[2020] IEHC 263

THE HIGH COURT

[2015 No. 8265 P]

BETWEEN

DENIS O'BRIEN

PLAINTIFF

AND

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

DEFENDANTS

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

1. This is an application for directions as to the order in which certain motions issued by the plaintiff and the first to sixth named defendants ("*the Red Flag defendants*") ought to be considered and determined. The plaintiff's is a motion for discovery and the Red Flag defendants seek an order pursuant to O. 19, r. 27 striking out paras. 16A and 16B of the amended statement of claim and the associated schedule no. 5 delivered on the 23rd March, 2018. In the alternative, an order is sought pursuant to the inherent jurisdiction of the court that those pleas should be struck out as being inadequately particularised, disclosing no reasonable cause of action, are frivolous and vexatious and are bound to fail.

2. The background to the proceedings has been addressed in the judgment of the court delivered in respect of the application of seventh named defendant to have certain matters tried by way of preliminary issue. The Red Flag defendants were not parties to that application.

3. The Red Flag defendants contend that entitlement to discovery is properly determinable by reference to the issues as defined in the pleadings. If a pleading or part of a pleading is struck out, then this will have a bearing on the discovery application. Therefore, as a matter of logic and principle, it is contended that the strike out motion should be heard and determined first.

4. The plaintiff maintains that in the particular circumstances and given the secretive and clandestine nature of the acts alleged against the defendants, the discovery application ought to be considered and determined first. It is argued that in such circumstances it is impossible for him to fully evidence matters without recourse to discovery and/or interrogatories and that the approach urged by the Red Flag defendants presents him with a *"Catch-22 situation".*

5. While it is not the role of the court on this application for directions to express any view on the substance of the respective motions it is nevertheless appropriate to engage to some extent with their content.

The Strike out application

6. The Red Flag defendants seek to exclude the following paragraphs from the pleadings:-

> *16A. Further, one Neil Ryan, is a former assistant secretary to the Department of Finance. In that capacity he became possessed of information in relation to the*

plaintiff (including information in relation to his confidential private banking affairs with IBRC) and companies with which he is associated which information was "Official Information" within the meaning of the Official Secrets Act 1963 and, in part at least, information in which the plaintiff enjoyed a right of confidence. For Mr. Ryan to disclose that information is a criminal offence pursuant to the Official Secrets Act 1963 and the tort of breach of confidence. The defendants, and in particular the second named defendant, sought to encourage and facilitate the disclosure by Mr. Ryan of such information. They were themselves, therefore, guilty of soliciting, aiding, abetting, counselling and/or procuring the commission of a criminal offence and a breach of confidence. Particulars of the said actions on the part of the defendants comprising text messages between the defendants (and particularly the second named defendant) and Deputy Colm Keaveney, together with messages as between Deputy Keaveney and the second named defendant relating to the arrangements to have Mr. Ryan meet with Deputy Michaél Martin are set out in schedule 5 attached hereto. The plaintiff reserves the right to adduce further particulars after receipt of discovery and/or answers to interrogatories. The said actions on the part of the defendants are themselves criminal wrongs and amount to the tort of breach of confidence and therefore comprise wrongful actions with intent to injure the plaintiff by unlawful means and thereby amount to the tort of conspiracy.

16B. Pursuant to and in further of the aforementioned conspiracy the Defendants engaged in a campaign of briefing politicians and journalists with material adverse to the interests of the plaintiff with the express purpose of having those politicians and journalists promote and publish the material with the predominant intention of injuring and/or causing loss to the plaintiff."

