

## THE HIGH COURT

[2007 No. 2069 P]

BETWEEN

NATIONAL EDUCATIONAL WELFARE BOARD

PLAINTIFF

AND

NEIL RYAN, I.T. UPGRADE LIMITED AND PETER O'GRADY

DEFENDANTS

JUDGMENT delivered by Mr. Justice Clarke on the 14th December 2007

**1. Introduction**

1.1 The plaintiff ("the Board") is a statutory body established under the Education (Welfare) Act, 2000. In these proceedings the Board makes serious allegations against the first named defendant ("Mr. Ryan"), a former employee, and the second and third named defendants ("I.T. Upgrade") who are respectively a company which has done significant business in the IT area with the Board and the principal of that company.

1.2 At its simplest the Board alleges that Mr. Ryan, who was at the material time the Information Technology Manager of the Board, was party to a fraudulent arrangement with IT Upgrade concerning the supply of equipment and services in the IT field to the Board. It is said that Mr. Ryan received a number of cheques drawn on IT Upgrade's account which were made payable to him personally and which totalled a sum of €136,405. It is pleaded that these payments were made by way of bribes or secret commissions and that a consequence of such bribes or secret commissions was that the Board did not receive proper value for its contracts with IT Upgrade.

1.3 Those allegations are strenuously denied by IT Upgrade. The case has reached a stage where a statement of claim has been filed and where, in the ordinary way, IT Upgrade would be required to file its defence. However, IT Upgrade has raised a very detailed notice for particulars to which it will be necessary to refer to in due course. The Board has declined to answer that notice for particulars at this stage. In those circumstances IT Upgrade maintains that the Board has failed to comply with O. 19, r. 5(2) of the Rules of the Superior Courts ("RSC") and that the Board's claim should, therefore, be struck out. The Board has also brought a motion for judgment in default of defence. However, the Board accepts that in the ordinary way, IT Upgrade would be entitled to further time to file its defence. In truth, therefore, the real issues between the parties is as to whether IT Upgrade should now be required to file a defence notwithstanding the refusal on the part of the Board to answer the particulars sought or whether the Board should be required to answer those particulars as the price for avoiding a strike out of its proceedings.

**2. The Issue**

2.1 In precise terms the issue before the court is as to whether the Board has failed to comply with the relevant rule which provides as follows:-

"O. 19, r. 5(2) - In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings."

2.2 It is said on behalf of IT Upgrade that the Board has not only failed to comply with its obligation to set out its allegations of fraud in sufficient particularity in the statement of claim, but has compounded that situation by refusing to answer what are asserted to be reasonable particulars. In those circumstances it is said that the court should strike out the proceedings as against the Board or, at a minimum, indicate that the proceedings will be struck out unless the Board is prepared to mend its hand by replying to the particulars sought at this stage.

2.3 It is clear, therefore, that the issue concerns the state of the pleadings and with that in mind it is appropriate to turn to the relevant aspects of the pleadings for the purposes of identifying the extent to which the claim in fraud as against IT Upgrade has, in fact, been set out.

**3. The Pleadings**

3.1 As already indicated the Board maintains, and has pleaded with some particularity, that significant payments were made to Mr. Ryan as a bribe or secret commission. It is also alleged that those payments were made by IT Upgrade.

3.2 The manner in which it is alleged that IT Upgrade was involved in a conspiracy to defraud are set out in para. 12 of the statement of claim in the following terms:-

"(a) by arranging for the second named defendant to invoice the plaintiff for goods at list prices, while paying reduced prices to the suppliers of such goods.

(b) by arranging for the second named defendant to invoice the plaintiff for services not performed or not fully performed.

(c) By arranging for the second named defendant to invoice the plaintiff for purchase of services from third parties, while in fact purchasing services of a lower price and quality.

(d) By arranging to supply the plaintiff with goods comprising computer hardware of a higher specification than were actually delivered.

(e) By arranging to supply the plaintiff with goods comprising computer hardware of a higher specification than that was, to the knowledge of the defendants, actually required by the plaintiff.

(f) By over-charging the plaintiff for equipment and consumables.

(g) By agreeing not to pass on any discounts to the plaintiff and

(h) By the payment of sums by way of bribes or secret commissions to the first named defendant as aforesaid."

