

THE HIGH COURT

[2020] IEHC 556
[No. 2018/221 P]

BETWEEN

VODAFONE IRELAND LIMITED

PLAINTIFF

AND

RIGNEY DOLPHIN LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 30th day of October, 2020

Introduction

1. In this application, the defendant seeks a stay on the proceedings until the determination of other proceedings entitled '*Richard Wilson v. Vodafone Ireland Limited*, High Court Record No. 2013/5473P' ('the Wilson proceedings'). It does so in circumstances where the plaintiff in the present proceedings seeks a declaration that the plaintiff is entitled to an indemnity pursuant to s.27 of the Civil Liability Act 1961 ('the Act') from the defendant against claims made against it in the Wilson proceedings.
2. The plaintiff also seeks "*an order for such damages and costs for which the Plaintiff may be held liable in [the Wilson proceedings] ...*". Counsel for the plaintiff contends that this is intended to invoke what the plaintiff contends is a contractual right to indemnity as against the defendant, in addition to the alleged right under s.27. The plaintiff also seeks an order for contribution in the alternative.
3. The defendant seeks the stay "*pursuant to the inherent jurisdiction of the court*". It is necessary to examine the circumstances of the case, and of the Wilson proceedings, to establish the context in which this jurisdiction is to be considered.

Background

4. The plaintiff ('Vodafone') is a provider of telecommunications services. The defendant provides call centre personnel services. The parties entered into a contract in January 2004 whereby, in consideration of payment terms as set out in the contract, the defendant agreed to provide personnel to work in the plaintiff's call centres in Dublin and Dundalk. The contract was subsequently varied by letter in November 2006.
5. The Wilson proceedings came about in the following way. It is alleged in those proceedings that Mr. Wilson had a mobile telephone contract with Vodafone, and that in February 2010, an employee of the defendant, Ms. Jolene Hatzler, disclosed confidential information in the form of telephone records to Mr. Wilson's father-in-law. This alleged disclosure followed the publication of an article in the News of the World newspaper concerning Mr. Wilson's brother-in-law, and it is suggested that the mobile telephone traffic data "*appeared to show that Richard Wilson had been in contact with a reporter from the News of the World newspaper and also in contact with the Police Service of Northern Ireland, showing that Richard Wilson had reported certain criminal activities of his brother-in-law*" [grounding affidavit of David Strahan in the present proceedings, sworn 6th March, 2020]. As para. 10 of the statement of claim in the present proceedings puts it: -

"The Plaintiff in the said proceedings alleges that the said alleged disclosure, which was made to the said Plaintiff's father-in-law established that the said Plaintiff had been in contact with the Police Service of Northern Ireland and the News of the World newspaper with information concerning his brother-in-law as a result of which the said Plaintiff alleges that he has been subjected to a sustained and relentless campaign of harassment, threats, intimidation and abuse conducted by his in laws."

6. Mr. Wilson pleaded in his statement of claim that his physical and mental health had deteriorated and that his ability to work and earn a livelihood had been adversely affected. He alleged that he and his wife have been ostracised by her family, and that he believed that he would have to move *"to escape the campaign of harassment"*.
7. Mr. Wilson issued his proceedings against Vodafone on 29th May, 2013. The statement of claim was delivered on 18th May, 2015. Mr. Wilson seeks damages, including *"aggravated, exemplary and punitive damages"*, for, *inter alia*, breach of contract, breach of confidence and misuse of private information. Particulars of Mr. Wilson's claim were sought by Vodafone, and an order of this Court was made on 19th April, 2018 that Mr. Wilson furnish certain further particulars to Vodafone. It was also ordered that Vodafone could amend its defence. An amended Defence was duly delivered on 23rd April, 2018.
8. Vodafone issued its plenary summons in the present proceedings on 11th January, 2018. A statement of claim was delivered on 23rd January, 2018. The defendant's solicitors served a notice for particulars on 9th November, 2018, to which the plaintiff replied on 21st March, 2019. By letter of 14th February, 2020, Vodafone's solicitors consented to late filing of the defence within three weeks of that letter. However, no defence was delivered, and the present motion issued on 6th March, 2020.
9. In November 2019, the solicitors for Vodafone received a certificate of readiness for the Wilson proceedings, and by letter of 25th November, 2019, wrote to the defendant's solicitors indicating that they wanted to have the cases listed together and seeking the defendant's consent in this regard. The letter of 14th February, 2020 provoked a response from the defendant's solicitors on 18th February, 2020, in which the defendant's position was summarised as follows:

"It is self-evident that your client did not serve a third party notice in the Wilson Proceedings and chose, instead, to issue the 2018 Proceedings some five years after the commencement of the Wilson Proceedings. In the circumstances, your client is not entitled to seek an indemnity against our client given the inordinate and egregious delay, which is unexplained and highly prejudicial to our client.

