwise appropriate to do so, unless it is manifest that the issue sought to be raised by the amended pleading must necessarily fail.

20. In the case before him, Clarke J. indicated that it did not appear to him that he could impute at that stage any knowledge *inter alia* which might be attributed to the plaintiffs although open to doubt, he felt it could not be said, under any circumstances, such knowledge could not provide a defence to the defendant. Accordingly, Clarke J. concluded that the issue sought to be raised in the amended defence would not be considered one that was bound to fail. The plaintiffs had objected to the amendment on the basis of much of the basis for the proposed defence was based on hearsay. In this regard, the court held that if it were manifestly clear that the defendant had no admissible evidence available to substantiate its proposed defence the outcome might be different. However, Clarke J. was not satisfied that no such evidence might be available and accordingly was not satisfied that the amendments were bound to fail. The fact that it may be difficult for the defendant to sustain the ground of the defence did not take away from the contention on behalf of the defendant that the defence nonetheless remains open as a possibility and therefore is not bound to fail.

21. In resisting the amendment application, the defendants point to the limited evidential basis to support the amendment sought and suggests effectively that the factual basis for the amendment is tenuous and therefore the application should be refused. The plaintiff relies on the textbook of Delaney and McGrath, aforesaid, in countering this argument, including the Supreme Court judgment in *O'Leary v. Minister for Transport, Energy and Communications* [2001] 1 ILRM 132. That case concerned an appeal from the High Court where an amended application was refused. In her conclusion, McGuinness J. stated: -

> *"If the Applicant is permitted to amend his points of claim as sought by him he faces very great difficulties in establishing a claim of conspiracy. Nevertheless, the allegations which have been made on affidavit are of a very serious nature and cannot, it seems to me, merely be dismissed as being frivolous or vexatious. On balance it appears to me that to refuse to permit the Applicant to pursue this claim would be to do him an injustice."*

22. The plaintiff also refers to the judgment of Geoghegan J. in *Croke*, aforesaid, where an assessment as to whether or not to allow the amendments was based on the pleadings as opposed to an assessment of the affidavit evidence before the court.

23. The defendant argues that the amendments contained in para. 16(a) of the proposed statement of claim are radically different to the claim in the existing statement of claim and therefore in accordance with *Croke*, the amendment should not be allowed – the defendants liken the within amendments to the position of the second named defendant in the *Croke* judgment. On the other hand, the plaintiff asserts that the plaintiff's position and the amendments sought are in fact more akin to the position of the first named defendant in *Croke* (where the amendments were allowed) on the basis that the allegations of misconduct on the part of the defendants comprised in the original statement of claim were similar or akin to the misconduct now comprised in para. 16(a) and therefore the amendment should be allowed.

24. The defendants further complain that the necessary particulars are not included in the proposed amendment and therefore this comprises an additional reason why the amendments should not be afforded. The plaintiff counters that by reference to the exchange of emails attached to and incorporated within the proposed amended statement of claim, particulars are contained to identify dates, words spoken, actions taken and the purpose thereof, such detail amounting to sufficient particulars.

25. The amendment incorporated in proposed para. 16(b) is to the effect that in furtherance of the asserted conspiracy the defendants engaged in a campaign of briefing politicians and journalists with material with the predominant intention of injuring and/or causing loss to the plaintiff. The defendants suggest that the essence of this claim has already been made and hence their neutral position with regard to the amendment.

26. The proposed amendment at para. 16(a) relates to a party who was possessed of information which it is claimed was official information under the Official Secrets Act 1963 and in part information in which the plaintiff enjoyed a right of confidence. It is suggested that this third party was the subject matter of an encouragement or facility by the defendants or the second named defendant to encourage him to disclose same and in so doing the defendants were guilty of soliciting, aiding, abetting, counselling and/or procuring the commission of a criminal offence and a breach of confidence the particulars whereof are said to be set forth in the text messages attached, the plaintiff reserving the right to adduce further particulars on receipt of discovery and/or interrogatories. The paragraph states that the defendants' actions are criminal wrongs and amount to the tort of breach of confidence comprised wrongful actions with the intent to injure the plaintiff by unlawful means and therefore amount to the tort of conspiracy.

27. The additional relief claimed is damages for breach of confidence.

28. The defendants assert that the pleadings are closed and are at somewhat of an advanced stage however, otherwise, the defendants do not argue prejudice arising. Further, as has been pointed out by the plaintiff the defendants have taken a neutral position with regard to the possible joinder of Mr. Ganley and therefore this would suggest that the pleadings are not at such an advanced stage as to amount to sufficient prejudice to the existing defendants to encourage the court to refuse the amendments sought.

29. I am satisfied that:

> (i) In accordance with the submissions on behalf of the plaintiff it is appropriate to look at the pleadings, as was done by Geoghegan J. in *Croke*, in ascertaining whether or not to afford liberty to make the relevant amendments to the pleadings and the current deficit of evidence as asserted by the defendants, on the part of the plaintiff, to support the amendments now sought to be made, should not be the basis for refusing the amendments and in this regard reference is made to the comments of McGuinness J. in *O'Leary* and Clarke J. in *Woori Bank*;
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> (ii) Although the particulars by virtue of the inclusion of the series of text messages attached to the statement of claim might be considered less than ideal, nevertheless this would not be a reason to refuse the amendments;
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> (iii) It is significant, in my view, the facts (the emails attached to the statement of claim) were not available to the plaintiff until the 13th October, 2017, to ground the claim now incorporated within para. 16(a);
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> (iv) I am not satisfied that the claim now sought to be made by the inclusion of the amendments radically differs from the claim already made in the existing pleadings, therefore I am satisfied that the within plaintiff is more akin to the status of the first named defendant as opposed to the second named defendant in the *Croke* matter.

30. I am not satisfied other issues identified when there proceedings were previously before the courts and aired before this court, such as the provenance of the plaintiff's possession of the USB stick, are germane to the relief now sought, hence they have not been referred to in this judgement

31. By reason of the foregoing, I am satisfied that the plaintiff is entitled to amend his pleadings in the manner sought.

Conclusion

32. Orders will be made therefore: -

> (a) Joining Mr. Declan Ganley as a co-defendant,

and

> (b) According the plaintiff liberty to amend the plenary summons of the 13th October, 2015 and the statement of claim delivered on the 4th December, 2015, in the manner provided in the second exhibit to the affidavit of the 8th December, 2017 of Mr. Ó Comháin.