3.3 The remainder of the contentions set out in the statement of claim are largely consequential to the assertion set out in para. 12 which I have just quoted in full. Against that background, solicitors on behalf of IT Upgrade served a detailed notice for particulars.

As an example of the general tenor of that notice for particulars, I set out paras. 9 and 10 thereof which, as will be seen, relate to paras. 12(a) and (b) of the statement of claim. They are as follows:

"9. With reference to para. 12(a) of the statement of claim –

- (a) please furnish a copy of each and all invoices upon which the plaintiff will rely for the purpose of this claim.
- (b) please identify, if not otherwise apparent from the said invoices, each and all suppliers of the goods to which the plaintiff refers.
- (c) please distinguish, in respect of each and all invoices, the alleged list price for the said goods and the reduced price allegedly paid to the suppliers of such goods.

10. With reference to para. 12(b) of the statement of claim –

- (a) please furnish a copy of each and all invoices to which the plaintiff refers for the purposes of this claim.
- (b) please state with the greatest of particularity the arrangements to which the plaintiff refers as allegedly made between the first named defendant and the second named defendant.
- (c) Please distinguish, in respect of each and all invoices, the alleged services (i) not performed and (ii) not fully performed."

3.4 Similar particulars were sought in respect of the other sub-paragraphs of para. 12 of the statement of claim.

3.5 The Board's solicitors replied by letter of 28th May, 2007 in the following terms:-

"The fraud that is alleged against your clients is one the precise ambit of which is, by its clandestine nature, impossible for our client to define without the benefit of discovery and the delivery of interrogatories. In our view, the statement of claim is adequate to allow your clients to plead. (In this connection, we accept that your clients may not be in a position to admit the nature of the contractual relationship between the plaintiff and the first named defendant). We therefore require your clients to deliver a defence before our client will contemplate providing particulars of the fraud, over and above those contained in the statement of claim. It is our client's intentions to seek discovery from and to deliver interrogatories to you clients and, once this discovery has been made and examined, and the interrogatories answered, our client expect to be in a position to particularise the fraud further."

3.6 The contending positions of the parties are, therefore, clear. IT Upgrade maintains that it is entitled to answers to each of the relevant particulars before it should be required to file its defence. The Board maintains that IT Upgrade must deliver a defence followed by the making of discovery and the answering of interrogatories before detailed particulars, beyond those contained in the statement of claim, should be delivered. That is the net issue between the parties. If the Board are right, then it is clear that the appropriate course of action to take would be to require IT Upgrade to file its defence in a timely fashion and allow the other appropriate procedures to follow with the Board delivering detailed particulars subsequent to the receipt of discovery and answers to interrogatories. If, on the other hand, IT Upgrade is correct, then the price which the Board must pay to avoid the proceedings being struck out at this stage is that the particulars must now be answered. Either way the net issue is as to which comes first, a defence, or in more practical terms and in reality, discovery and interrogatories which follow a defence, or particulars. Against the background of that net dispute it is appropriate to turn next to the legal principles involved.

#### **4 The Law**

4.1 Counsel for IT Upgrade places reliance on a passage from the judgment of Barrington J. in *Hanly v. Finnerty* [1981] I.L.R.M. 198 in the following terms:-

"Undue influence is a plea similar to fraud and it appears to me that it would be quite unfair to require a party against whom a plea of undue influence is made to go into court without any inkling of the allegations of fact on which the plea of undue influence rests. Because of the seriousness of the plea counsel will not lightly put his name to a pleading containing a plea of undue influence so that his solicitor will usually have in his possession some allegations of fact which justify the raising of the plea or at least excuse the plea from being irresponsible."

That passage is quoted by the authors of Delaney and McGrath on Civil Procedure in para. 5-38 which also notes, relying on *Berkeley v. McHugh* [1878] 12 I.L.T.R. 176 and *Bula Limited v. Crowley* (unreported, High Court, Murphy J. 10th June, 2005) at p. 50, that it has been a long and established practice of the courts to require allegations of fraud to be specifically pleaded.

