

THE HIGH COURT

[2022] IEHC 397

Record No. 2019 / 8397 P

BETWEEN

BRENDON CHRISTIAN

PLAINTIFF

AND

SYMANTEC LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Stack delivered on the 30th day of June, 2022.

Introduction

1. This is an application by the defendant to strike out part of the plaintiff's claim pursuant to the inherent jurisdiction of the court as an abuse of process and/or pursuant to O.19, r.27 of the Rules of the Superior Courts.
2. The plaintiff is qualified as a solicitor in England and Wales and is a former employee of the defendant, where he was employed as senior corporate counsel from 30 November, 2018 to 2 May, 2019, inclusive.
3. By plenary summons issued 31 October, 2019, he seeks damages for breach of contract, brings a data protection action pursuant to s. 117 of the Data Protection Act, 2018, relief for breach of the tort created by s.13 of the Protected Disclosures Act, 2014, damages

for breach by the defendant of its duty of care and duty of mutual trust and confidence owed to the plaintiff, and declaratory and equitable relief.

4. The statement of claim is not in compliance with the Rules and in particular O.19, r.3 which provides that every pleading shall contain, and shall only contain, a statement in a summary form of the material facts on which the party pleading relies for his claim, but not the evidence by which they are to be proved. The plaintiff has delivered a statement of claim which is 85 pages in length, and contains a further 101 pages in the form of Annexes A to I. However, there is no application made on the basis of any complaint to that effect, and this is merely an observation. It has to be said that, as a result, the plaintiff has given a very full account of his complaints, and it is possible to know the full scope of his claim, as he appears to have not only pleaded his claim, but disclosed much of the evidence on which he intends to rely.

5. The relief claimed in the statement of claim is as follows:

- (1) A declaration that the plaintiff was automatically unfairly dismissed;
- (2) A declaration that the plaintiff suffered detriment as envisaged by s.13 (3) of the Protected Disclosures Act, 2014;
- (3) A declaration that the plaintiff suffered damage as envisaged by s.117 (10) of the Data Protection Act, 2018;
- (4) A declaratory Order in the terms set out in the draft at Annex I;
- (5) Compensation;
- (6) Interest;
- (7) Further, other, and/or alternative relief.

6. The draft declaratory order referred to at para. (4) and contained in Annex I to the statement of claim seeks, *inter alia*, relief pursuant to the Protected Disclosures Act, 2014,

the Data Protection Act, 2018 and the EU General Data Protection Regulation (“GDPR”), and the defendant makes no objection in relation to much of this.

7. This application is directed at three reliefs which the defendant says should be struck out. The claims in question are those at para. (1), as set out above, as well as those at paras. (4) and (7) of the draft declaratory order contained in Annex I. The application relating to para. (7) is also made in relation to a limited number of related pleas in the statement of claim and I discuss these in more detail below.

8. Para. (4) of the draft declaratory order seeks the following declaration:

“The defendant is subject to the 2015 Court Order obtained by the Federal Trade Commission in the US. The defendant did violate the GDPR and the 2015 Court Order obtained by the Federal Trade Commission in the US in relation to the plaintiff and the defendant’s failure to process the plaintiff’s personal data in accordance with the GDPR and the 2015 Court Order, and, as such, the plaintiff is entitled to compensation.”

9. Para. (7) of the draft declaratory order seeks:

“The defendant did subject the plaintiff to discrimination, which discrimination was wrongful and unlawful and in violation of the Employment Equality Acts, 1998-2015, and, as such, the plaintiff is entitled to compensation.”

10. The application to strike out those three reliefs are based on the following propositions. First, it is said that para. (1) of the relief claimed in the statement of claim constitutes an inadmissible attempt to claim relief pursuant to the Unfair Dismissals Act, by way of direct proceedings in this Court. Secondly, it is said that para. (7) of the draft declaratory order constitutes a similarly impermissible attempt to claim relief pursuant to the Employment Equality Act, 1998 to 2015, and thirdly it is said that para. (4) of the draft

declaratory order is an impermissible attempt to enforce a 2015 Order of the Arizona District Court (“the Arizona court Order”) in this jurisdiction.

