[2020] IEHC 261

THE HIGH COURT

[2015 No. 8265 P]

BETWEEN

DENIS O'BRIEN

PLAINTIFF

AND

RED FLAG CONSULTING LIMITED, KARL BROPHY, SEAMUS CONBOY, GAVIN O'REILLY, BRID MURPHY, KEVIN HINEY AND DECLAN GANLEY

DEFENDANTS

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 22nd day of May, 2020.

1. This is an application by the seventh named defendant for an order for the trial of the following as preliminary issues:

   (a) Whether the plaintiff's claim in defamation or conspiracy to defame is barred by reason of the provisions of the Statute of Limitations, 1957 (as amended) *("the Act of 1957"*);

   (b) Whether the plaintiff's claim relating to damage to reputation by lawful means conspiracy is unstateable, unknown to the law and/or an abuse of process;

   (c) Whether the plaintiff's claim for breach of confidence and criminal wrongs is scandalous and vexatious and/or inadequately pleaded and by reason of same ought to be struck out;

   (d) Whether the plaintiff's claim against the seventh defendant ought to be struck out as disclosing no cause of action or, in the alternative, as being frivolous, vexatious and an abuse of process.

2. The application comes before the court by way of notice of motion dated 10th December, 2018 and is grounded on the affidavit of Mr. Ganley sworn on the 3rd December, 2018. This is not a substantive application for the orders sought at paras. (c) and (d). While submissions have been made by the plaintiff on the jurisdiction of the court to make these orders, these have not been addressed in any detail in the submissions by the seventh defendant and therefore the court will not address them in any substantive way. Insofar as the reliefs at (c) and (d) are concerned, therefore the application is being treated as one to permit all issues to be dealt with together in order to save time and costs.

Orders 25 and 34(2) of Rules of the Superior Courts 1986

3. The rules of court pursuant to which this application is made are not expressly stated in the notice of motion, but the submissions have proceeded on the basis that the court's jurisdiction under O. 25 and O. 34, r. 2 of the Rules of the Superior Courts 1986 is invoked.

4. Order 25 provides as follows:-

"1. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

2. 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."

5. Order 34, r. 2 provides:-

"2. 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."

6. In *Campion v. South Tipperary County Council* [2015] 1 I.R. 716, McKechnie J. acknowledged the overlap between the rules but stated that it was clear that O. 34 may be invoked before any evidence is given or any question or issue of fact determined. In *McCabe v. Ireland* [1999] 4 I.R. 151, Lynch J. stressed that a preliminary issue of law cannot be tried *in vacuo*; it must be tried in the context of established or agreed facts. The facts may be agreed for the purposes of the preliminary issue of law, only without prejudice to the right to contest the facts if the actual determination of the preliminary issue should not dispose of the matter at issue. Having considered the authorities in relation to O. 25, in *Campion* McKechnie J. spoke of the requirement to consider the issues involved, the contextual setting in which they are pleaded and the overall evidential footprint in which they are positioned at that point in time. He stated:-

"[28] Whatever may be the precise contours of either or both O. 25(1) and O. 34(2) of the Rules of the Superior Courts, it is clear that each has a common purpose namely, to save time and cost, when the preliminary process is compared with any other suggested method of hearing, including a full trial of the issues raised. (Duffy v. News Group Newspapers Limited (No.2) [1994] 3 I.R. 63 and Croke v. Waterford Crystal Ltd. (Unreported, High Court, Smyth J., 26th June, 2003)). Convenience will also be a consideration and whilst there is no express reference to such in O. 25, as there is in O. 34, r. 2, nonetheless this matter has equal application to both rules…

[29] Whilst the factors most frequently referred to in the case law are time, costs, convenience and the potential impact which any decision on the preliminary issue may have for the case as a whole, it is important to bear in mind, as Tara Mines v.

Minister for Industry and Commerce [1975] 1 I.R. 242 discloses, that such are not exclusive of other factors and that rules of court are always the servants of justice. If they aid and assist that end, as they are designed to, they are apt, fitting and pertinent; where they are at odds with that purpose, they are stood down. Simply put, the overall requirements of justice are, as a matter of constitutional jurisprudence, intrinsic to all such rules which must be both read and applied accordingly."

7. The principles applicable were then helpfully summarised by McKechnie J. as follows:-

"[35] The following therefore is a summary of the legal position before O. 25 of the Rules of the Superior Courts can be successfully invoked:-

- *There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.*

- *There must exist a question of law which is discrete and which can be distilled from the factual matrix as presented.*

- *There must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.*

- *The greater the impact which a decision on the preliminary issue(s) is likely to have, on the entire case, the stronger will be the argument for making the requested order.*

- *Conversely if irrespective of the court's decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order.*

- *Exceptionally however, even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.*

- *As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate.*

- *It must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful, to retain the traditional separation of such matters.*

- *'Convenience' therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation.*

- *The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties.*

- *The court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally*

- *Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."*

Background

8. The plaintiff is a businessman with wide and various business activities, including in media undertakings. He holds the controlling ownership of Digicel Group Ltd, a company whose principle activities consist of the provision of mobile phone and related services in the Caribbean, Central America and the South Pacific regions.

