

THE HIGH COURT

[2021] IEHC 731

RECORD NO. 2012/5237P

BETWEEN

PETER SECANSKY

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND, THE ATTORNEY GENERAL, THE GOVERNOR OF CLOVERHILL PRISON, THE GOVERNOR OF MIDLANDS PRISON

DEFENDANTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 18 November 2021

Introduction

1. This is an application for leave to deliver interrogatories brought by way of notice of motion of 3 June 2020. The plaintiff is a Slovakian national, who lives in Slovakia. The application is brought in the context of somewhat unusual proceedings, whereby the plaintiff is seeking damages from, *inter alia*, the Commissioner of An Garda Síochána ("An Garda Síochána") and the Director of Public Prosecutions ("the DPP") for charging him with one count of rape that allegedly took place on 8 February 2009. He alleges, *inter alia*, breach of constitutional rights, malicious prosecution, false imprisonment, negligence and breach of duty and deliberate and conscious abuse of statutory powers.
2. In short, the relevant facts are as follows. The plaintiff was accused of rape by a complainant who had previously made a similar complaint in August 2007 against an individual entirely unrelated to the plaintiff, which she later withdrew, accepting that her complaint of rape was a fabrication, stemming from personal difficulties she was having due to a history of sexual abuse, family problems and an alcohol issue. Consideration was given to prosecuting her for wasting garda time, but it was recommended that no prosecution take place due to her personal circumstances.
3. Early on the morning of 8 February 2009, after spending the night with the plaintiff and some other people, where it appears significant amounts of alcohol were consumed, the complainant alleged the plaintiff had raped her and the gardaí were called by the father of her boyfriend. The plaintiff was questioned and released without charge. He emphasises that the complainant made only one statement against him on 8 February 2009, was never re-interviewed and that the garda who took the statement formed the opinion that she was under the influence of alcohol at the time of the making of the statement.
4. When the plaintiff returned to Ireland for the purpose of meeting his employer for an unrelated matter on 1 June 2010 (following his permanent return to Slovakia on 29 April 2009), he was arrested, detained, and later that day charged with the offence of rape pursuant to s.2 of the Criminal Law (Rape) (Amendment) Act 1990. He was remanded in custody by the District Court and on 1 July 2010 a book of evidence was served upon him and he was sent forward for trial to the Central Criminal Court. On the same date he made a bail application to the District Court which was opposed by the first defendant on the basis that he was a flight risk and bail was refused. On 27 July 2010 the matter was set down for trial for 22 June 2011.

5. On 30 August 2010 the plaintiff made an application for bail to the High Court and the first defendant opposed same on the basis again that he was a flight risk. He was granted bail on condition that he make a €10,000 cash lodgement, surrender his travel documents, reside at an address within the jurisdiction and sign on daily at a garda station. The plaintiff was unable to meet those terms and was remanded in custody until 21 June 2011.
6. In early June, some weeks before the trial date of 22 June 2011, he was provided with disclosure which included an extract from a file in respect of the investigation into the previous fabricated allegation of rape made by the complainant. On 20 June 2011, the plaintiff's solicitor was informed that the second defendant intended to enter a *nolle prosequi* in the matter.
7. The plaintiff identifies in his statement of claim the harm that was caused to him by his detention in custody in Ireland for 385 days when he returned to Slovakia, including the breakdown of his relationship, the ensuing lack of access to his daughter and the loss of his job.