4.2 Counsel for the Board does not dispute the general proposition that a claim alleging fraud must be pleaded specifically. However, counsel placed reliance on a line of authority commencing with *Leitch v. Abbott* [1886] 31 Ch.D. 374 where Bowen L.J. said the following:-

"There is here a general allegation of fraud, and the Plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings, but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed. I do not, however, think that that case applies, for there is here a statement of the nature of the fraud alleged. The Plaintiff may hereafter have to condescend to particulars, but, in my opinion, it would be wrong to say that he is not entitled to have this discovery now, because he has not given full details of the fraud which he alleges. We may possibly have to decide to what extent the Defendant is obliged to go into all these matters, but, in my opinion, it would be wrong to say that the Court has a discretion to deprive the Plaintiff of discovery altogether, either until the trial of the action, or until he has given details of the fraud which he alleges. He wants the discovery in order to enable him to give those details, and to establish his right to relief at the trial. I think, therefore, that the Defendant must give a further answer to the interrogatories."

4.3 North J., in *Sachs v. Speilman* [1887] 37 Ch. D. 295, having cited the judgement of Bowen L.J. which I have quoted, applied the same approach in the following terms:-

"The question now is not what is in issue between the parties. Nobody can say what that is until the defence is seen.

That defence may admit that in all or in some of these transactions the allegations in the statement of claim are well founded. It may, on the other hand, of course, deny that they are so; but until I know what matters are in issue between the parties it is impossible for me to say that the plaintiff does not require further information; but it is not wanted to enable the defendant to put in his defence. Particulars by way of amendment cannot be given until after discovery, and I have ordered the summons to stand over until after the defence has been put in in order that I may know what the issues raised by the parties are. The general rule is that discovery is not allowed till after defence: but there are exceptions to that rule: and it follows from the two cases I have stated that if I held it necessary to require the plaintiff to give particulars before the defence is put in, I should also hold that this is one of the cases in which the plaintiff would have the right to have discovery before defence.

Then it is suggested by the notice of motion that the Defendants are embarrassed by the form in which this pleading is framed. But how can it be said that the Defendants are embarrassed by not knowing these details? The Plaintiff has told them in his statement of claim that he has not the means of giving these details. They, on the other hand, are the persons who carried through the transactions, and have in their possession the books containing the full accounts; therefore they have full knowledge and means of knowledge, and can shew precisely what the cases are, if any, in which they did do what the statement of claim alleges they did. I do not see how they can possibly be embarrassed by not obtaining from the Plaintiff the information they have in their own possession. Of course I can see well enough why they press for these particulars. If the Plaintiff were obliged to condescend upon particulars, and to specify the instances in which the Defendants have done what he charges them with, the result might be that from his imperfect knowledge he would not be able to point out in the particulars some cases in which they had actually done what he says they have done; and inasmuch as, after particulars were given, their defence would be addressed only to those points, the ignorance of the Plaintiff might relieve the Defendants from being held responsible as to certain matters with respect to which they are open to the charge contained in the statement of claim."

4.4 More recently Hoffman J., in *Arab Monetary Fund v. Hashim & Ors* (No.2) [1990] 1 All E.R. 673, took the view that the plaintiff in that case was entitled to plead in general terms that a non fiduciary had actual or constructive knowledge of the fraudulent or dishonest breach of trust in respect of which it was sought to make him accountable. Hoffman J., went on to determine that, in the circumstances of that case, it was appropriate to defer particularisation of both allegations until after discovery provided that there was some evidence of conduct on which the plaintiff was entitled to plead a want of probity.

4.5 Each of those authorities bring into clear relief the issue which arises in this case. It is clear that, in the ordinary way, an entitlement to seek discovery or raise interrogatories only arises when the issues between the parties have become clear as a result of a defence being filed. As pointed out by Bowen L.J., in *Leitch*, if a plaintiff is not able to have the benefit of discovery before defining the precise parameters of his claim, it is likely, in cases of fraud or other clandestine activity, to place very great limits on the benefit of discovery. That that would be so is clear. Discovery (or interrogatories) is, quite properly, limited to materials or issues which arise on the pleadings. If the pleadings are narrowly drawn, then it follows that discovery or interrogatories will, likewise, be confined within the same narrow ambit. If a plaintiff who makes an allegation of fraud is required to give full and exhaustive particulars prior to defence (and thus prior to discovery or interrogatories) in a manner which necessarily narrows the case, then there is every chance that, in a genuine case of fraud, the perpetrator will escape having to make discovery in respect of aspects of the fraud because the plaintiff will not have been sufficiently aware of the details of those aspects of the fraud to plead them in an appropriate manner in advance. In those circumstances aspects of the fraud will be outside the case as originally pleaded and will not be caught by any order of discovery or interrogatories.

