Decision of the Master of the High Court (Irelan), 22nd October, 2003.

Allegations of fact, or to be more precise, **disputed** allegations of fact are the starting point for all discovery applications. In this thirty-five paragraph Statement of Claim there must be at least two hundred allegations of fact, if not three hundred.

Unfortunately the entire Statement of Claim is replete with prolix and surplus factual allegations which make the process of identifying or "netting out" the material facts extremely arduous and time consuming.

If there is an allegation of a fact which is not, as a matter of law, a material constituent of any of the causes of action pleaded, it is redundant (or "surplus"). It is "inert" and discovery in respect thereof will not be ordered. Take, for example (para. 4) the fact that the plaintiff "*applied for the position*". Given that he was successful in his application, the fact of having applied is not material. Nor is the fact that (para. 5) the plaintiff met with four staff members or the fact that (para. 6) Dr. O'Suilleabhain also applied for the post of Head of Department.

And what are we to make of paragraph 8 ?: *"This situation has persisted since the plaintiff became Head of Department although Dr. O'Suilleabhain has recently retired having attained normal retirement age. Notwithstanding this complete lack of co-operation and refusal on the part of Mr. Barlow, Mr. Kenneally and Dr. O'Suilleabhain to carry out their duties adequately or at all, the plaintiff has expanded and improved the Department of Economics so that the Department is now one of the largest in UCC in both student and staff terms."*

This is pleading by narrative. It is slipshod and substandard. It is at this discovery stage that the plaintiff will suffer consequences. He can only obtain discovery in respect of disputed facts which are material (as a matter of law) in one or other (or more than one) of his various causes of action. These are the following (and no other): breach of contract, carelessness, conspiracy, breach of legitimate expectations and wrongful infliction of emotional distress.

In summary – and this case does not easily lend itself to brevity – the parties were sued by others in separate proceedings and it is alleged that, as co-defendants in these other proceedings, they agreed to jointly defend same. The plaintiff now complains that he was not consulted before or involved in steps taken by the defendant to secure mediation in the other proceedings.

In particular the plaintiff relies on the express terms of the so called Joint Defence Agreement as follows (and alternatively pleads that if such terms are not express, they ought to be implied):

(a) *the proceedings would be jointly defended*
(b) *retain one firm of solicitors on behalf of all defendants*
(c) *that "matters" in relation thereto would only be "considered" when "all involved" were present*
(d) *a vigorous defence*
(e) *no settlement unless agreed (or in the defendants' favour)*
(f) *no costs to be conceded to the plaintiffs unless "comparable recognition was made to the plaintiff herein"* (whatever that means !)
(g) *all relevant documents to be made available to the plaintiff*
(h) *to file a defence denying the plaintiff's allegations "and positively set out the defendants' case".*

In paragraph 14 the plaintiff pleads as to the shared opinions of the parties to the Joint Defence Agreement as to the strength of their legal position, the implication of the proceedings for the college generally and the expected workload involved in defending same. No date for the existence of these opinions is pleaded. Why are these facts pleaded at all? Is it as the basis for the implication of terms that are found not to have been recorded as express?

The plaintiff pleads no other contract but, perhaps a little uncertain about his contractual entitlements (express or implied) under the Joint Defence Agreement, the plaintiff then lists seven separate obligations which he asserts are owed to him by the defendant in exercising due care in the performance of the said agreement or (alternatively?) *"generally in and about his position as Head of the Department*". These are the obligations he asserts:

(i) *to show him due respect*
(j) not to undermine his position
(k) *to keep themselves (the University) fully informed of "all relevant facts"*

(l) *not to prejudge (or give the impression of having prejudged) the issues "in the said proceedings"*
(m) *to keep the plaintiff fully informed and copy him all relevant documents*
(n) *not to take any step which might "impact on the proceedings or the plaintiff's status" without first hearing him in respect thereof.*

Generally speaking, the law does not favour the assertion of a duty of care arising out of a contract (in this case an "*agreement*") when the parties themselves have fixed the terms and conditions of their relationship. There is no penumbra of care extending beyond the actual agreed terms.

Before the Court embarks on an examination of the evidence as to the conduct of the defendant it will have to determine exactly what the plaintiff was entitled to expect of the defendant either in furtherance of the Joint Defence Agreement, any duty of care (if any) associated with same, or a general duty arising out of the plaintiff's position. (The express terms of his contract of employment are not pleaded or relied on.)