Procedural History of the Case

8. The procedural history of the case is of some importance. The plaintiff received disclosure and therefore was able to formulate the pleas in his statement of claim of 30 April 2013 with some particularity.
9. A defence was filed on 22 January 2015, where it was pleaded that the defendants were carrying out their public function in pursuance of a public duty, being the investigation and prosecution of criminal offences and that as such the plaintiff had no permissible cause of action as against the defendants. It was further pleaded that without a plea of *mala fides*, no cause of action subsists against the defendants.
10. The plaintiff subsequently brought an application for discovery. Wide-ranging discovery was ordered by Twomey J. on 11 July 2016 whereby it was directed that discovery be made, *inter alia*, of the garda investigation file into the complaint of rape made by the complainant in August 2007, as well as the file into the complaint made against the plaintiff on 8 February 2009. Discovery was also ordered of all correspondence between the gardaí and the office of the DPP in relation to the 2007 allegation and the 2009 allegation. Discovery was also ordered of the DPP file in respect of the 2007 complaint.
11. Ultimately, four affidavits of discovery were sworn. Privilege was claimed over a significant number of the categories but not over the garda files in respect of either of the investigations. As part of the papers in this case I have been provided with the discovery made, which includes custody records, interviews with the plaintiff, statements of various witnesses, a preliminary report on the alleged assault, reports from the forensic science laboratory, the statement of the complainant, records of phone calls and other associated documents.

12. It is fair to say that the plaintiff has received a very significant amount of relevant documentation both through discovery and also due to the disclosure in the criminal case against him.
13. The plaintiff has not exhibited the material that he received by way of that disclosure but it is clear from the level of detail in the statement of claim in these proceedings that he must have received a significant amount of information in that way also.

Motion for Interrogatories

14. The motion was grounded on a short affidavit by Adrian Shanley, solicitor for the plaintiff, sworn 3 June 2020 where he refers to the correspondence seeking interrogatories and avers that the interrogatories sought are relevant to the issues in the pleadings and are necessary for the purpose of disposing fairly of the proceedings and for the purpose of saving costs. He goes on to say that each of the said interrogatories have a litigious purpose in that they will enable the plaintiff to sustain his case or damage that of the first and second defendants and will narrow the issues and will reduce the area of proof required of the plaintiff which would be beneficial to the administration of justice. He goes on to say that the interrogatories are necessary to enable the plaintiff to obtain information as to facts material to issues in dispute between him and the first and second defendants and are also necessary for the plaintiff to obtain admissions of facts which he would otherwise have to prove and which are raised in the pleadings herein.
15. That is the extent of the averments and it is fair to say that none of those averments are in any way referable to the individual facts of this case or to the necessity in this particular case of obtaining the interrogatories sought. They are what might be described as formulaic averments. This is highly unsatisfactory, *inter alia*, because very extensive interrogatories are sought, being fifty two in number as against the first defendant and eight as against the second defendant. The letter seeking the interrogatories of 18 December 2019 provides no reasons explaining the necessity for same.
16. By letter of 1 October 2020, the Chief State Solicitor wrote on behalf of the defendants identifying that interrogatories cannot displace the necessity for the calling of oral evidence and cross-examination and that irrespective of the decision of the court on leave to issue interrogatories, the plaintiff must prove his case on oral evidence. It is noted that no special exigency exists so as to displace any privilege that would otherwise exist. The defendants referred to the interest of doing justice and that the interrogatories sought are matters that can properly be and should be dealt with on the hearing of oral evidence and cross examination. The defendants identify a risk that their position would be irredeemably prejudiced were they compelled to deliver replies to the intended interrogatories. On the other hand, they say that there is no evidence that without answers to the intended interrogatories the plaintiff would be irredeemably prejudiced in advance of the trial. Ultimately the letter concludes that it is a matter for the court to decide, *inter alia*, the necessity for same.
17. No replying affidavit was filed to the affidavit of Mr. Shanley. At the hearing written submissions were delivered by the defendants. Those took up and elaborated upon the

approach in the letter of 1 October described above. In short, it was emphasised that the application for leave should be refused in respect of all interrogatories for the following reasons:

- They comprise requests seeking to avoid oral evidence and cross-examination in respect of issues which the plaintiff has pleaded with particularity;
- They seek to minimise the hearing of proceedings by *viva voce* evidence, which limitation will prejudice a proper adjudication of the claim, and where the answers sought are nuanced in the context of the role of each defendant and do not give rise to a simple yes or no answer;
- The affidavit grounding the application fails to make reference to the significant discovery that has been provided by the defendants and fails to identify any evidential deficit;
- They are not directed to any individual and cannot be answered with certainty.