11. The plaintiff accepts that he cannot seek the relief at para. (1) and therefore I will strike out that aspect of the claim. However, while he does not dispute that any attempt to either pursue relief pursuant to the Employment Equality Act, 1998 to 2015 or to enforce the Arizona court Order would be doomed to fail, he is defending the application in respect of those reliefs on the basis that the defendant has misinterpreted his case.

Jurisdiction to strike out

12. Before dealing with the application of the defendant, it is necessary to say something very briefly about the jurisdiction that I am being asked to exercise. The application is made primarily pursuant to the inherent jurisdiction of this Court, but the defendant relies in the alternative on O.19, r.27.

i. The inherent jurisdiction of the court

13. Counsel for the defendant says that it follows from the nature of the inherent jurisdiction to dismiss, identified in *Barry v. Buckley* [1981] I.R. 306 that it is open to me to dismiss part of the claim without dismissing it all. This, she says, flows from the nature of the inherent jurisdiction of the court. She contrasts this with the limitation on an application to strike out pursuant to O.19, r.28, as that refers to “*any pleading*”, which is a reference to a pleading as a whole, and therefore does not permit an application to strike out part of a statement of claim.

14. Counsel for the defendant is of course correct in conceding that Order 19, r. 28 does not permit the strike out of part of a statement of claim: *Aer Rianta c.p.t. v. Ryanair Ltd* [2004] 1 IR 506. I note that, there, the Supreme Court (*per* Denham J., as she then was) expressly left over any consideration of whether part of a claim could be dismissed or struck out pursuant to the inherent jurisdiction of the court. The key finding in that case was that O. 19, r. 28 could only be used to strike out an entire pleading. In coming to this conclusion, the Supreme Court contrasted the wording of r. 28, which refers to the striking out of “any pleading” with the explicit reference in Order 19, r. 27 to the striking out of “*any matter in ... any pleading*”.

15. The rationale underlying the exercise by the court of its inherent jurisdiction appears from the judgment of Costello J. in *Barry v. Buckley* where he said that the jurisdiction existed “*to ensure that an abuse of the process of the courts does not take place*”. He further stated (at p. 308) that if a court is satisfied that a plaintiff’s case was doomed to fail “*then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to the defendant*”.

16. In *Barry v. Buckley*, the defendant was being prejudiced by the very existence of the proceedings because the plaintiff had instituted proceedings for specific performance and had registered a *lis pendens* against the land, meaning that the defendant could not sell the lands for a considerable time, perhaps several years, even though the claim was completely unfounded as it was clear that no contract had ever been concluded between the parties. That was an abuse of the court’s processes as the proceedings themselves were being used to obtain a benefit to which the plaintiff was clearly not entitled.

17. If the primary rationale for the jurisdiction is to permit the court to regulate its own procedures and prevent abuse of them, it seems to me to follow logically that it is possible to strike out part of a claim. There would seem to be no reason why a claim which constitutes an

abuse of process and which, if it were the only matter pleaded in a statement of claim, would be liable to be struck out as an abuse of process, could not also be struck out in circumstances where it was included in the same action as other claims. The jurisdiction would seem to be sufficiently flexible to be applicable in such case. Indeed, the exercise of the jurisdiction in relation to only part of a claim seems to have been assumed in *Burke v. Beatty* [2016] IEHC 353, discussed further below.

18. It remains the case, however, that the jurisdiction is one to be “*exercised sparingly*” as cautioned by Costello J. (also at p. 308). It also appears from *Barry v. Buckley* that the basis for exercising the claim is where the proceedings are causing “*irrevocable harm*” (in that case, by unjustifiably preventing a landowner from dealing with his property) or where it is in some way oppressive to ask a defendant to defend the claim. This could occur, for example, where a defendant is being asked to meet a claim which has already been determined in earlier proceedings. In those circumstances, the court retains an inherent jurisdiction to dismiss as being frivolous or vexatious, or as an abuse of process.