7. The application to strike out the proceedings is grounded on the affidavit of Mr. Garret Doyle sworn on the 1st July, 2019. He is the chief operations officer of Red Flag. He points out that the plaintiff has brought a number of applications seeking various forms of discovery and disclosure. In October, 2015 the plaintiff applied unsuccessfully for both *Anton Piller* and *Norwich Pharmacal* type relief and he also unsuccessfully applied for discovery in December, 2016. Mr. Doyle avers that the refusal of that latter application was upheld by the Court of Appeal and that leave to appeal was refused by the Supreme Court. Nevertheless, the plaintiff and the Red Flag defendants agreed on the 12th April, 2016 to exchange certain discovery in respect of the issues arising from the pleadings as they stood at that time.

8. On the 8th December, 2017, application was brought to amend the statement of claim. This was opposed by the Red Flag defendants. O'Regan J. delivered judgment on the 22nd March, 2018 (*O'Brien v. Red Flag Consultancy Limited* [2018] IEHC 143) granting leave to amend the statement of claim. The amended statement of claim was delivered on 23rd March, 2018. An amended defence was delivered on the 27th June, 2018. On 1st May, 2018, the Red Flag defendants sought particulars of the claim as amended. A reply

was delivered by the plaintiff on the 1st June, 2018. A request for further and better particulars was sent on the 3rd August, 2018 and replied to on the 14th November, 2018.

9. The Red Flag defendants have also sought discovery from the plaintiff relating to the amendments. A motion for discovery was issued by the Red Flag defendants on the 27th September, 2018. The documents which are sought include those evidencing the acts of encouragement or facilitation allegedly undertaken by each defendant in respect of the alleged disclosure by Mr. Ryan of information relating to the plaintiff and/or companies with which he is associated. They also seek documents concerning and evidencing the defendants' alleged campaign of briefing politicians and journalists with material adverse to the interests of the plaintiff. In a replying affidavit sworn in response to that motion by the solicitor for the plaintiff, it is averred, *inter alia*, that the plaintiff is not in possession of those documents and that they are in the possession of Red Flag.

10. Mr. Doyle considers the pleading at para. 16A to be of the utmost gravity and made without any supporting evidence. He avers that despite the seriousness of the allegations, which he states are unfounded, they have not been adequately particularised in the amended statement of claim or in response to two requests for particulars. The thrust of his affidavit is to the effect that the text messages which are relied upon demonstrate nothing more than that the second defendant contacted Mr. Keaveney to arrange a meeting between him and Mr. Martin. Schedule 5 contains, *inter alia*, a series of text messages between Mr. Keaveney and others. Mr. Doyle observes that it is asserted in para. 16A that those text messages comprise particulars of the alleged criminal activities on the part of the Red Flag defendants, but he states that this is manifestly not so. A small number of the text exchanges between Mr. Keaveney and the second defendant, Mr. Brophy, concern the arrangement of a meeting with Mr. Ryan. However, he avers that they say nothing about the disclosure of confidential information and there is nothing to suggest that the plaintiff was the subject of the proposed meeting. He also points out that the balance of the text messages contained in Schedule 5 are of no relevance to the pleas at para. 16A. Therefore, it is the contention of the Red Flag defendants that these allegations are unnecessary, scandalous and prejudicial. He further states that nothing in the particulars supplied demonstrate that Mr. Ryan had confidential information and the plaintiff has identified no evidence of intention on the part of the Red Flag defendants that Mr. Ryan disclose the information.

11. On 1st May, 2018, the Red Flag defendants sought particulars of the information allegedly in the possession of Mr. Ryan concerning the plaintiff and companies with which he was associated, and the basis upon which it is alleged that such information constituted official information within the Official Secrets Act. The response, he submits, was in the most general of terms that Mr. Ryan *"became possessed of information held by/within IBRC in relation to the plaintiff, including information in relation to his confidential private banking affairs with IBRC and companies with which he is associated"*. Mr. Doyle avers that the plaintiff failed to specify with any degree of precision what information Mr. Ryan is alleged to have had in his possession and also failed to state the basis upon which such information constitutes official information. Mr. Doyle maintains that it is clear that the

plaintiff does not know what confidential information (if any) was in Mr. Ryan's possession. It follows that the plaintiff cannot demonstrate any basis for his claim that such information was "*Official Information*" within the meaning of the Official Secrets Act. He avers that it is also clear that the plaintiff has no evidence that the Red Flag defendants (or any of them) encouraged or facilitated Mr. Ryan to disclose confidential information and it is clear that the plaintiff has no idea whether Mr. Ryan in fact disclosed confidential information. In the reply received on the 14th November, 2018, he states that the plaintiff failed to provide confirmation as to whether he was alleging that there was in fact a breach of confidence or an unlawful disclosure by Mr. Ryan.