18. At the oral hearing, counsel for the defendants emphasised that given the complete absence of any engagement with the disclosure and discovery already made and the failure to explain why the interrogatories are necessary in that context, the plaintiff has failed to discharge the burden upon it of showing necessity.

Legal Test

19. Order 31 rule 1 of the Rules of the Superior Courts identifies that where the court gives leave, a party may deliver interrogatories in writing and that the interrogatories should identify which person is required to answer which interrogatories. Interrogatories that do not relate to any matters in question shall be deemed irrelevant although they might be admissible on cross examination.
20. Order 31, rule 2 identifies that the court shall consider the particular interrogatories sought to be delivered and in deciding upon such an application, the court shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars or to make admissions or to produce documents relating to any matter in question. The test for whether leave shall be given comes at the end of Order 31 rule 2 – leave shall be granted only for such interrogatories as may be considered necessary either for disposing fairly of the cause or matter or for saving costs.
21. Accordingly, when seeking leave, the burden rests upon the person seeking the interrogatories to demonstrate to the court that same are necessary for disposing fairly of the cause or for saving costs.
22. The defendants interpret the reference to fairness as encompassing the question of prejudice to either party.
23. Insofar as case law is concerned, the parties have referred, *inter alia*, to the following cases: *Blackwell v Minister for Health and Children* [2020] IEHC 427, *McCabe v Irish Life*

Assurance Plc [2015] IECA 239, *Irish Bank Resolution Corporation v Fitzpatrick* [2017] IEHC 715 and *Cole v Blood Transfusion Service Board* [1996] 6 JIC 1101. Those cases in turn make reference to older case law such as *Mercantile Credit Company of Ireland v Heelan* [1994] 2 IR 105, *Money Markets International Stock Brokers Ltd v Fanning* (2000) 3 IR 215, *Bula Ltd. v Tara Mines Ltd.* [1995] 1 ILRM 401 and *Woodfab Ltd v Coillte Teoranta* [2000] 1 IR 20.

24. In short, the core principles that may be gleaned from the case law are the following:
- The delivery of interrogatories has obvious efficiencies. It can obviate the necessity for expensive and time-consuming discovery, can dispose of issues prior to trial and can lessen the number of witnesses, resulting in an overall shortening of trials. However, the efficient conduct of litigation is one, but only one, factor to be taken into account by the court;
 - Interrogatories must not be used to prejudice a fair hearing of the issues between the parties;
 - Interrogatories should not be used in respect of matters more akin to opinions or meanings, the effect or the factual context of which may not admit a clear answer;
 - In considering the fair disposal of an action commenced by plenary summons the court must bear in mind that such actions are in principle to be heard on oral evidence, and that certain issues are more properly answered where the parties can contextualise the answer, rather than being confined to the narrow parameters of an interrogatory;
 - Where only one party has knowledge and the ability to conveniently prove facts which are important to be established in aid of the opposing party's case, the purpose of interrogatories is to avoid injustice.
25. The question as to whether the use of evidence given in reply to interrogatories is an exception that must be justified by some exigency is a somewhat vexed one. In *Mercantile Credit Company*, Costello J. suggested that this was the case. The judgment of O'Sullivan J. in *Money Markets International* tends to support that view. On the other hand, in *McCabe*, a decision of the Court of Appeal, Kelly J., having reviewed the authorities, expressly held there was no test of so-called special exigency and the test was no different from the necessity test identified in Order 31, rule 2.

Application of Principles

26. The defendants have strongly objected to leave being granted on the basis that the plaintiff is required to demonstrate why the interrogatories are necessary and has signally failed to do so. As I point out above, the affidavit grounding the motion contains boilerplate averments to the effect that the interrogatories are necessary without in any way explaining why this is so. That may be because, as explained by counsel for the plaintiff, it was expected that the substantive dispute over interrogatories would take place not at the leave stage, but when the defendants provided their answers to same.