9. The first defendant is a company providing consultancy services in the field of public relations, communications and public, governmental and regulatory affairs. The second to sixth defendants are servants or agents of the first defendant. The first to sixth named defendants will hereafter be referred to as the "*Red Flag defendants".* The seventh defendant is a businessman with interests in telecommunications and it is alleged that he is the client of the Red Flag defendants in respect of matters which are central to the allegations in the proceedings.

10. For the purposes of this application, the facts as pleaded may be stated as follows. In 2015, the plaintiff received a USB memory stick. Its receipt was unannounced and on it was what is described as "*the dossier".* The dossier contained various briefing documents, press articles, a court judgment, copies of transcripts of parliamentary speeches, a draft of a speech, a different version of which was subsequently delivered in the Dail by a member of Dáil Éireann, Mr. Colm Keaveney, and copies of various witness transcripts from the Tribunal of Inquiry into Certain Payments to Politicians and related matters, otherwise known as the Moriarty Tribunal. Also included in the dossier was a copy of the prospectus dated 22nd September, 2015 for the initial public offering ("*IPO*") of shares in Digicel.

11. The plaintiff alleges that the documents in the dossier, and further matters which have been pleaded, give rise to a number of causes of action and that the Red Flag defendants acted in conjunction with a then unnamed client. It is alleged that the defendants were responsible for dissemination of information and communications which amount to defamation, conspiracy to cause the plaintiff damage by lawful and unlawful means and

breach of confidence. He seeks compensatory, aggravated, punitive and exemplary damages.

12. Proceedings against the Red Flag defendants were instituted in 2015. At that time the client had not been identified. The plaintiff states that he made efforts, including applications to court, to seek to identify the client and that it was not until October, 2017 that he was informed by Mr. Keaveney of his understanding that Mr. Ganley was the client on whose behalf the dossier had been produced and that Mr. Ganley was an active participant in a campaign against the plaintiff which included negative media briefings. Mr. O'Brien had at that time been engaged in litigation with Mr. Keaveney. Following the resolution of those proceedings Mr. Keaveney made the information available to Mr. O'Brien.

13. It is also alleged that the defendants, in particular the second, third and seventh defendants, have had previous dealings with Mr. O'Brien as a result of which they bear hostility towards him. A similar allegation is made of Mr. Ganley with whom Mr. O'Brien has been involved in litigation concerning the awarding of a telephone licence approximately 25 years ago.

14. Mr. O'Brien's application to join Mr. Ganley as co-defendant was based, inter alia, on affidavits sworn by Mr. Keaveney and a public relations practitioner, Mr. John Fallon. Mr. Ganley was joined as a co-defendant pursuant to an order made by O'Regan J. on the 22nd March, 2018. An amended statement of claim was delivered on 23rd March, 2018.

15. In his affidavit in support of that application, Mr. Fallon averred that he had been asked by Mr. Ganley in 2013 to conduct research in relation to Mr. O'Brien but declined to do so. He averred that having read a newspaper article concerning these proceedings, it sounded identical in nature and scope to a research report which he had been asked to prepare by Mr. Ganley in relation to Mr. O'Brien in 2013. Mr. Ganley denies that he is the client.

The Allegations against Mr. Ganley

16. Without going in to each and every aspect of the pleadings, it is sufficient for present purposes to note that the plaintiff alleges, *inter alia*, the following:

    a. on a date unknown the seventh defendant, his servants or agents and/or companies associated with him, engaged the services of the Red Flag defendants and that on unknown dates, but believed to be between the 9th October, 2014 and 9th October, 2015, the defendants conspired together wrongfully and with the sole or predominant intention of injuring or causing him loss or damage. By way of aside, counsel for Mr. Ganley, Mr. Harty S.C. suggests that this is a highly unusual plea in that it purports to hold Mr. Ganley accountable for the actions of associated companies not joined in the proceedings;

    b. the defendants or one or other of them commissioned, compiled, authored, edited, contributed to, published and distributed the dossier, that it was directed towards

the plaintiff and his commercial and business interests with the sole and predominant object of damaging him and his business interests;

c. there had been a pattern of increased questioning of the plaintiff by journalists and business associates over a period of some twelve months prior to discovery of the dossier. The thrust of the questioning conformed to a pattern with an underlying negative theme and it is claimed that the level and pattern of such questioning indicates that the dossier was disseminated by the defendants and is also indicative of damage having been inflicted on the plaintiff by virtue of the defendants' activities. The plaintiff alleges that he has been put to extra costs, time, inconvenience and expense in dealing with increased negative questioning;