Furthermore, it is not appropriate for our client to deliver a Defence to the 2019 Proceedings and for both sets of proceedings to be listed together. Our client ought not to be put to the significant trouble of preparing for and effectively participating in proceedings to which it is not a party. In addition to the prejudice that arises to our client, it is a waste of Court time and our respective clients' costs to have both

sets of proceedings listed together, especially where the claim for indemnity may well be moot..

In the interests of the efficient use of Court time and the savings of substantial costs, the appropriate step is for the 2018 proceedings to be stayed pending the determination of liability, if any, in the Wilson proceedings."

10. By letter of 19th February, 2020, Vodafone's solicitors reiterated their demand for a defence, and commented that:

"There would be twice as much waste of Court time if the plaintiff in the 2013 proceedings succeeds and the entire case has to be re-run in the 2018 proceedings. There would be a substantial overlap of witnesses and consequently, listing both cases together would represent a substantial saving of costs and Court time. We agree that if the Plaintiff is unsuccessful in the 2013 proceedings then the only issue is our client's costs."

11. The grounding affidavit for the present application of David Strahan, the defendant's solicitor, and the replying affidavit of Robert Browne, Vodafone's solicitor, largely address the merits of the application. It is relevant to record that Mr. Strahan makes the point that, as is apparent from the Wilson proceedings, Vodafone have been aware of Mr. Wilson's allegations regarding Ms. Hatzer's alleged acts since November 2010 and that *"...contrary to its pleas in its Defence, Vodafone was fully aware of the existence and employment of Jolene Hatzer...on 8 November 2010"* [para. 12].
12. However, Mr. Browne avers in his replying affidavit of 6th May, 2020 that *"the Investigation and Disclosure Manager"* of Vodafone, Mr. Jim Faughnan, who is dealing with the matter for Vodafone, *"...was not in a position to locate any record of Jolene Hatzer being employed by the Plaintiff or by Rigney Dolphin until 2017..."*, and refers to paras. 11-13 of an affidavit sworn by Mr. Faughnan on 2nd November, 2017 in the Wilson proceedings in this regard.
13. Paragraphs 11 and 12 of that affidavit suggest that Mr. Faughnan *"had consulted with Vodafone's Human Resources Department, who were unable to find any employee records relating to Ms Jolene Hatzer...I made inquiries with Vodafone's Human Resources Department for any record of Ms Jolene Hatzer being a Rigney Dolphin employee and no such record was found"*. However, documentation sourced from the defendant appears to confirm that Ms. Hatzer was indeed employed by the defendant at the material time.

Submissions

14. Mr. Ciaran Lewis S.C. for the defendant submitted that, if the plaintiff had wished to have its claim for indemnity against the defendant heard with the Wilson proceedings, it should have applied for liberty to join the defendant as a third party to those proceedings. It would then have been subject to the established jurisprudence in relation to the time within which a third party must be joined. However, it did not do so, but launched its proceedings for an indemnity over two and a half years after service of the statement of

claim in the Wilson proceedings, and over seven years after the events at the heart of both proceedings. The Wilson proceedings had in fact been set down for trial in 2016.

