

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

DANIEL McATEER

Plaintiff

v

TOBY McMURRAY

Defendant

WEATHERUP J

[1] This is the defendant's application to strike out the plaintiff's claim on the grounds that two years have elapsed since the last proceeding in the action and under the inherent jurisdiction of the Court and as it discloses no reasonable cause of action and further for a limitation issue to be dealt with as a preliminary issue. Mr Humphreys QC moved the application on behalf of the defendant and Mr McAteer appeared in person.

[2] The endorsement on the Writ issued on 28 June 2007 states that the plaintiff's claim is for damages for (i) loss and damage by the plaintiff by reason of misrepresentation, defamation and malicious falsehood and (ii) negligence and breach of contract.

[3] An appearance was entered on 10 July 2007 and the Statement of Claim was served on 19 October 2007. The Statement of Claim pleads that the defendant acted as solicitor to David Lovesy of McCambridge Duffy & Co in the liquidation of JJ Mullan Ltd. The plaintiff was appointed a Director of JJ Mullan Ltd on 2 August 2004 and the company was placed in liquidation on 29 September 2004. The plaintiff commenced an action in the High Court against the Liquidator of 28 June 2005 and the liquidation was held to be invalid. It is stated to be the plaintiff's belief that the company should never had been put into liquidation and that it was in a position to pay its debts in full. It is pleaded that during the course of the liquidation the

plaintiff had notified the creditors of the company that he intended paying 100% of the debts due to the legitimate creditors.

[4] A creditors meeting took place in Derry on 26 April 2006. The purpose of the meeting was to discuss the company's main asset, Mullan's Bar. Some creditors asked the Liquidator why the plaintiff's proposals for the rescue of the company had not been put to the creditors. The defendant, who was present at the meeting representing the Liquidator, advised the meeting that the High Court Judge who had conducted the hearing in relation to the company had had sight of the plaintiff's proposals and the defendant quoted the Judge as having said that the proposals were not worthy of consideration. The plaintiff therefore claims that the defendant communicated defamatory matters to third parties that were calculated to damage and injure the reputation of the plaintiff and that, in addition, the slander was calculated to disparage the plaintiff in his office and the defendant maliciously used a falsehood to seek to destroy the plaintiff's economic reputation.

[5] A Defence was served on 3 December 2007 stating that, if the defendant spoke the words attributed to him at the creditors meeting, the words were published on an occasion of qualified privilege and were a fair and accurate report of remarks made by Deeny J on 13 January 2006 in the High Court proceedings against David Lovesy and McCambridge Duffy as Liquidators. The Defence pleads that the words were published on a matter of public concern and that the publication was of public interest. Further, the Defence relies on fair comment on a matter of public interest. In addition, the Defence states that the claim is barred by the lapse of time and the provisions of Article 6(2) of the Limitation (Northern Ireland) Order 1989 as amended.

[6] The defendant's affidavit grounding the present application states that no step has been taken by the plaintiff since service of the Defence in December 2007, over 7 years ago, so there has been inordinate and inexcusable delay. The meeting at which the words were spoken took place on 27 April 2006 and the plaintiff issued the Writ on 28 June 2007, being over one year from the date on which the cause of action accrued and therefore outside the one year limitation period.

[7] The plaintiff's affidavit filed in reply on 4 May 2015 states that the defendant acted improperly from the outset of the liquidation of the company and continues to do so. The plaintiff sets out the background concerning JJ Mullan Ltd with wholesale complaints about the defendant going well beyond the initial complaint about the statement made by the defendant at the creditors meeting.

[8] The plaintiff's affidavit continues to the effect that he had secured funding to undertake a proposed rescue of the company. He says that when he was out of the country a meeting took place at the offices of Tughans solicitors where the decision was taken to put the company into liquidation and paperwork was backdated and forged to give effect to a fraudulent creditors voluntary liquidation. The plaintiff then commenced the proceedings to have the liquidation declared invalid and

succeeded. According to the plaintiff, McCambridge Duffy approached the Official Receiver and claimed that the Judge had effectively recommended the firm because of their appointment as provisional liquidators and this was said to have been a complete distortion of the situation.

[9] The plaintiff says that he issued legal proceedings to protect rights in relation to a share agreement with the Mullans. Deeny J decided against him and he appealed and was granted a retrial. According to the plaintiff, in October 2007 Campbell LJ gave judgment verbally in his favour. However Campbell LJ gave McCambridge Duffy an opportunity to make submissions as to the remedy that should be granted to the plaintiff and according to the plaintiff Campbell LJ then delivered a written judgment in which he reversed his initial judgment in favour of the plaintiff.

[10] The plaintiff says that the defendant had an obligation to provide to the creditors meeting a proper explanation of the plaintiff's proposals for the rescue of the company. The plaintiff issued the present proceedings to protect his position and the proceedings have been parked pending the outcome of other matters. The Mullans subsequently issued proceedings against Tughans and others. The plaintiff's position is explained as follows -

"The matters that I complained about against Mr McMurray started off as complaints about what he had said at a creditors meeting. However, I say that Mr McMurray's conduct was part of a wider campaign by his firm to deny me my rights. I therefore say that I am entitled to pursue the matter.... I say that [Mr McMurray] is perfectly aware that there are ongoing matters that will influence the case. These include the outcome of the case involving the Mullans and Mr McMurray's firm (and others).... The case involving Mullans is listed for hearing in November 2015."