d. the dossier was authored in a manner that could be understood and easily digested by a national and international audience and, in particular, an American audience;

e. it was authored, amended and updated from time to time to cause maximum damage to and undermine the plaintiff's professional and business reputation – with particular reference to acquisitions by him and/or companies connected to or owned by him regarding assets purchased from the Irish Bank Resolution Corporation (in Special Liquidation) and the upcoming and then imminent IPO of Digicel and an unrelated IPO in which the plaintiff was involved. It is alleged that this was for the purpose of conveying that the earlier IPO was shrouded in controversy;

f. pursuant to a conspiracy one of the defendants, or perhaps more of them, suggested amendments to the draft speech to be delivered by a member of Dáil Éireann in the knowledge that the speech would enjoy absolute privilege and with the intention of ensuring that it was extremely damaging to the plaintiff's personal and commercial interests;

g. the defendants published or caused to be published and disseminated of and concerning the plaintiff certain statements, some of which relate to philanthropic and charitable acts carried out by him and also commentaries/comments made in respect of those actions, which it is contended are defamatory of him. Another allegation revolves around comments and utterings relating to the takeover of Siteserv.

17. At the time of the application to join Mr. Ganley, application was also made to amend the pleadings to include an allegation that the defendants had sought to encourage and facilitate disclosure of official information by a former assistant secretary to the Department of Finance. He is alleged to have come into possession of information concerning the plaintiff (including information in relation to his confidential private banking affairs with IBRC) and companies with which he is associated. It is pleaded that this information constituted "*Official Information*" within the meaning of the Official Secrets Act 1963 and, in part at least, information in which the plaintiff enjoyed a right of confidence and the disclosure of which is a criminal offence under the Official Secrets Act 1963. It is also contended that this amounts to the tort breach of confidence. It is pleaded

that the defendants, and in particular the second named defendant, sought to encourage and facilitate the disclosure of such information. Particulars of the said actions on the part of the defendants comprising text messages between the defendants (and particularly the second named defendant) and Mr. Keaveney, together with messages between Mr. Keaveney and the second named defendant relating to the arrangements to have Mr. Ryan meet with Mr. Michaél Martin are set out in schedule 5 of the statement of claim. It is further alleged that in furtherance of this conspiracy, the defendants engaged in a campaign of briefing politicians and journalists with material which was adverse to the interests of the plaintiff and with the express purpose of having those politicians and journalists promote and publish the material with the predominant intention of injuring and/or causing loss to the plaintiff. It is pleaded that by reason of the covert nature of the defendants' activities the plaintiff is unable to particularise the nature and extent of the publication and dissemination of the dossier as a whole and in particular the statements in schedule 2, until after discovery and/or interrogatories. All claims are denied by the defendants.

18. The application under consideration is grounded on the affidavit of Mr. Ganley, sworn on the 3rd December, 2018. He avers, *inter alia*, that he is not "*the client*" as alleged by the plaintiff, that he did not either personally or through servants or agents conspire together with the other defendants as alleged. He also avers that the plaintiff in his own pleadings is not asserting that he is necessarily the client but pleads that the client may be associated companies and that such plea reveals the speculative nature of the claim.

19. Mr. O'Brien in a replying affidavit sworn on 4th July 2019, avers that on or about the 18th October, 2015 just days after he commenced the proceedings, Mr. Ganley was quoted in an article in the Sunday Times as having allegedly stated:-

> *"Declan Ganley, a long-time business adversary of Denis O'Brien, offered some free advice last week about what he would do if the contents of a computer memory stick arrived unannounced on his desk. 'If I got an anonymously delivered USB', he tweeted 'I'd step on it and sweep the remains into the bin'."*

Mr. O'Brien maintains that this constitutes active engagement by Mr. Ganley designed to throw him "*off the scent".* It was not until the 13th October, 2017 that he learnt through Mr. Keaveney that Mr. Ganley was the client. He attempted to corroborate that information and then applied to join Mr. Ganley in the proceedings.

20. With regard to the claim for breach of confidence and criminal wrongs, Mr. O'Brien avers that he has been left in a less than ideal situation wherein he knows what had been done to him and who has done it but not precisely when, where and how. He states that he has been completely upfront in this regard both in his pleadings and in submissions made to court on his behalf. He suggests that if the seventh defendant "has his way" then any individual who commits fraudulent and/or clandestine acts will be able to use his own dishonesty and/or secrecy as a shield to protect himself in any claim his victim might have against him.

The objections

21. All defendants deny the claim. They have not served notices claiming indemnity or contribution on each other. Mr. Ganley also raises several objections. He pleads that the claim in defamation or conspiracy to defame is barred by reason of the provisions of the Statute of Limitations, 1957 as amended ("*the Act of 1957");* that the claim concerning damage to reputation by lawful means conspiracy is unstateable and unknown to the law; that the claim based on breach of confidence and criminal wrongs is scandalous, vexatious and inadequately pleaded and that the pleadings disclose no cause of action which is not statute barred.