19. In considering the application in this case, I am acutely conscious that, regardless of its merits, it can, at best, remove only a limited part of the extremely lengthy statement of claim that has been filed. I note the comments of the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Ltd* as to the undesirability of applications in respect of part of the pleadings, and the consequences of such applications for the courts which could, as outlined by Denham J. at para. 24 of that case, have the potential of initiating a whole new jurisdiction of interlocutory applications whereby parties sought to “*blue pencil*” (i.e., strike out) portions of statements of claim or defences, and it could herald a whole new list in the High Court where parties would fight on the pleadings. The Supreme Court was clear that such an approach would be contrary to the policy of expeditious litigation, would involve further costs, and that such motions could be time consuming and difficult.

20. It therefore seems to me that the inherent jurisdiction of the court should only be exercised in relation to part of the proceedings in very rare and clear cases, where that part of the claim constitutes an abuse of process even though the remainder of the claim is properly brought, or where the defence of that particular aspect of the claim would prove oppressive for the defendant over and above any difficulties presented by the defence of the proceedings as a whole.

ii. The jurisdiction pursuant to O. 19, r. 27

21. As an alternative basis for her application, counsel for the defendant relied on the jurisdiction pursuant to O.19, r.27 to strike out part of a pleading:

“The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client.”

22. It is clear from O.19, r.27, as interpreted by the Supreme Court in *Aer Rianta c.p.t v. Ryanair Ltd*, above, that parts of the pleadings can be struck out under that rule. There was, however, no examination in *Aer Rianta c.p.t. v. Ryanair Ltd* of the precise basis on which an application pursuant to O.19, r.27 could be made. The wording of r. 27 is noticeably different from that in r. 28 and is arguably narrower, relating to situations where allegations which are irrelevant to the issues are made solely for the purpose of taking advantage of the absolute privilege afforded to litigants in respect of the allegations made in pleadings, or where material is included which is simply extraneous to the issues in the proceedings.

23. No authority was opened to me on the scope or proper application of r. 27 but it seems to have been comprehensively described by Noonan J. in *Burke v. Beatty* [2016] IEHC 353 where he stated (at para. 14):

“Rule 27 is concerned with a different subject matter to r. 28. Unlike r. 28, it explicitly permits the court to strike out a part of a pleading. Pleadings exist to define the issues which the court has to determine. Thus, where a pleading contains allegations which are irrelevant or otherwise unnecessary to make out the cause of action pleaded, they may be struck out. Scandalous matter may also be struck out which is not present for legitimate pleading purposes but rather is a form of abuse of process. An example would be the inclusion of gratuitous allegations defamatory of a party, which are irrelevant to the issues and included for the improper purpose of abusing the cloak of privilege conferred in court proceedings. Matters which may tend to prejudice, embarrass or delay the fair trial of an action may for example include excessive prolixity, vagueness and lack of particularity in pleadings. Rule 27 enables the court to address all such issues which are separate and distinct from the subject matter of rule 28....” [Emphasis added.]

24. In that case, Noonan J. struck out a conspiracy claim on the basis that it was doomed to fail as no loss had been suffered but refused to strike out a professional negligence claim. It appears that the application was determined on the basis of the inherent jurisdiction of the court to dismiss as an abuse of process a claim that is bound to fail as Noonan J. considered not only the pleadings but also the affidavit evidence filed (see paras. 24 and 25). As is well established, an application based on the inherent jurisdiction of the court is distinct from that under r. 28 which is directed to the content of pleadings and permits a very limited consideration of the underlying evidence. It therefore supplements r. 28 so as to prevent the court’s processes being abused by the bringing of an action by way of pleadings which on

their face disclose a cause of action but in circumstances where it is clear that the facts are such that the claim has no merit whatsoever.

25. Rule 27, however, like r. 28, is directed at the pleadings. It seems that the principal focus of Order 19, r. 27 is the abuse of the absolute privilege applicable to pleadings by the inclusion of unnecessary, scandalous and embarrassing material which has nothing to do with the claim. As Smyth J. said in *Riordan v. Hamilton* [2000] IEHC 189, at pp. 5-6:

“A number of allegations have been made in the pleadings. The purpose of pleadings is to convey what the nature of the action is. Pleadings should not be used as an opportunity of placing unnecessary or scandalous matters on the record of the court, or as an opportunity of disseminating such matters when they have nothing to do with any dispute between the parties. Allegations are not scandalous where they would be admissible in evidence to show the truth of any allegation in the pleadings which is material to the relief claimed. ... In the pleadings here, there are allegations which are totally unnecessary to any reasonably balanced or strongly held views of a plaintiff as against a defendant. The imputations of character made here would leave a person open to litigation in defamation had they not been accorded the protection of the privilege of the court. The pleadings here, it seems to me, are of that character. I need not go through them but merely highlight further what I would regard as contemptuous language and scandalous allegations. It is perfectly in order for a litigant to say that a defendant has acted in a particular way. However, what has been imputed here is not only over the top but is being deliberately used for the purpose of trying to advance some view which does not accord with fairness, common sense, justice, constitutional right or with any modicum of decency. Accordingly, I will order that the pleadings in this case be stricken from the record.”

The order striking out the pleadings in that case therefore seems to have been directed at preventing the abuse of absolute privilege by removing those proceedings from the record.

26. In addition, it appears to be settled that part of a pleading can be struck out as “*unnecessary*” within the meaning of r. 27, and that this word is read disjunctively from “*scandalous*”. This interpretation is supported by the reference later in the rule to the matters pleaded which are “*likely to delay the fair trial of the action*”. This seems to be broader in its scope than simply the inclusion of allegations which are scandalous or embarrassing. An example of this is found in *Ryanair Ltd. v. Bravofly* [2009] IEHC 41 where Clarke J. struck out certain paragraphs of a pleading on the basis that they were irrelevant to the issues between the parties. Clarke J. however cautioned (at para. 5.2) that the jurisdiction provided by the rule should not be exercised lightly.

27. In both *Burke v. Beatty and Ryanair Ltd. v. Bravofly*, this Court approached the question of what would be regarded as “*unnecessary*” within the meaning of O. 19, r. 2, as being extraneous matter that was not relevant to the cause of action pleaded. I think this is something different from a pleading which might be regarded as a pleading which can be struck out under O.19, r.28 “*on the ground that it discloses no reasonable cause of action*” or that it appears from the pleadings that the action is “*frivolous or vexatious*”. The words used in rules 27 and 28 are quite different and appear to be directed at different problems which might emerge from the pleadings. Rule 27 is directed at material which is included when it should not be included, rule 28 is directed at actions which are clearly unfounded.

28. Bearing those observations in mind, I now turn to consider the particular application made here.

Application to this case

29. The essential basis for this application is that, insofar as the claims pursuant to the Unfair Dismissals Acts and the Employment Equality Acts are concerned, no common law jurisdiction exists in this Court for breaches of those Acts and the plaintiff is confined to his statutory remedies and must therefore apply to the Workplace Relations Commission for the relief sought. Insofar as the Arizona court Order is concerned, it is said simply that, as matter of first principle, this Court has no jurisdiction to enforce the Order.

30. As indicated above, the plaintiff accepted that this relief at para (1) of the statement of claim, which asserts that he was unfairly dismissed, should be struck out of the statement of claim, as he was clear that he was not attempting to pursue an unfair dismissals claim by the back door, but was merely pointing to his dismissal as a “*detriment*” within the meaning of s.13 of the Protected Disclosures Act, 2014. I will therefore strike out para. (1) of the relief claimed in the last page of the statement of claim.

31. As regards the issue of whether the plaintiff is seeking to claim relief on the basis of the Employment Equality Acts, which he denies, the defendant referred me to paras. 5.21.10 – 5.21.14 of the statement of claim, which contains specific pleas that the plaintiff is being discriminated against on the basis of his race as defined in s.6 (2) (h) of the Employment Equality Act, 1998, that the defendant is vicariously liable for the discrimination perpetrated by its employees by reason of s. 15 of the Employment Equality Act, 1998, and that the defendant has breached ss. 15 and 22 of the Equality Act, 2004, in failing to take positive action to address the discrimination suffered by the plaintiff. I was also referred to section 10 of the statement of claim which is, in large part, a repeat of paras. 5.21.10- 5.21.14, albeit that it also refers in a very limited way to the Protected Disclosures Act, 2014 and the defendant’s

duty of care to the plaintiff. However, the clear thrust of section 10, as drafted, is to plead breaches of the Employment Equality Acts.