12. Mr Doyle also avers that the second defendant, Mr. Brophy, denies ever meeting Mr. Ryan or receiving information pertaining to the plaintiff from him or furnishing information to him. Mr. Doyle contends that the pleas at para. 16A constitute a blatant attempt by the plaintiff to bolster his conspiracy claim with sensational allegations of criminal wrongdoing. He describes these allegations as being fanciful and having no basis in fact.

13. With regard to the pleading at para. 16B, Mr. Doyle avers that in the replies to particulars, the plaintiff has failed to identify any information supplied by the Red Flag defendants which was published by any journalist or politician allegedly briefed by them. He states that it is clear from the pleadings, particulars and replies that the plaintiff has no evidence to sustain the allegations at para. 16A and that therefore those pleadings are unnecessary, scandalous and/or prejudicial or embarrassing. It is also claimed that the pleadings are not adequately particularised and disclose no reasonable cause of action and therefore are frivolous and vexatious and are bound to fail.

14. In response to this strike out application, Mr. O'Brien, in an affidavit sworn on the 4th October, 2019, avers that the activities the subject matter of the allegations at para. 16A and the relevant portions of schedule 5, were carried out clandestinely and in the utmost secrecy. He states that it was entirely possible that he would never have learned of them were it not for his dealings with Mr. Keaveney. The communications set out at schedule 5, their timing in the middle of the 2015 Siteserv controversy, their broader context (one in which it is alleged that two of the Red Flag defendants were, *inter alia*, assisting Mr. Keaveney in writing speeches which Mr. O'Brien maintains were to attack him) and their content gave rise to clear inference that the Red Flag defendants were acting as conduits between Mr. Ryan and Mr. Martin, that they were acting unlawfully and as parties to a conspiracy. While willing to accept that the scheduled communications may potentially be susceptible to a more innocent inference, he maintains that a full plenary hearing will be required on such competing inferences. He avers that the fact that he cannot name specific journalists and specific politicians briefed by the defendants, or that he cannot identify the precise subject matter of the briefings is entirely consistent with the actions and behaviours pleaded. He suggests that the Red Flag defendants are essentially shielding their wrongdoing by denying him access to court processes which enables a litigant obtain probative information.

The Plaintiff's discovery application

15. The plaintiff also issued a motion for discovery (the date is unclear but most likely October, 2018) against the Red Flag defendants seeking four principal categories of documents including, *inter alia:*

    a. documents evidencing the defendants, their servants or agents, seeking to encourage and/or facilitate the disclosure by Mr. Ryan of information (including information relating to the plaintiff's confidential private banking affairs with IBRC) relating to the plaintiff and companies with which he is associated;

    b. documents relating to and/or evidencing the consequences and/or results of any communications between the defendants and Mr. Ryan.

    c. documents evidencing the defendants briefing of politicians, their parliamentary assistants, servants or agents and/or journalists with material adverse to the interests of the plaintiff, including documents relating to and/or evidencing the purpose and/or the motive of such briefings.

    d. documents evidencing or relating to the defendant's awareness or knowledge of the confidential banking affairs of the plaintiff and/or companies associated with him.