Certain observations on the pleadings

22. I should make a number of observations on the pleadings as they stand. A reply has not been delivered, but the court has been informed by counsel for the plaintiff that a draft reply has been prepared and that it will contain a plea of fraudulent concealment pursuant to s. 71 of the Act of 1957 which, it is contended, has the effect of postponing the limitation period. Section 71 is referenced in Mr. O'Brien's replying affidavit, as it was in argument before O'Regan J. and by her in a judgment delivered on 22nd March, 2018. While counsel for the defendant submits that as the pleadings now stand, s. 71 is not in the case, he accepts that it will or may be on the hearing of the preliminary issue.

23. When Mr. Ganley sought details of the extra cost, time, inconvenience and expense alleged by notice for particulars dated 27th April, 2018 (i.e. special damages), the reply on the 1st June, 2018 was that it was matter for evidence. Mr. Harty S.C. maintains that this has implications for the cause of action based on lawful means conspiracy because it has been held by the Court of Appeal in England and Wales, in *Lonrho plc v. Fayad* (No.5) [1993] 1 W.L.R 1489, that where there are no special damages the cause of action for lawful means conspiracy is not sustainable.

24. However, when a similar question was raised by the Red Flag defendants before Mr. Ganley was joined to the proceedings, the plaintiff replied on 8th February, 2016 that:-

> *"The Plaintiff claims both general and special damages. The increased and increasingly negative questioning of him by journalists in the period of approximately 12 months prior to the discovery of the Dossier has put the plaintiff to much extra cost, time, inconvenience and negative questioning. Ultimately, this loss will be a matter of evidence but it is estimated that the Plaintiff has incurred additional expenditure of approximately €55,000 in dealing with the aforesaid increase and negative questioning."*

This reply predated the inclusions of paras. 16A and 16B of the amended statement of claim.

25. On 9th October, 2018 the seventh named defendant issued a motion for discovery against the plaintiff. On 18th October, 2018, the plaintiff issued a notice of motion seeking discovery against the seventh named defendant. This issuing of these motions predate the motion under consideration. The plaintiff seeks, *inter alia,* from the seventh defendant

and/or anyone or entity on his behalf, and/or any entity in which he has a legal and/or beneficial shareholding:-

a. documents relating to the engaging of the services of the Red Flag defendants;

b. documents concerning the contribution to the commission, compilation, authorship, editing, contribution, publication, distribution and/or dissemination of the dossier or any part thereof;

c. documents relating to and/or evidencing the hostility allegedly borne by the seventh named defendant to the plaintiff, including any communication between him and also documents relating to and/or evidencing the nature of the hostility and/or the ill feeling;

d. documents relating to or evidencing the encouraging and/or facilitating of the disclosure by Mr. Ryan of the information referred to;

e. documents relating to or evidencing the defendant's briefing of politicians or their parliamentary assistants or journalists in relation to material which may be adverse to the interests of the plaintiff;

f. documents relating to the identity of those to whom the dossier or any part thereof was sent or received, or any attempts made to send such documentation;

g. documents relating to Mr. Ganley's awareness and/or his knowledge of the confidential banking affairs of the plaintiff and/or companies associated with him.

It is suggested by the seventh named defendant that the nature, type and extent of discovery sought is illustrative of the highly speculative nature of the claim.

Seventh defendant/applicant's submissions

26. The seventh named defendant's submissions may be summarised as follows:

i. It is accepted for the purposes of the trial of a preliminary issue that facts must be agreed or accepted, but this is without prejudice to the right to contest those facts at a later stage. Mr. Harty S.C. also points out, however, that there is a distinction between the necessity to admit facts on the trial of the preliminary issue as opposed to admitting them on this application. While in written submissions it was stated that Mr. Ganley was prepared to accept the allegation that he had some responsibility for the publication of the allegedly defamatory material and also that he was the client, this acceptance was broadened during oral submissions.

ii. Although other causes of actions are pleaded, it is clear from the replies to particulars that the plaintiff's cause of action is confined to defamation. The Red Flag defendants raised a notice for particulars seeking details of the tort of conspiracy to injure by unlawful means and confirmation whether the sole unlawful means relied upon is the alleged publication of the statements appeared at schedule 2 of the statement of claim. This was confirmed, albeit the plaintiff

reserved the right to furnish additional particulars in the event that he became aware of other unlawful means implied by the defendants.