4.6 The other side of the coin, of course, requires that care be taken not to allow a party, by the mere invocation of an allegation of fraud, to become entitled to engage in a widespread trawl of the alleged fraudster's confidential documentation in the hope of being able to make his case.

4.7 A balance between these two competing considerations needs to be struck. In my view the balance must be struck on a case by case basis but having regard to the following principles. Firstly no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party, in its pleadings, specifies, in sufficient, albeit general, terms, the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and thus prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a prima facie case to that effect, the defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial.

4.8 This latter point must, of course, be subject to the caveat that the defendant must always be entitled to sufficient detail to enable him to plead in his defence. However, it is important to note that O. 19, r. 7(3) of the RSC provides that:-

"Particulars shall not be ordered under this rule to be delivered before defence or reply, as the case may be, unless the Court shall be of opinion that they are necessary or desirable to enable the defendant or plaintiff, as the case may be, to plead or ought for any other special reason to be so delivered."

4.9 It is clear, therefore, that a defendant is entitled to have the claim sufficiently particularised to enable him to plead in any event.

4.10 The reason why I have taken the view which I have identified in the next preceding paragraphs is that to do otherwise would, in my view, be to strike an inappropriate balance against the legitimate requirements of persons who can make out a stateable case in fraud. It is in the very nature of fraud (or other unconscionable wrongdoing) that the party who is on the receiving end will not have the means of knowing the precise extent of what has been done to them until they have obtained discovery. To require them to narrow their case prior to defence (and thus discovery) would be to create a classic catch 22. The case will be narrowed. Discovery will be directed only towards the case as narrowed. Undiscovered aspects of the fraud or the consequences of the fraud will, as a natural result, never be revealed. This would, in my view, be apt to lead to an unjust solution.

4.11 It seems to me that I should, therefore, approach this case on the basis of asking the following questions:-

1. Has the Board established a sufficient threshold so as to take it outside a case where there is a bald allegation of fraud?
2. If so, has the Board given sufficient particulars to enable IT Upgrade to plead by way of defence?

3. In all the circumstances of the case (including the extent to which the plaintiff may have established a *prima facie* case for the fraud alleged) is it appropriate to require any further particulars to be delivered in advance of the defence.

I propose to consider each of those questions in turn.

## **5. Application to facts of this case**

5.1 This is not, in my view, a case where a mere or bald allegation of fraud is made. The Board has set out in considerable detail the payments which it alleges have been made by the defendants to its former I.T. manager. It has also set out, in some detail, the various ways in which it is suggested that the Board may have suffered by reason of the making of those payments (which, of course, it alleges were made as bribes or as secret commissions). The only matter which the Board has not addressed is as to the extent to which it will seek to bring individual transactions within the ambit of the various sub-paragraphs of paragraph 12 of the statement of claim.

5.2 I am, therefore, satisfied that the Board has gone a significant way beyond making a mere or bald allegation of fraud in this case. The defendants can be in no doubt as to the general nature of the accusation made. It is said (and of course this is hotly denied) that I.T. Upgrade procured favourable terms in one or other of the manners specified in paragraph 12 of the statement of claim by making illicit payments to a senior employee of the Board.