16. The application for discovery is grounded on the affidavit of Mr. O'Brien's solicitor, Mr. O'Comhain. He acknowledges that an application was previously brought by the plaintiff before the seventh defendant was joined in the proceedings. This was ruled upon by the High Court and the Court of Appeal. He also addresses the exchanges between the parties prior to the bringing of the motion, including his response to the claim by Red Flag that the application was no more than a fishing expedition. He adverted to the text messages at schedule 5 which, he stated, made it clear that the defendants were actively facilitating and promoting the secret meeting between Mr. Ryan and Mr. Martin. He also rejects the suggestion that the application for discovery amounts to an attempt to circumvent the judgments of the High Court and the Court of Appeal. It was reiterated that the plaintiff had no means of obtaining these documents other than by way of discovery, particularly in the context of the clandestine nature of the defendant's alleged conduct.

Red Flag submissions

17. Counsel for the Red Flag defendants, Mr. Collins S.C., submits that logically the strike out motion should proceed first because discovery is ordered by reference to the pleadings. This also follows from the manner in which the court ought to approach the application for discovery and in this regard bare allegations are insufficient to provide a basis for discovery. Reliance is placed on *Goode Concrete v. CRH plc* [2020] IECA 56 which concerned an allegation of conspiracy. Costello J. summarised the proper approach as follows:-

> *"The categories sought by a requesting party must be shown to be both relevant and necessary to issues in the proceedings. Relevance is determined by reference to the pleadings: Hannon v. Commissioners of Public Works [2001] IEHC 59; Tobin*

v. Minister for Defence [2018] IECA 230. However, a requesting party cannot rely on a mere allegation or bare assertions to establish relevance and thereby justify a broad request for discovery. In Carlow/Kilkenny Radio Limited v. Broadcasting Commission [2003] 3 I.R. 528, Geoghegan J. in the Supreme Court held at p. 534:-

> *"It is not open to a plaintiff in a civil action, or to an application for judicial review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertion that the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the proscribed activity usually described as 'fishing': the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."*

5. *In Framus Limited v. CRH Plc [2004] 2 I.R. 20, Murray J. held that "An applicant is not entitled to discovery based on mere speculation or on the basis of what has been traditionally characterised as a fishing expedition."*

6. *In O'Brien v. Red Flag Consulting Limited [2017] IECA 258, Ryan P. noted that while it was legitimate to seek discovery in support of a case, it was not legitimate to seek discovery "in order to make a case which otherwise did not exist" or by reference to a case which might potentially be made out if extensive discovery was ordered against the defendant. At para. 21 of the judgment he summarised various principles in relation to discovery and at point 6 he held:-*

> *"6. In balancing procedural justice, the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim. [Hartside Ltd v. Heineken Ireland Ltd, para. 5.9.]"*
>
> *The party requesting discovery must meet the "low threshold separating a genuine case perhaps lacking in evidence from one which was speculative and unsupported by facts."*

7. *The reference to Hartside Ltd v. Heineken Ireland Ltd [2010] IEHC 3 was to a decision by Clarke J. where he held at para 5.9:-*

> *"… a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent's relevant documentation. The need for such restriction seems to me to stem from the undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information.""*

18. Mr. Collins S.C. submits not only are the allegations bare, in the sense that an application for discovery ought to be refused, but that the plaintiff's case on this issue does not

reach the threshold of being arguable. He submits that the pleas in question are so speculative, unjustified and lacking in any basis that they ought to be struck out before the discovery application is considered.

Plaintiff's submissions

19. In reply, Mr. Beatty S.C. submits that the court is being invited to approach the matter as if the issue of whether the controversial pleadings are "*bare*" has already been determined. It is not accepted by the plaintiff that these are bare pleas but, if they are, he submits that the time at which to deal with this contention is on the hearing of the discovery application and not before. He further submits that the discovery sought is net and the request is made in the context of a denial by the Red Flag defendants that they encouraged Mr. Ryan to disclose information. The court should not be invited to look at letters between the Red Flag defendants and the Chief State Solicitors (in relation to Mr. Ryan's suggested involvement). By requesting the court to consider the letters, the Red Flag defendants are seeking to have such evidence viewed from their perspective but not from Mr. O'Brien's perspective. The chronology of the proceedings illustrate that the plaintiff's discovery application preceded the Red Flag application by several months, despite previous threats to issue the strike out motion.