iii. The cause of action based on lawful means conspiracy has not been properly particularised, has not been distinguished from defamation and is in any event bound to fail. While the tort of conspiracy by lawful means, or lawful means conspiracy exists, nevertheless it cannot be advanced to seek damages for injury to one's reputation. As a matter of law, damages can be sought for damage to reputation only by way of an action for defamation and cannot be sought under the guise of lawful means conspiracy; see *Lonrho (No. 5).* As the plaintiff has not particularised any special damage, any cause of action based on lawful means conspiracy is unstateable. This is a discrete and precise issue which can be decided on the pleadings.

iv. The issue on the Statute of Limitations is discrete and precise. There is no dispute that the defamatory material was published not later than 9th October, 2015 and the seventh named defendant was not joined to the proceedings until the 17th April, 2018.

v. Whether or not s. 71 of the Statute of Limitations (as amended) may come to the aid of the plaintiff, against the background of accepted facts, is entirely a matter of law. The provisions of s. 38 of the Defamation Act, 2009 ("*the Act of 2009")* must also be considered in context of the extent to which s. 71 may be relied upon. If the court determines that s. 71 has no application, then the seventh named defendant will succeed.

vi. As a matter of law, fraudulent concealment cannot arise because there was no pre-existing relationship between the parties such as a contractual or fiduciary one (and none is pleaded). No additional background facts and evidence are required in order for the court to make a determination on that issue. It is also accepted by Mr. Harty S.C., for the purposes of the preliminary issue, that his client concealed his involvement and therefore he submits the fraudulent concealment issue can be tested without any additional facts and can be determined by way of preliminary issue.

vii. To the extent that breach of confidence and/or criminal wrongs are pleaded, this too is unstateable and bound to fail. The plaintiff has not given particulars of disclosure or intention to disclose confidential information. He has not brought proceedings against other persons who are alleged to have disclosed material nor against the person(s) to whom the material is alleged to have been disclosed. The plaintiff cannot state whether the confidential information allegedly disclosed was his information and purports to rely on the potential disclosure of confidential information which belongs not to him but to companies with which he is associated. There is no entitlement to advance proceedings on behalf of companies with which the plaintiff is associated. They are not parties to the proceedings.

viii. There will be considerable saving of time and expense if the application succeeds. Extensive discovery requests have been made on which there is no agreement or consensus. To the extent that the preliminary issue is ordered and is successful, or even partially successful, at the very least this will have the effect of significantly narrowing the ambit of discovery and potentially obviating the need for discovery at all.

ix. To the extent that it is alleged and submitted that the claim is scandalous, vexatious or inadequately pleaded, this involves a court considering the plaintiff's case as pleaded and there is no requirement to consider extrinsic facts. Similar considerations arise in respect of whether the action should be struck out as being frivolous, vexatious and/or abuse of process.

x. As set out in *Guerin v. Guerin* [1992] 2 I.R. 287 more than one preliminary issue can be tried. If the court determines that there should be a preliminary issue on the first two issues, there is no reason that it would not also deal with the third and fourth matters at the same time.

xi. It is also accepted that if the seventh named defendant is successful on his application, there may remain some issues concerning breach of confidence but that the vast majority of the claim will have fallen away and there will be a considerable saving in terms of time and expense, which the procedure sought to be employed encourages.

Plaintiff/respondent's submissions

27. The plaintiff's submissions are as follows:

i. Counsel for the plaintiff, Mr. Cush S.C. submits that at primary level, a unitary trial is the starting point. The court must exercise caution when acceding to an application to have a particular issue determined in a preliminary way. The greater number of issues required to be addressed, then the greater degree of caution ought to be exercised. The facts being conceded are limited, are complex and interlocking; and Mr. Ganley is selective about the facts he is willing to accept. Thus, for example, he submits that the contents of text messages which are contained in the schedule to the statement of claim must be accepted, particularly those exchanged between Mr. Brophy and Mr. Keaveney; and that for the purposes of this application the Red Flag defendants must be accepted as servants or agents of the seventh defendant.

ii. The issues set out in the notice of motion are not discrete and precise. Assertions of consensus and/or agreement on facts is contrived and there is an insufficient nexus to agreed facts to allow for the issues to be tried on a preliminary basis.

iii. The Statute of Limitations defence rests on a mixture of law and contested facts. By reason of the operation of s. 71 of the Act of 1957, the causes of action against Mr. Ganley accrued on the date upon which the plaintiff could reasonably have come to

learn of them, a date which is itself a matter of fact and cannot be described as uncontested. Where fraudulent concealment is an issue, the date of accrual of the cause of action will rarely be a matter of pure legal as opposed to evidential controversy. Reliance is placed on a decision of Morris J. (as he then was) in *McBain v. McDonald* [1991] 1 I.R. 284.