[11] The plaintiff's affidavit, having referred to a large number of extraneous matters to those appearing in the pleadings, was accompanied by an amended Statement of Claim dated 2 June 2015 for which the plaintiff requires leave. By that amended Statement of Claim the plaintiff sets out the wider complaints against the defendant alleging conspiracy and a misuse of process and unlawful interference with the plaintiff's economic interests.

[12] The particulars of the plaintiff's new causes of action are stated as (a) Being party to a sham of a liquidation, (b) Inter-meddling in the proper process of the Court, (c) Interfering with the plaintiff's economic interests and his shareholding in the company, (d) Conspiring with McCambridge Duffy to damage the plaintiff and (e) Interfering with the plaintiff's right to a fair trial.

[13] The Writ of Summons relies on 5 causes of action, namely (i) defamation, (ii) malicious falsehood, (iii) negligence, (iv) breach of contract and (v) misrepresentation.

[14] The original Statement of Claim relies on 2 causes of action, namely defamation and malicious falsehood. If a plaintiff delivers a Statement of Claim that does not plead to matters in the Writ, the matters omitted are treated as having been abandoned (White Book 1999 at 18/15/13). Accordingly, the outstanding causes of action in the proceedings, prior to the application for leave to amend the Statement of Claim, are defamation and malicious falsehood.

[15] The application for leave to amend the Statement of Claim relates to 3 new causes of action, namely conspiracy, abuse of process by interference with proceedings and interference with economic interests.

[16] Article 6(1) of the Limitation (Northern Ireland) Order 1989 provides for a 6 year limitation period for an action founded on tort. The conduct relied on to ground the new causes of action occurred up to 2008 and thus the period of 6 years has expired from the conclusion of that conduct.

[17] Article 73 of the 1989 Order provides that a Court may not allow a new claim after the expiry of the time limit unless provided by the rules in specified circumstances. Order 20 Rule 5(v) provides that a new cause of action may be allowed if it arises out of the same or substantially the same facts as are already in issue in the proceedings.

[18] The facts relied on in the existing proceedings are the statements made by the defendant at the creditors meeting. The facts that are now sought to be relied on are related to broader impropriety in relation to the liquidation. The conspiracy, abuse of process and interference with economic interests are therefore not based on the same or substantially the same facts as the defamation and malicious falsehood. Accordingly, the new causes of action may not be allowed. Leave to amend the Statement of Claim is refused. Thus the original Statement of Claim remains the basis of the plaintiff's claim and that extends to two causes of action, namely slander and malicious falsehood.

[19] Article 6(2) of the 1989 Order provides for a 1 year limitation period for slander and malicious falsehood. The creditors' meeting was on 27 April 2006. The Writ was issued on 28 June 2007 and thus the limitation period had expired on the date the proceedings commenced.

[20] Article 51 of the 1989 Order provides for discretion to extend the time limit on equitable grounds. The equitable grounds may be exercised on a balance of prejudice to the plaintiff if the time is not extended and prejudice to the defendant if the time is extended. Account will be taken of the length of delay and the reasons and the extent of relevant evidence not available or less cogent because of the passage of time.

[21] The plaintiff has not formally pleaded any grounds on which the Court should extend time. However the plaintiff's skeleton arguments address the basis on

which this should happen. I disregard the lack of formality in the plaintiff's presentation of grounds to extend time and look to the skeleton arguments. There are two skeleton arguments for this purpose, one dated 10 June 2015 the other dated 15 June 2015. These contain a great deal of detail concerning the plaintiff's complaints against the defendant about the alleged fraudulent liquidation, most of which is not relevant to the issue of extension of time. There are however two matters that emerge that would bear on whether it would be equitable to extend time.

[22] First of all, in relation to this alleged fraud, there was a disciplinary inquiry into the Liquidator, Mr Lovesy, by the regulatory body, the Chartered Accountants Regulatory Board based in Dublin. At a meeting of the Complaints Committee on 19 May 2015 it was directed that the case officer should prepare a draft formal complaint and make efforts to locate Mr Lovesy, who it appears has proved difficult to trace.

[23] The second matter concerns the outstanding Mullans action which is due for hearing in November 2015 and which will examine issues concerned with the liquidation of the company.

[24] I will exercise my discretion to extend the time on equitable grounds to allow the defamation and the malicious falsehood claims to remain in place because of the extant inquiry arising from the examination of a complaint against the Liquidator by his professional body and further the extant inquiry arising from the hearing of the Mullans action in November 2015.

[25] This application also proceeds on the basis of want of prosecution based on inordinate and inexcusable delay. In 2014 the plaintiff issued a notice of intention to proceed with the action but did not take any further step. There has undoubtedly been inordinate delay. It is necessary to consider whether that inordinate delay has created a substantial risk to a fair trial or is likely to cause serious prejudice to the defendant. I exercise my discretion not to strike out the claim for defamation and malicious falsehood despite the inordinate delay because I am not satisfied that there would be a substantial risk to a fair trial or that it is likely to cause serious prejudice to the defendant.

[26] I will reserve the costs of the application.

[27] The next step is to co-ordinate this action with the Mullans action due for hearing in November. I will adjourn this action for review on 1 December 2015.