20. Counsel relies on a number of authorities which he submits, support the approach urged by the plaintiff as to the order in which the motions should be considered. In *Lac Minerals Limited v. Chevron Mineral Corporation of Ireland and Hibernia West plc*. (Unreported, High Court, Keane J., 6th August 1993), Keane J. considered, *inter alia*, two motions brought by the defendants for orders pursuant to provisions of O. 19, r. 28 RSC or, alternatively, pursuant to the inherent jurisdiction of the court, to dismiss the claim on the grounds that the pleadings disclosed no reasonable cause of action and/or were frivolous and/or vexatious and were bound to fail. In rejecting the applications Keane J stated, at p. 33 as follows:-

> *"In the light of the legal principles to which I have already referred, it is obvious that, if this action proceeds to a hearing, the Court would be in a position to conduct a full investigation into the circumstances surrounding the execution of the JVA Agreement in order to ascertain whether this apparent inconsistency can be reconciled. The result of that investigation may lend support to the contentions advanced on behalf of LAC or it may not. The necessary materials for such an investigation may emerge from the process of discovery or they may not. The Court may be assisted in arriving at a resolution of the difficulty by the oral evidence adduced at the hearing or it may not. It appears to me that, in these circumstances, it is not possible to say with the degree of confidence which the authorities suggest should be present in the mind of the Judge when deciding an application of this nature that, no matter what may emerge on discovery or at the trial of the action, the inconsistency will be resolved only in a manner which will be fatal to the Plaintiff's contentions."*

21. Reliance is also placed dicta of McKechnie J. in *Finnegan v. Graham Richards and Padraic Madigan as attorneys of Barbara Allen* [2007] IEHC 134 where he observed at para. 31:-

> *"In any event as McCarthy J. had warned in Sun Fat Chan v. Osseous the pleadings in the instant case are in their infancy in that no particulars have either been sought or delivered, no defence has been filed and no discovery has been obtained. In these circumstances it would be in my view an entirely unwarranted interference with the plaintiffs' constitutional right of access to the courts to dismiss his action on the basis suggested by the defendants."*

22. While it is accepted that the pleadings in this case are at a more advanced stage and thus potentially distinguishable on the facts, nevertheless it is argued that the observations of Keane J, with particular regard to discovery, apply and ought to be taken into account by the court when considering the order in which the motions should be heard.

23. The third authority upon which reliance is placed is *National Educational Welfare Board v. Ryan, IT Upgrade Limited and O'Grady* [2007] IEHC 428. Allegations of a serious nature were made that a former employee of the plaintiff was part of a fraudulent arrangement with the second and third defendants. Particulars of the alleged fraud were sought but the plaintiff responded that the ambit of the fraud was one which was not possible to particularise because of its clandestine nature, that discovery/interrogatories would be sought and that the allegations would be further particularised after discovery/interrogatories. The second and third named defendants were dissatisfied with that reply and sought to have the claim struck out pursuant to O. 19, r. 5(2) RSC. It was submitted that the alleged fraudulent activity had not been pleaded with sufficient particularity. The plaintiff placed reliance on a line of authority commencing with *Leitch v. Abbot* [1886] 31 CHD 374 and *Sachs v. Spellman* [1887] 37 CHD 295, where North J. stated, *inter alia:-*