iv. It is submitted that Mr. Ganley does not contest the fact that the date of accrual of a cause of action can be extended by virtue of fraudulent concealment where a defendant knowingly fails to inform the plaintiff of a cause of action. The plaintiff is on very strong ground in asserting that a fraudulent concealment claim cannot fail solely on the grounds that there was no special relationship and, in any event, there is no exhaustive definition of what constitutes a special relationship for this purpose. This requires to be decided on the basis of the facts of each case. The seventh defendant must demonstrate as a matter of fact that he did not make positive efforts to conceal the cause of action. Discovery has not yet been received. It may yet emerge that he did engage in positive acts of concealment as opposed to merely remaining silent in the face of the considerable media coverage that accompanied the commencement of the proceedings – all of these matters are issues of fact, not law, thus rendering the limitation of actions issue unsuitable to be determined by way of preliminary issue.

v. While lawful means conspiracy may be difficult to establish, it is a tort which is known to the law and is not necessarily the same as defamation. In any event, the tort of unlawful means conspiracy will remain.

vi. The jurisdiction of the court under O. 19, r. 27 or O. 19, r. 28 RSC can only be deployed to strike out proceedings which have not yet come to trial if (a) it is clear that the proceedings have no prospect of success, as opposed to them being weak; (b) have been commenced for abusive or collateral purposes not ostensibly connected to the actual case as pleaded or (c) are incapable of conferring any benefit on the plaintiff. Applying those criteria to the facts, the objections to the claim come nowhere near the threshold for striking out proceedings.

vii. The height of the seventh defendant's case is a contention that the plaintiff's claim lacks evidence to support it and has not been pleaded with sufficient particularity. This is more suitably dealt on an application to strike out of proceedings. Insofar as it is claimed that the pleadings are prejudicial, embarrassing or scandalous, it is submitted that to demonstrate this a very high bar must be reached.

viii. Whatever lack of detail in the claim - a lack of detail which it is submitted is inevitable in cases involving allegations of clandestine surreptitious activity - the case is sufficiently particularised to ensure that Mr. Ganley knows the case that he has to meet at trial. This is particularly so in circumstances in which the seventh defendant claims that he is an innocent bystander who has nothing to do with any conspiracy or wrongdoing. The defence which he advances requires little by way of precise particularisation. The assertion that the plaintiff's claim has not been

pleaded with appropriate particularity has not hindered the delivery of a defence in which he pleads that he was not the client and is a stranger to the dossier.

Discussion and Decision

28. The principles to be applied on an application such as this have been summarised in *Campion*. While the extent to which facts must be accepted for the purposes of a preliminary issue has been the subject of argument and submission, ultimately there does not appear to me to be any real dispute between the parties. The trial of a preliminary issue will be ordered only in limited circumstances where there are identifiable, discrete and precise issues which can be conveniently tried by reference to agreed or accepted facts the outcome of which will be determinative or substantially determinative of the action, or a substantial issue in the action, which will clearly benefit the action in the overall sense and result in the saving of time and cost. This is a particularly suitable procedure for determining whether a case is statute barred. The plaintiff contends, however, that the position is otherwise because of issues arising in relation to the application of s. 71 of the Act of 1957.

29. A cautious approach must be adopted when entertaining an application such as this. In *L.M. v. Commissioner of An Garda Siochána* [2015] IESC 81, the Supreme Court was concerned with an issue as to whether a duty of care arose as a matter of law. O' Donnell J. spoke of the benefits of the procedure, but cautioned:-

> *"[32] It is, as a general matter, important that the point sought to be tried as a preliminary issue should have the possibility of either terminating the claim altogether or at least resulting in an obvious saving in both costs and time consequent on a reduction of the issues to be tried. A point should also raise a clear issue to which it is possible to give a clear answer. The more qualified and contingent the possible answers, the less likely that the court will be able to provide a clear and decisive disposition of the case and a clarification of the law. The decision to direct a trial of a preliminary issue is therefore one which requires careful consideration by trial judges. It is important that judges do not too readily accept a respondent's protestations of complexity, impossibility or inconvenience in trying a preliminary issue, while at the same time interrogating with some scepticism a moving party's claim that the point is clear and potentially dispositive of the litigation or some significant portion of it."* (emphasis added)

The Supreme Court had been requested to consider preliminary issues in three separate cases which raised similar points of law concerning whether, inter alia, a duty of care is owed in the investigation crime. In one of the cases, L.M., the application to fix the issue was not contested and indeed may in fact have been ordered on consent. Nevertheless, O'Donnell J. stated at para. 34:-

> *"However, I also consider that a court is entitled, on the hearing of the preliminary issue, to consider if it is an appropriate case for determination by this procedure. If, for example, the court proceeded to hear and seek to determine the preliminary issue after a full and elaborate argument, it would, as I conceive it, still be open to the*

court to conclude that in the light of the arguments and the matters advanced, that it was not possible to give the sort of clear and unequivocal answer to the issue which would dispose of the case or any issues in the case. Therefore, the case should proceed to trial to have issues of law determined in the concrete and precise circumstances of an individual case. Indeed, counsel for the defendants in these cases conceded that this could be done in an appropriate case, but I do not wish to rest this decision, particularly in the context of this case, on any such concession. In my view, a court retains power to refuse to determine a preliminary issue if, after careful analysis, it becomes apparent that some aspect of the issue was heavily fact dependent, or that a possible outcome would be so contingent or qualified as to require almost a form of advisory opinion." (Emphasis added)

Ultimately, he concluded that it would have been wrong to seek to address important issues of law in the context of limited available information.