At this point it seems appropriate to observe that, apart from the foregoing, there appear to be no other assertions of what I might characterise as a positive nature which might be the basis of the plaintiff's (otherwise unspecified) "legitimate expectation". The plaintiff's case starts and ends with his expectations of due performance of the Joint Defence Agreement (coupled with the duty of care allegedly associated therewith).

It is now time to look at the allegations of wrongdoing on the part of the defendant. They comprise allegations to the effect that

(1) the College President attempted to break the Agreement (how? – by pressing the plaintiff herein to agree to mediation). It is news to me that an attempt to breach a contract is actionable. It is a novel and unstateable proposition.

(2) the Governing Body authorised the President to appoint a mediator to mediate a resolution and to report so that the College could decide as to whether to defend the proceedings.

    If the decision to so appoint was in breach of the agreement, the allegations in para. 20 that the president wrongly advised the governing body, failed to fully inform them, failed to involve the plaintiff etc., cease to be material: it is the mediator's appointment itself which may be actionable and if not, the defective pre-appointment matters logically cannot be complained of as independent, stand alone, offences.

    Even if I am wrong in that, the question must be asked: do any of these allegations against the president amount to a breach of any of the pleaded express or implied terms of the Agreement, or of the five aspects of the duty of care otherwise owed by the college defendant?

    This is easily tested by recasting the negative allegations in their positive form and checking whether, as such, they correspond with the positive obligations above outlined. Did the college
    (i) agree to provide the plaintiff with a copy of such a petition
    (ii) agree not to discuss same at a governing body meeting without (1) first putting it on the agenda and (2) excluding Mr. Kenneally
    (iii) agree not to deal with such a proposal merely on the basis of information furnished to them by the College President, or
    (iv) without first hearing the plaintiff?

    This list overlaps the lists (a) to (h) and (i) to (n) only in three respects, as I read the case. One is the failure to copy the petition to the plaintiff if the petition is a "relevant" document (see (g) above) (see also para. 29). Another is acting on the basis of the information supplied by the president instead of the "full" information they contracted to be the sole basis of action. The final infringement (negative) which fails a previously agreed term (positive) is acting without first hearing the plaintiff if (and only if) the decision to appoint a mediator can be considered as one which "might impact on the proceedings".

(3) Moving on then to the plaintiff's complaints about the mediation process (paras. 22 to 27). Does para. 28 amount to an allegation that the matters complained of in these foregoing paragraphs are in breach of agreement and/or negligent? It appears so. The situation appears to me to be as follows: either the mediation itself was excluded by the agreement terms/duty of care as asserted, or it was not. If it was, then the Court will not bother to critically examine the mediation process.

On the other hand, if mediation *per se* did not cross the lines agreed (or the duty of care owed), the plaintiff is making no case ("in the alternative") for damages in respect of his criticisms of the mediation process.

(4) The plaintiff alleges (para. 31) that the College President (for whom the defendant is vicariously liable) intended to bring about a resolution of the proceedings. He lists twenty one instances of behaviour on the part of the President, any one or more of which "manifest" or "indicate" the existence of such an intention.

The president's such intention would not be actionable in law. (Even though execution of the intention might be a breach of the Agreement.) Consequently none of the allegations listed at para. 31(a) to (u) is material: they are surplus.

(5) The plaintiff alleges (also para. 31) that the president conspired with others (unknown) to bring about a resolution. There are no new facts asserted as constituents of this particular case. It appears to be not a stand alone claim, but rather a characterisation of facts alleged elsewhere.

(6) The plaintiff alleges (para. 32) matters which occurred after the commencement of the proceedings. These matters cannot be dealt with in these proceedings. They are prolix.

(7) A further forty three facts are alleged in paragraph 34. Some are sufficiently specific to be the basis of a discovery application. Some are non specific and discovery must be refused where it clearly amounts to a "fishing expedition". The forty three include the twenty one above described but now these are not merely asserted as evidence of an intention, but as actionable misbehaviour in their own right.

Before deciding on discovery in respect even of those facts alleged with sufficient particularity, it is necessary to recall that the plaintiff's case is only about matters which may be in breach of the Joint Defence Agreement (and any duty of care in regard to same). No other contract is asserted as the basis of claim. Items which survive the test of particularity may fail the test of materiality.