However, that approach is misconceived. Order 31, rules 1 and 2 make it quite clear that it is at the leave stage that the questions of necessity and fairness should be considered.

27. Notably, there is no identification of any gap in the knowledge of the plaintiff in respect of the issues the subject of the interrogatories, and no reason is given on affidavit as to why, despite the extensive discovery in this case, the interrogatories are necessary. Given the burden upon the person seeking interrogatories, it would be quite in order for me to simply dismiss the application on this basis as the defendants ask me to do.
28. However, I am conscious of the sensitive nature of these proceedings and the undoubted perception of the plaintiff that he has been unfairly treated by the Irish legal system. In those circumstances, I am prepared to consider, by reference to the interrogatories and the pleadings, whether same are necessary within the meaning of Order 31. Turning to the fifty two interrogatories against An Garda Síochána first, there are a number of questions in respect of the 2007 complaint, identified at numbers one to fourteen. An examination of them discloses that they are susceptible to a yes or no answer and that the information sought is to be found in the discovery made. Similarly, in respect of the interrogatories in relation to the 2009 complaint against the plaintiff, the answers to the vast majority of these may be found in the discovery. For example, at interrogatory number eighteen it is asked whether, in the course of taking the said statement from the complainant, Garda Beirne formed the opinion that the complainant was, at the time of the taking of the said statement, very drunk. At page three of the covering report of Garda Beirne of 26 November 2009 in the discovery, it is stated that Garda Beirne observes that the complainant appeared extremely intoxicated and there was a very strong smell of alcohol emanating from the complainant's breath.
29. Similarly, at interrogatories number twenty four and twenty five, it is asked whether Sgt. Boyle visited the scene of the alleged rape and whether he interviewed the plaintiff at 2.35pm on 8 February 2009 in relation to the allegations made earlier that day by the complainant. In the statement of Sgt. Boyle of 20 November 2009, included in the discovery, he says that he attended the alleged scene at 93 Abbey Grove, Navan and that he interviewed the plaintiff at 2:35pm.
30. The interrogatories at numbers thirty five to thirty eight relate to the knowledge of the three gardaí as to the false complaint made by the complainant in 2007. Again, when one goes to the discovery, one sees that the information sought is contained therein.
31. Interrogatories number forty seven to fifty two are concerned with inquiries as to what happened at various bail applications. The plaintiff's legal team attended those hearings and therefore are in as good a position as the defendant's legal team to answer those questions. Therefore, no necessity for those interrogatories has been established.
32. There are eight interrogatories sought against the second defendant, the DPP. These are concerned with;

- Whether particular files and reports passed between the first and second defendants in relation to the investigation of the complaint of 8 February 2009 and the complainant's previous false allegation of rape;
 - Did the second defendant disclose to the plaintiff a copy of the garda investigation file into the complainant's previous false allegation and further did the second defendant make the District Court and the High Court aware of this previous false allegation at the respective bail hearings;
 - Was a file sent by the relevant superintendent to the second defendant on foot of that false allegation and further, did the superintendent seek directions from the second defendant as to whether the complainant should be prosecuted for that false allegation.
33. Again, it appears that the answers to these interrogatories are to be found in the discovery. Before dealing with the issue that this application revolves around i.e. are the interrogatories necessary given the extent of the information in the disclosure and discovery, I should address some discrete arguments made by the defendants. They asserted that given the sensitive nature of the issues in the case, the matters addressed by the interrogatories are more properly dealt with in the context of a plenary hearing, through examination and cross examination, where answers can be contextualised. However, a close examination of the interrogatories does not support that argument. They go to black and white factual issues, i.e. it does not seem to me that any of the interrogatories fall into the category identified by Baker J. in *IBRC v Fitzpatrick* as problematic i.e. interrogatories that constitute a snare or trap or raise questions that are better put in examination or cross examination or raise matters that are more properly matters of opinion rather than fact. Here, as I discussed above, the interrogatories appear to be simply designed to elicit admissions in relation to facts that appear in the discovery documentation.
34. Nor do I consider, contrary to the submissions of the defendant, that responding to these interrogatories would cause an injustice to the defendants. The defendants did not identify any concrete instance of injustice and given my conclusion as to the nature of the interrogatories, it is difficult to see how the defendants would be prejudiced. The interrogatories admit of a simple yes or no answer and do not require to be contextualised. Even the question about the knowledge of the gardaí at certain points in the investigation, which initially appeared as potentially requiring a nuanced response, in fact is answered squarely by the discovery material and does not appear to be the subject of any ambiguity.
35. Finally, there is no issue about the relevance of the questions, with counsel for the defendants fairly – and appropriately – conceding that the interrogatories were relevant having regard to the pleadings.