30. I accept, as a general proposition, that the more issues one seeks to have tried in this manner, the greater level of caution ought to be exercised. Nevertheless, the court ought not be deterred from making the order sought simply because there may be more than one issue. The basic principles continue to apply regardless of the number of such issues, always bearing in mind that the default position is a unitary hearing.

31. It is clearly not the function of the court on this application, and at this stage, to examine the legal issues which have been raised and which are likely to be dealt with at preliminary issue stage if this application is successful. It appears to me, however, that, given that to a certain extent they have been addressed in argument, it is appropriate to advert to them in a similar way, without expressing any view on the respective positions of the parties on the substantive legal principles, but in order to consider whether the issues are "*clear and precise*" and to which it is possible to give a clear answer.

32. The issues which are stated to arise to be determined by way of preliminary issue include whether s. 38 of the Act of 2009 has the effect of curtailing the fraudulent concealment provisions of s. 71 of the Act of 1957; whether a pre-existing relationship must exist to enable a party to rely on the defence of fraudulent concealment; or, if not, the nature and quality of the acts of concealment that will be sufficient to engage the provisions of s. 71 of the Act of 1957.

33. In *Kitchen v. Royal Airforce Association* [1958] 1 W.L.R. 563 Lord Evershed M.R. observed that fraud comprised conduct which, having regard to some special relationship between the two parties, was unconscionable. In *King v. Victor Parsons and Co.* [1973] 1 W.L.R. 29 however, Lord Denning M.R. did not require a pre-existing or special relationship.

34. In *McDonald v. McBain*, the plaintiff's premises were burnt down on 29th March, 1974. The six year limitation period for a cause of action in trespass, on the face of it, expired on 28th March, 1980. The action was not commenced until 10th April, 1985. At the conclusion of the plaintiff's case the defendant applied for a direction on the basis that the case was statute barred. The plaintiff sought to rely on s. 71 of the Act of 1957 and

argued that as her right of action was concealed by fraud the limitation period did not run until she discovered or could with reasonable diligence have discovered the fraud. It was argued on her behalf that she only learnt of this when the defendant admitted his involvement to her in October, 1983. Her counsel relied, *inter alia,* on the decision in *King v. Victor Parsons* in which Lord Denning M.R. held that there was no requirement for a pre-existing relationship and that it was sufficient that the defendant knowingly committed the wrong and did not tell the owner anything about it. Lord Denning M.R. observed that the wrong was committed secretly and by saying nothing the defendant kept it secret. He therefore concealed the right of action. This amounted to fraud within the terms of the section. Lord Denning M.R. equated '*knowingly'* with '*recklessly'* in terms of such concealment. In *McDonald v. McBain* the defendant contended that this could be differentiated because the plaintiff had at all times full knowledge of the burning of the property and the loss. Morris J. stated as follows:-

"it is my opinion that if the circumstances were such that the plaintiff in the present case had her property destroyed by fire deliberately by third party and that third party, either by stealth or silence, succeeded in hiding that fact from the plaintiff, and she was left in complete and total ignorance of the identity of the wrongdoer, then that conduct on the part of the wrongdoer would amount to fraud within the meaning of the Statute of Limitations."

35. Certain facts were available to the plaintiff relating to the identity of the defendant. Morris J. felt that she could have relied on them to attempt to persuade the court, on the balance of probabilities, that the defendant was responsible for the deliberate burning of her property. Having carefully examined the facts he stated:-

"While postponement of a limitation period might occur where the identity of a wrongdoer remains entirely undiscovered, there was no authority for the proposition that a plaintiff could postpone the bringing of claim until he/she had available to him/her evidence which he/she believed would copper fasten the matter in his/her favour."

36. Although Mr. Harty S.C. submits that dicta of Morris J. in *McDonald v. McBain* is obiter, the decision is illustrative of how fact dependent the issue might be.

37. Mr. Harty S.C. submits that even allowing for the absence of a reply the parties can agree a matrix of facts. Mr. Cush S.C. suggests that the seventh defendant is selective as to what facts he will agree. What is clear, however, is that the pleadings have not yet closed. Counsel has informed the court that a reply has been prepared and will be delivered. If not delivered by consent, an application to extend the time for so doing will be required. Thus, the facts on which reliance is or may be placed to engage the provisions of s. 71 of the Act of 1957, while to some extent addressed in the affidavits, have not been the subject of pleadings or any potential interrogation of those pleadings. At this stage therefore it cannot be said that the facts upon which the alleged answer of fraudulent concealment is based have been pleaded, agreed or accepted for the purposes of the issue. While a concession was made in argument of concealment of involvement, it

is also clear that there is as yet no agreement between the parties as to factual basis for this concession.