15. I was informed at the hearing that the plaintiff has now in fact issued a motion seeking to link the present proceedings with the Wilson proceedings. This motion is to be heard on 14th December, 2020. I asked counsel for the plaintiff whether he was seeking to have the present motion deferred until that date, but counsel said that he was satisfied to proceed with that motion.
16. Counsel for the defendant submitted that the plaintiff was trying to bring about a situation which would have the same effect as if the defendant had been properly joined as a third party. Counsel analysed the well-known provisions in relation to third party procedure, and in particular s.27(1)(b) of the Act, which requires a third party notice to be served by a concurrent wrongdoer "*as soon as is reasonably possible...[I]f such third party notice is not served [as soon as is reasonably possible]... the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed*". Counsel also referred to the requirement in O.16, r.1(3) of the Rules of the Superior Courts that, unless otherwise ordered by the court, an application for leave to issue a third party notice must be made within 28 days from the time limited for delivering the defence. It was submitted that, by the time the present proceedings were initiated, the delay would have ensured that an application to join the defendant as a third party would not have succeeded, and that the plaintiff was not entitled to circumvent the third party procedure, having failed to avail of it in the first place.
17. The only relevant authority which either counsel produced in relation to the exercise of the court's inherent jurisdiction to stay proceedings was the decision of Clarke J. (as he then was) in *Kalix Fund Limited v. HSBC Institutional Trust Services (Ireland) Limited* [2010] 2 IR 581. The proceedings in that case were two of a large number of cases arising from the collapse of an investment fund, and the court had to consider whether to stay certain proceedings brought by the investors until the determination of proceedings against the custodian of the fund on the basis that any losses that would be established in proceedings against the custodian of the fund were the same as the losses claimed in the investors' proceedings.
18. In considering the matter, Clarke J. stated as follows: -

"45. *It does seem to me, at the level of principle, that a court has discretion, in ordering its business, to ensure that scarce court resources and the resources of parties to litigation are not inappropriately wasted by an unnecessary duplication of litigation. In addition it is, of course, important that measures are taken to minimise the risk of any inconsistent determinations arising from different proceedings. It is for reasons such as those, that the practice has grown up over recent years of cases being linked as a purely procedural measure to ensure that a series of cases which have common factors are assigned to a single judge, who will determine all relevant issues across the range of cases concerned.*

...48. *It seems to me to follow that the court has an inherent jurisdiction to manage the conduct of a series of cases which are connected by reason of having significant factual or legal overlap for the purposes, in the words of Kelly J. in Re Norton Healthcare Limited [2005] IEHC 441, [2006] 3 IR 321, of bringing about 'a just and expeditious trial whilst seeking to minimise costs' (at p.331). Applied to a number of cases, the obligation is to ensure that each party to each of the cases nonetheless will achieve, as best as can be done, a just and expeditious trial, but also that, across the range of cases, costs be minimised and scarce court resources not be wasted."*

19. At para. 49 of his judgment, Clarke J. referred to three factors which needed to be taken into account in assessing how to manage a series of cases. Abbreviated somewhat, they are as follows: -
- "(a) *the fact that each individual plaintiff is entitled to have that plaintiff's proceedings determined in an expeditious manner, subject only to ensuring that there is no disproportionate added expense or drain on court time imposed;*
- (b) *a consideration of the extent to which the first case to be tried is likely to bind all other cases in whole or in part...the greater the extent to which all other proceedings will be governed by the first case to be run, the more value there is in ensuring that the cases generally are managed in a fashion which allows the common issues to be resolved in a speedy fashion...*
- (c) *the need to ensure that any measures adopted which have the effect of preventing one or more cases from progressing in the way in which they might ordinarily be expected to progress, were they to be considered on a stand alone basis, are no more than is necessary and proportionate to achieve the end of preventing unnecessary expense or use of court time."*
20. Counsel for the defendant urged the court to exercise its discretion to stay the present proceedings until the Wilson proceedings were determined. It was submitted that the issue in the present proceedings – whether the defendant was obliged to indemnify the plaintiff or was at all responsible for the actions causing the alleged damage – was distinct from the issues in the Wilson proceedings, so that the risk of duplication of evidence was minimal. If Vodafone successfully defended the Wilson proceedings, the question of indemnity did not arise. On the other hand, if the defendant was compelled to participate in the Wilson proceedings, it would have to take numerous procedural steps, engage in matters such as particulars and discovery, and prepare for a trial of issues in an action to which it was not a party, and the result of which might render the proceedings moot.
21. It was submitted that there was no prejudice to the plaintiff; even if it were to have an award made against it in the Wilson proceedings, the sole issue of the defendant's responsibility in law or under the contract between the parties could then be determined in the present proceedings.