Necessity for interrogatories

36. I turn now to the crux of the application: are these interrogatories necessary within the meaning of Order 31, rule 2? With the possible exception of the questions going to the conduct of the bail application (which information is already within the possession of the plaintiff), it appears that the information sought is all contained in the documents discovered. Counsel for the plaintiff did not cavil with this proposition but indicated that this did not dispense with the necessity for the interrogatories since, if the defendants decided not to call witnesses who could give evidence as to the matters in the discovery documents, the plaintiff would be left with no way of proving the matters at issue. Moreover, even if relevant witnesses are called by the defendants, he referred to the saving of time if leave is given, as questions will not have to be put to witnesses to elicit answers and instead replies to interrogatories can be relied upon. In short, the purpose of these interrogatories appears to be to ensure that the plaintiff will be able to admit into evidence factual matters that flow from the discovery.
37. It is true that the plaintiff cannot force the defendants to call any witness required by the plaintiff to prove documentation. It is also true that discovery does not prove itself i.e. factual matters appearing from the discovery documents must still be proved by a witness unless the parties can reach some agreement on this point (see the judgment of Clarke C.J. in *RAS Medical v RCSI* [2019] IESC 4). However, the plaintiff can subpoena any witnesses he wants. The plaintiff's counsel objected to that course, saying that the plaintiff could not in those circumstances cross examine the witnesses. However, if the only purpose of calling those witnesses is to prove the discovery documentation produced by each witness, there is no need to cross examine them and the plaintiff will be able to prove the documentation in this way. It is of course true that this will involve additional expense and court time over and above what would be required if the defendants call the relevant witnesses or agree to permit material in discovery to be introduced without formal proof.
38. In this regard, the plaintiff could write to the defendants and request the documents be introduced according to the *Bula/Fyffes* model whereby parties agree that discovered documents can be placed before the judge without formal proof and may also agree that the documents concerned can be taken to represent *prima facie* evidence of the truth of the contents of the documents in question.
39. Alternatively, the plaintiff could take the very simple step of writing to the defendants to ask them to confirm that, if they choose not to call witnesses who can prove the documents, they will not object to the discovery documents being admitted without formal proof.
40. In short, if the plaintiff had exhausted all the above options before bringing this motion and it was clear that he would have to subpoena all relevant witnesses in order to introduce the discovery documentation, he might be in a position to persuade me that leave to deliver interrogatories is necessary on the basis that same will save costs and there is no other way to achieve such a saving apart from interrogatories.

41. However, no such attempt has been made and as a result, at this point, I cannot assess whether the interrogatories will in fact save costs. Accordingly, I am going to adjourn the motion to allow the plaintiff to take whatever steps he considers appropriate to see whether the defendants will permit the discovery material (and if relevant the disclosure material) to be introduced without the necessity for interrogatories. If it becomes clear that the defendants will not do so, then the plaintiff may be in a position to persuade me that the interrogatories are "necessary" within the meaning of Order 31.

Conclusion

42. I therefore adjourn this motion for the purpose identified above and give the parties liberty to mention it for the purpose of re-entry at an appropriate time. If the matter is to be re-entered, and the plaintiff wishes to proceed with his application, he will be obliged to file a supplemental affidavit identifying the persons to whom each interrogatory is directed as required by Order 31, rule 1 and I give liberty for a supplemental affidavit to be filed identifying same.