38. It seems to me that the issue which the court has been requested to consider is, accepting that fraudulent concealment has occurred and without details or further pleading of such concealment, that this matter might be dealt with on a preliminary basis because there is no pre-existing duty owed by the defendant to the plaintiff. If the court is to accede to the application on this basis, I fear that absent agreement on the particular facts on which such concession might be based, the determination of the issue might become impossible or perhaps be an academic exercise. In light of the authorities, including *McDonald v. McBain*, I am also persuaded to the view that the issue concerning the application and operation of s. 71 is likely to be considerably fact dependent. I therefore find myself unable to conclude that there is, on this particular issue, a clear point to which it is possible to have a clear answer. I am also of the view that in light of the state of the pleadings and the absence of agreement or concession on the facts, that it is premature.

39. On the second issue, the seventh named defendant maintains that the plaintiff's claim regarding damage to reputation by lawful means conspiracy is unstateable and is one which might be usefully determined by way of preliminary issue. To this end, the defendant is willing to accept the facts as pleaded. It is clear that in principle whether a duty is owed as a matter of law or, as in this case, whether the facts as pleaded amount to the tort of lawful means conspiracy, might usefully be determined by way of preliminary issue.

40. However, in my view there are complicating factors. First, although the pleading of special damage as against the Red Flag defendants arose before the seventh named defendant was joined in the proceeding and while special damage is not expressly pleaded against him, nevertheless special damages are pleaded against the Red Flag defendants. Yet a further complicating factor is the contention of Mr. Cush S.C. in argument that the Red Flag defendants are servants or agents of the seventh named defendant in respect of at least some if not all of the wrongs alleged.

41. While there may be some saving of court time if the preliminary issue on this point were to be decided in favour of the seventh defendant, given the potential reduction in the number of parties to that issue, the cause of action based on unlawful means conspiracy and breach of confidence will remain, with, it seems, a continuing contention that the Red Flag defendants are the servants or agents of the seventh defendant. In addition, is so far as the question of time and expense associated with discovery is concerned, on that application the court will undoubtedly be mindful of the parameters of its jurisdiction to direct discovery and will assess whether what is sought is relevant, necessary and proportionate in accordance with the principles set out by the Court of Appeal in *Good Concrete v. CRH plc* [2020] IECA 56.

42. A further consideration is the prospect that either party may appeal any order which this court might make. In Campion. McKechnie J. adverted to this as follows:-

"[56] Finally, it is at least as likely as not, that if the issues were determined by way of a preliminary hearing, either party, if aggrieved by the result, may undertake an appeal in respect thereof to this or as may now be more appropriate, to the Court of Appeal. Duffy v. Newsgroup Newspapers Limited (No.2) [1994] 3 I.R. 63 is apt on point where O'Flaherty J. said at p. 77:-

> *'I would also make the observation that the whole point of setting down a preliminary point of law is to save in time and costs. This is surely not being achieved in the course of these proceedings. Even if there were a preliminary hearing on this matter whoever lost would, presumably, appeal to this Court and would mark the third appeal in an interlocutory manner in these proceedings.'"*

43. The matter is addressed as follows in *Delaney and McGrath on Civil Procedure* (4th ed, Round Hall, 2018) at para. 14.26:-

"One factor that will be taken into account in deciding whether there would be a saving in time and costs is the likelihood of an appeal against the determination of the preliminary issue. However, this will rarely be decisive as that possibility will arise in virtually every case."

44. I agree. I do not think that a suggestion by one of the parties in submissions that an appeal might be taken from any order the court might make is anything other than a statement of the obvious. Nevertheless, the fact that a party may have pursued appeals in the same case or indeed in other matters, although not in any way determinative, is a factor which must be considered.

45. Weighing all of the above factors, notwithstanding the prematurity of the application, I am not satisfied that the applicant has identified issues which are sufficiently concise and capable of a clear answer to justify making the order sought. I am also not satisfied that it has been established that there would be significant saving of time and expense. While there may be some reduction in the length of the trial, given the potential reduction in the number of parties if the seventh defendant were to be successful on the suggested preliminary issues, the extent of any savings to the court or to the parties is insufficiently clear to tip the balance on this issue.

46. For all of the above reasons, I must therefore refuse the relief sought.

47. Finally, with regard to the remaining issues (c) and (d) on the motion, the court expresses no view save to say that nothing in this decision affects Mr. Ganley's right to engage the jurisdiction of the court to seek to strike out pleadings, or parts thereof, on the grounds that that they are scandalous, vexatious, inadequately pleaded or that they fail to disclose a cause of action.