32. The defendant says that any claim pursuant to the Employment Equality Acts must be pursued before the Workplace Relations Commission, as the Oireachtas has provided specifically for that remedy, and the Superior Courts have repeatedly confirmed that a plaintiff is confined to their statutory remedies. In this regard, I was referred to the judgment of Laffoy J. in *Nolan v. Emo Oil Services Ltd* [2009] IEHC 15, which was itself based on the Supreme Court decision in *Maha Lingham v. HSE* [2006] 17 E.L.R. 137, where Fennelly J., having set out the common law position on wrongful dismissal stated (at p.140):

"[I]t is an entirely different matter as to whether a person has been unfairly dismissed and a different scheme of statutory remedy is available to any person dismissed whether with or without notice under the Unfair Dismissals Act, but this is not such an application. This is an action brought in common law for wrongful dismissal in the context of which an injunction was sought."

33. I was also referred to the Supreme Court decision in *Sheehy v. Ryan* [2008] IESC 14, where the Supreme Court upheld a decision of Carroll J. distinguishing between the common law remedy of wrongful dismissal and proceedings under statutes such as the Unfair Dismissals Act.

34. The plaintiff does not dispute that he cannot seek relief pursuant to the Employment Equality Acts. He says, however, that he is not seeking relief under those Acts, and that he relies on the discrimination provisions contained in them for the purposes of persuading a court that a similar definition of "*discrimination*" should be applied to the meaning of that word in s.13 (3) (b) of the 2014 Act. In the portions to which I was referred by the defendant, however, this legal argument is quite simply not pleaded.

35. It is not asserted that the specific paragraphs referred to by the defendant, or para. (7) of the draft declaratory order, contain any scandalous material or abuse of court privilege and the essential submission made was that it was clear as a matter of law that the plaintiff could not obtain relief pursuant to the Employment Equality Acts. That seems to be a submission that the plaintiff is doomed to fail in his claim for the relief at para. (7) of the draft declaratory order. As the defendant acknowledges that this cannot be done pursuant to Order 19, r. 28, it submitted that this part of the pleading was “*unnecessary*” and could be struck out pursuant to Order 19, r. 27.

36. However, I am not convinced that r. 27 applies. If the claim is included in the reliefs, it cannot be said that the claim is “*unnecessary*” or “*irrelevant*” to the issues between the parties: that is the claim that is made. The real complaint of the defendant is that the claim for particular reliefs is doomed to fail as a matter of law and it seems that the essence of the defendant’s complaint is frivolous or vexatious in that any claim pursuant to the Employment Equality Acts must be made to the Workplace Relations Commission rather than this Court. However, so far as the rules are concerned, this is a matter for O. 19, r. 28, which is not available to the defendant for the purposes of this application as it does not submit that the statement of claim as a whole fails to disclose any cause of action or shows that the entire action is frivolous or vexatious.

37. That leaves the inherent jurisdiction of the court. It should be noted that no reference was made in the course of the application to the underlying facts of the case, as occurs where the application is brought pursuant to the inherent jurisdiction of the court. Although affidavits were filed by both parties in this motion, the application was moved solely by reference to the pleadings. I am not sure that that in itself would prevent the application succeeding, however, if it could be shown that it was appropriate to exercise the jurisdiction.

38. Given that it is to be exercised sparingly, it is my view that the defendant must show that the continued inclusion of para. (7) of the declaratory order in Annex I to the statement of claim, together with paras. 5.21.10-14 and section 10 of the statement of claim, creates some particular difficulty for it such as would justify excising these very limited sections of this extremely lengthy statement of claim.

39. While para. 5.21.10 pleads retaliation by an employee of the defendant in response to the plaintiff raising concerns about the processing of his personal data and about the defendant's legal obligations more generally as an employer and as a data controller, paras 5.21.11-14 quite plainly plead breaches of particular provisions of the Employment Equality Acts and do not plead the legal argument referred to by the plaintiff in his oral submissions in this application, i.e., that the alleged racial discrimination constitutes a "*detriment*" within the meaning of s. 13 of the 2014 Act. I have come to the same view about paras. 10.2-5 and part of 10.6. By contrast, para. 10.1 I think pleads the argument which the plaintiff says he intends to make.