> *" … the plaintiff has told them in his statement of claim that he has not the means of giving these details. They, on the other hand, are the persons who carried through the transactions, and have in their possession the books containing the full accounts; therefore, they have full knowledge and the means of knowledge, and can show precisely what the cases are, if any, in which they did do what the statement of claim alleges they did. I do not see how they can possibly be embarrassed by not obtaining from the plaintiff the information they have in their own possession. Of course I can see well enough why they pressed for these particulars. If the plaintiff were obliged to condescend upon particulars, and to specify the instances in which the defendants have done what he charges them with, the result might be that from his imperfect knowledge he would not be able to point out in the particulars some cases in which they had actually done what he says they have done; and inasmuch as, after particulars were given, their defence would be addressed only to those points, the ignorance of the plaintiff might relieve the defendant from being held responsible as to certain matters with respect to which they are open to the charge contained in the statement of claim."*

24. Clarke J. (as he then was) held that the plaintiff could defer furnishing further particulars until after interrogatories and/or discovery. In arriving at this conclusion, he referred to

the above authorities and also to *Arab Monetary Fund v. Hashim and Ors (No.2)* [1990] 1 All E.R. 673. There, Hoffman J. expressed the view that a plaintiff was entitled to plead in general terms that a non-fiduciary had actual or constructive knowledge of fraudulent or dishonest breach of trust and that it was appropriate to defer particularisation of the allegations until after discovery, provided that the was some evidence of conduct on which the plaintiff was entitled to plead a want of probity . At para 4.5 as follows:-

> *"Each of those authorities bring into clear relief the issue which arises in this case. It is clear that, in the ordinary way, an entitlement to seek discovery or raise interrogatories only arises when the issues between the parties have become clear as a result of a defence being filed. As pointed out by Bowen L.J., in Leitch, if a plaintiff is not able to have the benefit of discovery before defining the precise parameters of his claim, it is likely, in cases of fraud or other clandestine activity, to place very great limits on the benefit of discovery. That that would be so is clear. Discovery (or interrogatories) is, quite properly, limited to materials or issues which arise on the pleadings. If the pleadings are narrowly drawn, then it follows that discovery or interrogatories will, likewise, be confined within the same narrow ambit. If a plaintiff who makes an allegation of fraud is required to give full and exhaustive particulars prior to defence (and thus prior to discovery or interrogatories) in a manner which necessarily narrows the case, then there is every chance that, in a genuine case of fraud, the perpetrator will escape having to make discovery in respect of aspects of the fraud because the plaintiff will not have been sufficiently aware of the details of those aspects of the fraud to plead them in an appropriate manner in advance. In those circumstances aspects of the fraud will be outside the case as originally pleaded and will not be caught by any order of discovery or interrogatories."*

25. However, Clarke J. also adverted to the necessity to exercise care to ensure that a party is not allowed, by the mere invocation of an allegation of fraud, to become entitled to engage in a widespread trawl of the alleged fraudsters confidential documentation in the hope of being able to make his case. Therefore, he found that a balance was required to be struck between these two competing considerations. This balance is to be struck on a case by case basis but having regard to the following principles:-

> *"4.7 Firstly no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party, in its pleadings, specifies, in sufficient, albeit general, terms, the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and thus prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a prima facie case to that effect, the defendant*

should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial."

26. Clarke J. also acknowledged that a defendant is entitled to have a claim sufficiently particularised to enable him to plead in his defence. He was satisfied that the allegation of fraud did not constitute a bare assertion, that no prejudice arose at that stage and that, in the circumstances, it was an appropriate case in which the plaintiff could defer furnishing particulars until after interrogatories/discovery. Although that case concerned fraud, Clarke J. also referred to other unconscionable wrongdoing and continued at para. 4.10:-

> *"It is in the very nature of fraud (or other unconscionable wrongdoing) that the party who is on the receiving end will not have the means of knowing the precise extent of what has been done to them until they have obtained discovery. To require them to narrow their case prior to defence (and thus discovery) would be to create a classic catch 22. The case will be narrowed. Discovery will be directed only towards the case as narrowed. Undiscovered aspects of the fraud or the consequences of the fraud will, as a natural result, never be revealed. This would, in my view, be apt to lead to an unjust solution."*

27. Mr. Beatty S.C. submits that in line with this jurisprudence the court ought to direct that the discovery application be dealt with first.