22. The plaintiff furnished written submissions, although the only authority on which reliance was placed was the decision in *Kalix*.
23. Mr. Michael Howard S.C. for the plaintiff submitted that the order sought by the defendant would not have been available to it if the third party procedure had been adopted, as the third party proceedings would have been litigated along with the Wilson proceedings, and that the stay should not be available in the present circumstances when it would not be available if the defendant had been joined as a third party.
24. It was submitted that the principles governing whether or not a stay should be granted have nothing to do with whether or not the plaintiff had or had not availed of the third party procedure in the Wilson proceedings, and counsel suggested that it was notable that, while counsel for the defendant had referred in detail to chapter 9 of Delany & McGrath on Civil Procedure, 4th Edition, 2018, in relation to third party procedure, there was no reference by the authors to *Kalix* in that chapter.
25. Counsel submitted that the court should proceed from the assumption that both the Wilson proceedings and the present proceedings will go to trial, and that the issue to be considered by the court concerns the question of whether time and resources can be saved if a stay is granted. This, rather than the question of whether the plaintiff was by-passing the third party procedure, was the true focus of the *Kalix* decision.
26. It was also asserted that the plaintiff sought an indemnity, not just under s.27 of the Act, but under the terms of the contract itself, and that Clause 8 in particular of the contract dealing with the warranties and indemnities given by the defendant to Vodafone was cast so wide as to encompass "*all losses, costs, damages and expenses*" [clause 8.2], and to indemnify Vodafone against a number of named categories of loss "*...or otherwise arising from or connected with the provision of the Services...*" [clause 8.3]. The plaintiff therefore had a wider claim for indemnity than that envisaged under s.27, and was entitled to pursue any such losses in separate proceedings. It was also submitted that the proper interpretation of the clause was that liability under it was not fault-based.
27. Counsel referred to the three criteria for the exercise of the court's jurisdiction identified by Clarke J. in *Kalix* and referred to at para. 19 above. It was submitted that the imposition of a stay would cause considerable delay in having its proceedings determined, and that it would result in added expense and misuse of court time if the matter could not be litigated together with the Wilson proceedings.
28. As regards the second and third criteria, the plaintiff submits that this is not a case in which matters to be determined between the plaintiff and the defendant in the present proceedings will be determined in the Wilson proceedings, and that a stay would be more than would be "*necessary and proportionate to achieve the end of preventing unnecessary expense or use of court time*".

Discussion

29. It seems to me that, in principle, the plaintiff is correct in suggesting that, to the extent that it is pursuing a free-standing remedy in contract against the defendant as well as an indemnity under the Act, it was entitled not to invoke third party procedure. Indeed, it would seem from the decision of Cregan J. in *Irish Bank Resolution Corporation v. Purcell* [2016] 2 IR 83, and in particular at paras. 229-234 of that judgment, that it is not possible to plead a separate claim for damages owed by a third party to a defendant in a third party statement of claim, as the defendant and third party would not be concurrent wrongdoers – as defined by s.11(1) of the Act – for the purpose of s.27.
30. However, there can be no doubt that the plaintiff allowed a very considerable amount of time to elapse before progressing the present proceedings, which were issued in January, 2018, over seven years after the occurrence of the events grounding Mr. Wilson's claim, and over a year after the Wilson proceedings had been set down for trial.
31. The plaintiff excuses its inaction by maintaining that, in the words of Mr. Browne at para. 7 of his affidavit, "...Mr. Faughnan was not in a position to locate any record of Jolene Hatzer being employed by the Plaintiff or by Rigney Dolphin until 2017". However, it is very clear from the documentation relating to the Wilson proceedings exhibited to Mr. Strahan's affidavit that Vodafone was well aware of Ms. Hatzer's involvement in November 2010, and that Mr. Faughnan was in fact at that time attempting to procure a "waiver" of any claims by Mr. Wilson which named Ms. Hatzer in its text. A copy of this waiver, alleged to have been signed by Mr Wilson in November 2010, was sent by the plaintiff to Mr. Wilson's solicitors by letter of 2nd July, 2015.
32. What is proposed now by the defendant is that the present proceedings be stayed until the Wilson proceedings are determined. It is suggested that the plaintiff may successfully defend the Wilson proceedings. While it would be improper of me to attempt any estimate of its prospects in this regard, the amended defence delivered by the plaintiff in the Wilson proceedings is robust and proactive, with several preliminary objections and a full statement of its position. In fact, it asserts that it cannot be liable for the conduct of Ms. Hatzer, either vicariously or at all, as it occurred "*whilst Ms. Hatzer was engaged in a frolic of her own*" [para. 48]. I have no indication other than that the plaintiff intends to defend the Wilson proceedings fully and vigorously.
33. The plaintiff contends for a contractual right of indemnity which extends further than would be permitted under s.27. However, it is not at all clear to me what the plaintiff might claim apart from the losses falling under the s.27 indemnity. Indeed, counsel for the defendant went so far as to say that no such cause of action or loss was pleaded in the statement of claim. Although the reliefs claimed in the statement of claim do not mention the contract, there is mention of it in para. 12: -