40. In considering whether to grant the application in respect of this very limited part of what is plainly an excessively lengthy statement of claim, I think the nature of the inherent jurisdiction requires me to consider whether excising a few paragraphs from a document of approximately 200 pages will make much difference to the defendant in terms of how it manages to deal with the litigation.

41. With some reluctance, I think that removing this very limited section of the statement of claim will serve a purpose in removing from the defendant the burden of a claim which it should not have to deal with. A claim pursuant to the Employment Equality Acts is a discrete claim and it is plainly made on the face of the statement of claim. The purpose of pleadings is to identify the issues between the parties and, regardless of what the plaintiff may say in oral submissions, his pleadings very obviously maintain an impermissible claim which should

have been brought before the Workplace Relations Commission. As pleadings can dictate the outcome of various interlocutory applications, such as discovery, as well as affecting preparations for trial, it is important that they do not include inadmissible claims, even if that claim is only a small part of a very long claim. Once there is a distinct and identifiable claim which is manifestly unfounded, it is unfair to require a defendant to deal with it.

42. I will therefore grant the application to strike out para. (7) of the draft declaratory order in Annex 1, and paras. 5.21.11-14, as well as 10.2-5 of the statement of claim itself. I will not strike out 10.6 as it includes matter which goes beyond an impermissible claim which should be made to the Workplace Relations Commission.

43. Finally, there is the question of the Arizona court Order. The defendant says that the relief at para. (4) of Annex I should be struck out as an impermissible attempt to enforce the order of a court in Arizona.

44. However, the plaintiff disclaimed any intention to seek to enforce that order, saying that it was referred to in the pleadings because the obligations of the defendant under the Arizona court Order were a "*legal obligation*" such that his disclosure of information tending to show a breach of it constitute "*relevant wrongdoing*" within the meaning of s. 5 (3) (b) of the 2014 Act. But this claim is already contained in para. (3) of the draft declaratory order in Annex I.

45. I will therefore strike out the contents of para. (4) of the draft declaratory order at Annex I pursuant to the inherent jurisdiction of the court as purporting to enforce in this jurisdiction an order of the Arizona District Court which this Court cannot do. Leaving this relief in the pleadings runs the risk that the defendant will have to defend this claim even though it is admitted by the plaintiff to be completely unsustainable. As with the Employment Equality Acts claim, it is not material that the plaintiff has disclaimed this relief in oral submissions as the pleadings should reflect the actual issues between the parties.

46. There is no other relief claimed in relation to the 2015 court Order, but counsel for the defendant says references to it are “peppered” throughout the statement of claim. This may be so, but, for the reasons set out in the Supreme Court judgment in *Aer Rianta c.p.t. v. Ryanair Ltd*, this Court cannot redraft the statement of claim. In fairness to the defendant, it was not suggested that the court would do so. However, it seems to me that there is no workable way of removing all of the references to the 2015 court Order from the statement of claim, and that no such attempt should be made.

47. This reinforces my view that applications to strike out part of a pleading on the basis that it is “unnecessary” within the meaning of Order 19, r.27 or the inherent jurisdiction of the court should be confined to clear cases where it is possible to excise distinct portions of a claim with a view to achieving some identifiable efficiency in the conduct of the proceedings. It is not desirable that applications of this kind should be made as a matter of course. As the court cannot redraft the statement of claim so as to remove the references to the Arizona court Order which appear throughout the pleading, I will make no further order in respect of this aspect of the application. However, by removing the relief, this will have the consequence that any attempt to enforce the Order cannot be entertained and the defendant will not have to deal with it at all.

Conclusion

48. I think it is appropriate to take a reasonably restrictive approach to applications of this kind, as routine applications of this nature would lead to the inefficiencies and pressure on the court system described by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Ltd*.

49. Nevertheless, as there are specific claims made in this case that quite simply cannot be entertained in these proceedings, I will make an order striking out para. (1) of the relief

claimed in the Statement of Claim, and paras. (4) and (7) of the draft order at Annex I to the Statement of Claim, together with paras. 5.21.11-14 and 10.2-5 of the statement of claim.

50. I will list the matter to make directions for the service of an amended statement of claim and to deal with costs.