Discussion and Decision

28. In considering this application, the court must take into account many factors, including the issues as pleaded, the nature of the wrongs alleged, the nature of the pending applications, the most efficient manner in which the case might be managed and most importantly the protection and vindication of the rights of the parties in so far as is possible. Account must also be taken of the fact that, the defendants right not to be subjected to wide ranging, vague or oppressive discovery, can be vindicated at the hearing of the discovery motion through the application of the principles outlined by the Court of Appeal in *Goode Concrete*. A further consideration is that on an application to strike out pleadings which are not adequately particularised, the court may have regard to the fact that the discovery has not yet taken place.

29. Costello J. reiterated in Goode Concrete that the categories of discovery sought must be necessary and relevant, with relevance to be determined by reference to the pleadings. I accept therefore, at least as a general principle, Mr. Collin's submission that as a matter of logic and principle the pleadings and their permitted parameters ought to be defined before an application for discovery is considered and determined. This might be described as the general default position. Mr. Collins S.C. also makes a valid point that to adopt a different approach may result in one of the parties being subjected to an unnecessary discovery application. Nevertheless, Mr. Beatty S.C. describes his client as finding himself in a Catch-22 situation. The plaintiff complains that a wrong has been done but without discovery he will not be able to advance fully and properly the claim in terms of how,

when, where and by whom. He further submits that any inadequacy of pleading has not prevented the defendants from delivering their defence.

30. Having considered the submissions of the parties and the authorities on which they rely, I do not believe the general default position necessarily dictates the order in which matters might be considered and determined in every case. As Clarke J. observed in *National Education Welfare Board,* each case must be approached on its own facts. This is particularly so, it seems to me, where the allegation is one of wrongdoing of an unconscionable nature where a person who claims to have been wronged is unaware of, and unable to discover the full extent of that activity, due to the alleged covert or clandestine manner in which it has been perpetrated.

31. On the other hand, however, the court must take cognisance of the proviso mentioned by Hoffman J. in *Arab Monetary Fund* that there be some evidence of conduct on which the plaintiff is entitled to plead a want of probity. Thus, in *National Education Welfare Board*, Clarke J. found that the pleadings under consideration went beyond a bare assertion. Had it been otherwise, the application may have been determined differently. It is clear, therefore, that a balance must be struck.

32. It is also to be noted that Clarke J.'s conclusion concerning the issue of bare assertion was arrived at in the context of a substantive application. This court is not here concerned with the substance of the motions. Nevertheless, it seems to me that I should take into account at least to some extent the principles referred to by Clarke J., but that appropriate care ought to be exercised when so doing. I believe this to be particularly the case on the issue of whether the pleadings amount to a bare assertion. The submissions and arguments on the substance of the motions have yet to be made and must not be unwittingly pre-judged. Any view expressed can be no more than tentative or preliminary and nothing stated hereafter is to be taken as being indicative of any view a court might take on the substantive application.

33. Turning then to a consideration of paras. 16A and 16B, the contents of schedule 5 and the text messages between Mr. Brophy and Mr. Keaveney, I do not believe that I could conclude *at this stage* that, as described by Hoffman J., there is *no evidence* of conduct on which the plaintiff is entitled to plead a want of probity or at least on which an argument to that effect might be made. But it is important that I reiterate the tentative and preliminary nature of any such observation. Nothing in this judgment should be taken as expressing a view on the potential outcome of the substantive applications in this regard. It clearly remains a matter for the court considering the application for discovery, after full argument, to conclude whether these pleas amount to no more than bare assertions, justifying a refusal of part or all of the discovery sought. The court will also have to be satisfied that any discovery ordered is necessary and proportionate.

34. Balancing all of these factors, I conclude that the motion for discovery ought to proceed first.