"12. In the event of the Plaintiff herein being held liable to the Plaintiff in the said proceedings the Plaintiff herein claims against the Defendant herein pursuant to the Civil Liability Act, 1961 and pursuant to the terms of the said contract between the parties herein to be indemnified against the Plaintiff's claim in that action and the costs of that action or alternatively claims a contribution including a contribution

amounting to a complete indemnity, in respect of the Plaintiff's claim in that action, and the costs of that action". [Emphasis added]

34. Nonetheless, the only claims to which specific reference is made in the statement of claim are for an indemnity against Mr. Wilson's claims and for the costs of that action. There is no suggestion in the pleadings at this stage of any further loss over and above that which would accrue in the normal course under a s.27 indemnity.
35. It would seem possible therefore that, if the proceedings are successfully defended, the present proceedings would be rendered moot. It might be that the plaintiff would claim some contractual right against the defendant such as a right to recover against the defendant any costs not recovered against Mr. Wilson. However, it seems to me that any remaining issues would be minor and capable of being resolved expeditiously.
36. If Mr. Wilson succeeds in obtaining an award of damages and/or costs against the plaintiff, the present proceedings will have to go ahead. However, it does seem to me that such proceedings would be unlikely to require a re-run of the liability issues in the Wilson proceedings, particularly if, as the plaintiff contends, the defendant may have a contractual liability to it on a no-fault basis. I think the defendant is correct in maintaining that the issue in the present proceedings is significantly different from the issues that arise in the Wilson proceedings.

Conclusions

37. A plaintiff has a right to progress its proceedings as best it can in accordance with the rules of the Superior Courts. A court is hesitant to impede the progress of litigation, and must do so only in accordance with clear principles and in a just and fair manner.
38. However, as the decision in *Kalix* makes clear, the court has an inherent jurisdiction to stay proceedings in certain circumstances. I note also the provisions of O.63c (4), which relates to Chancery and non-jury cases: -
 - "4. *A Judge may, at any time and from time to time, of that Judge's own motion and having heard the parties, or in the application of a party by motion on notice to the other party or parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings".*
39. As regards the three principles enunciated by Clarke J. at para. 49 of *Kalix*, I am conscious that Clarke J. was dealing with a slightly different situation, i.e. where there was a series of cases as opposed to just two cases. However, I consider that those principles are of considerable assistance, and indeed they were relied upon by both the plaintiff and the defendant in their submissions, albeit for opposing purposes.
40. It seems to me that, if the matters are not linked and the Wilson proceedings go ahead, it is very likely that, whoever is successful, relatively net issues will remain to be decided as between the plaintiff and defendant in these proceedings. It might be that any such

issues could be resolved without the necessity for a trial. However, if I do not grant a stay, both proceedings will go forward and the application to have the matters linked will be determined in due course. If the matters are linked, the defendant will have to involve itself in an action in which it has played no part to date, complying with all the necessary procedural steps and preparing for a trial in which it may play little meaningful part; all of this in addition to completing all of the necessary steps to progress the present proceedings, which due to the delay in initiating the proceedings are at a very preliminary stage.

41. On the other hand, it does not seem to me that there is any significant prejudice to the plaintiff if the issue of liability in the present proceedings awaits the outcome of the Wilson proceedings. That issue is likely to be relatively net, and there is no reason of which I am aware why it could not be progressed relatively quickly to trial. Such a course of action may deprive the plaintiff of the defendant's presence "*at the table*" in the event that a question of settlement of the Wilson proceedings arises. However, that is not a factor which I can take into account.
42. In all the circumstances, I consider that I should stay the present proceedings pending determination of the Wilson proceedings. I consider that such a step is necessary and proportionate to achieve the end of preventing unnecessary expense or use of court time. I am of the view that the making of such an order is "*convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings*" [O.63c(4)].
43. I consider it appropriate that the defendant deliver its defence, and I will order that it be delivered within three weeks of this ruling. However, with this exception, the stay will apply to any further conduct of these proceedings until after the determination, either by this Court or on appeal, of the Wilson proceedings, or until further order of this Court. I will give liberty to the parties to apply.
44. As this judgment is being delivered electronically, I would invite brief written submissions within seven days of this judgment in relation to any issue arising out of the orders I propose to make, including costs.