5.3 Secondly, it seems to me that there is nothing which could legitimately prevent I.T. Upgrade from filing its defence at this stage. I.T. Upgrade knows the allegations. If it is minded so to do, it can deny them. The only thing that it does not know with exact particularity is as to the precise transactions which the Board will ultimately allege give rise to a loss on the part of the Board under the various methods of potential loss which have been identified. It follows that the possible quantum of any such loss has equally not been specified. However, that information is not, in my view, necessary to enable an appropriate defence to put in. The only possible prejudice that might arise in relation to a defendant in a position such as I.T. Upgrade concerns the possibility that such a party might wish to put in a lodgement or might wish to make a specific admission that certain transactions did give rise to an appropriate adverse consequence from the Board's prospective. So far as the making of a lodgement is concerned, it seems to me that any prejudice can be appropriately dealt with by indicating that it would, of course, necessarily follow from the court accepting the submissions of the Board in this case, that the Board would, in due course, be required, well in advance of trial, to furnish detailed particulars of the precise case which it wished to make after it had the benefit of discovery and interrogatories. It would also, it seems to me, follow that, within a reasonable period of receipt of such detailed particulars, I.T. Upgrade would be entitled, if it so wished, to make a lodgement without any adverse consequences.

5.4 Likewise if I.T. upgrade wishes to make any admissions at this stage in its defence then it does not seem to me that it is, in any way, prejudiced in so doing. Similarly, if any aspect of the case as ultimately particularised would justify an amendment to the defence, same can and should be permitted without adverse consequences. In all the circumstances I do not believe that the level of particularity with which this claim has been set out by the Board in its statement of claim creates any difficulty for I.T. upgrade in now filing its defence.

5.5 It, therefore, follows that I should go on to consider whether, in all the circumstances, it is appropriate to require the particulars sought to be delivered in advance of the filing of a defence.

5.6 In that context it is said on behalf of I.T. Upgrade that the Board has had the benefit of receiving a significant volume of documentation from I.T. Upgrade concerning relevant transactions with the Board. It is also said that the Board has had the benefit of having had a review conducted of those transactions by a number of relevant experts. On that basis it is contended that the Board must be aware of at least some of the transactions which it might wish to allege were tainted by reason of the contended for illicit payments. The Board, as I understand it, largely accepts the factual matters which I have just outlined. It does not deny but that it could give some particulars under the various headings sought by virtue of being in possession of the relevant documentation and reports. In those circumstances counsel for I.T. Upgrade suggests that there is no reason why the Board should not be required to give such particulars as it can at this stage, with the Board being entitled to give further particulars should additional materials come to its attention as a result of discovery or interrogatories which would entitle it to expand its claim.

5.7 However, it seems to me that such an approach would fall into the very difficulty identified in Leitch. If the Board is now to be required to specify the individual transactions or invoices which it claims to be tainted, then discovery and interrogatories will, necessarily, be confined only to those transactions. In those circumstances it is highly unlikely that any other materials (even if they exist) would come to light in the discovery or interrogatories process.

5.8 In addition it seems to me that the Board has established a *prima facie* case for its contentions. In so saying I would emphasise that it is wholly inappropriate for a court, at this stage, to express any the view as to the merits or otherwise of the case as pleaded other than to determine that the necessary threshold has been reached. On the affidavit evidence filed, I.T. Upgrade asserts that it was informed by the relevant senior official of the Board that separate invoices were to be raised and given directly to the official concerned in respect of aspects of the contract as a means of getting round public service limitations. It will ultimately be for the court at trial to decide whether it accepts such an explanation. However the fact that it is accepted that what, at a minimum, was a most unusual practice of making direct payments to a senior official of a public body as part of the overall contractual arrangements with that public body, did, in fact, occur, seems to me to put this case well beyond a standard of *prima facie* case.

## **6. Conclusions**

6.1 I am, therefore, satisfied that this is an appropriate case to permit the plaintiff to defer giving any further particulars of its claim until after it has had the benefit of such discovery or interrogatories as might be agreed or directed by the court. I am satisfied that the pleading already in place in this case goes significantly beyond a mere assertion. I am satisfied that there is no prejudice in requiring the defendant to plead at this stage or, at a minimum, no prejudice which cannot be adequately dealt with by indicating that full particulars will have to be delivered well in advance of trial, and that the defendants will have the opportunity of making any appropriate amendments to their defence in the event that same should be justified by the particulars then delivered. Any such adjustment can, if appropriate, involve the making of a lodgement. In addition, I am satisfied that the Board has made out a *prima facie* case of fraud and that, having regard to those factors, the balance of justice does not require that any further particulars be delivered at this stage.

6.2 It follows that, in my view, the defendants must now file their defence but should be entitled to a reasonable extension of time within which to do so. I will hear counsel further on the precise order which I should make in that regard.