Fourteen of the forty three fail the former test. The following survive the former but fail the latter in this context (i.e. specific but not material).
Para. 31 (c) (d) (f) (g) (h) (i) (j) (k) (l) (n) (p) (q) (r) (s) (t) (u)
Para 34 (b) (l) (m) (n) (o) (q) (s) (t)

This leaves (both specific and material)
Para 31 (e) (o) and
Para 34 (k) (p) (r)

Concluding this analysis of the various matters complained of (1) to (7) above, we are left with a relatively short list of issues concerning material facts, as follows: (1) none, (2) four facts, (3) none, (4) none, (5) none, (6) none, (7) five facts

Categories of Discovery requested and the reasons stipulated therefor.
2, 3, and 4 relate to matters which the defendant has not admitted. The legal effect of such a plea may be misunderstood by the plaintiff. It is that the defendant does not intend to question whatever evidence the plaintiff offers the Court in respect of such pleas. The facts are not in dispute, and the defendant will not, indeed cannot, offer contrary evidence at variance with the evidence of the plaintiffs. Of course the plaintiff can only offer evidence strictly in line with the facts he alleges: it cannot be varied or embellished at the trial.

1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14,16 and 41 all concern the dispute as to the existence of the so called joint Defence agreement (and the terms thereof) and the consideration therefor.

5 and 7 relate to meetings at which the plaintiff was present. That the minutes or records of such a meeting contain or do not contain references to an agreement of the sort contended for, is not probative either way. Best evidence of such agreement is available to the plaintiff himself.

8, 10, 12, 14 and 16 relate to work done by Solicitors Ronan Daly Jermyn. Again, there may be a misunderstanding on the part of the plaintiff as to how to prove that these solicitors were instructed to act on behalf of all defendants: the entry of appearance confirms as much. As for fees paid – the payment of fees by one of the defendants is not probative of an agreement between the defendants that one would bear the costs of the other. Whether the contents of a draft Defence (or instructions as to same) could be assessed as

evidence of agreement to "aggressively" deny the plaintiff's allegations is doubtful in the extreme. One denial looks much the same as another! As for category 41 the non filing of a defence is easily proved.

Category 6 relates to meetings in the minutes of which it is surmised that evidence of the "joint" nature of the legal steps being taken by the College might be found.

If the plaintiff is in difficulty because, to coin a phrase "he didn't get it in writing", I can appreciate why, although he himself may be in a position to offer his personal testimony as to what was agreed, he is curious as to what written record exists in the defendant's files. In addition, he is trying to prove implied terms, a process which involves a Court examination of all the surrounding matters likely to be reflected in the terms of any such agreement.

Insofar as the documentation sought records or deals with matters other than the joinder of defendants for the purposes of the litigation (or the actions of the defendant unequivocally probative of such joinder) the documents will not assist the plaintiff one way or another. I will limit discovery in this way.

Categories 9 and 11 arise because of the plaintiff's need to prove consideration for the so-called joint Defence Agreement. The plaintiff nowhere states that he is unable himself to prove that which he wishes to prove, namely, that he put a lot of work into the joint defence effort.

Category 13 is proposed to enable the plaintiff to find out what documents, if any, he was not furnished with by the defendants "to confirm the nature and extent of the breach". The term of agreement which the plaintiff seeks to enforce (by an award of damages) is intrinsically unenforceable because of the inclusion of the word "relevant" which is essentially a matter for self assessment by the part who is deciding whether or not to copy documents to the other. I am not going to permit the process of the Court to be a mechanism for pre-trial enforcement of a disputed term. In any event the discovery order itself would be necessarily unenforceable since the yardstick of reference is in the hands of the deponent.

At category 18 the plaintiff seeks to uncover whether the president "*kept him informed of all relevant facts and issues relating to the Barlow proceedings*." There is no allegation of such a term of agreement. The terms alleged concern "relevant documents" (para. 12(g)) and "*developments in relation to the issues*" (para. 15(e)). "*Facts*" are an entirely different, and much broader, set of items both real and metaphysical. In any event, there must be considerable doubt as to whether the petition was a document "relevant" in the context of the Barlow proceedings or constituted a "*development in relation to the issues".*

I understand the plaintiff's case. He feels there was an agreement to face down the Barlow plaintiffs, not to placate them or compromise. A settlement with them meant loss of status for him. But perhaps less unambiguously so than an adverse court finding? Who is to say that the college did not do him a favour?

Conspiracy is the only actionable matter referred to in category 15. The remainder of this category, and the whole of category 17, concern "attempts" to break a contract. I will return to conspiracy later. Category 37 also concerns an "*attempt"*.

Category 19 relates to the pleas in paragraph 20 concerning the proceedings at the meeting of the Governing body on the 9th March, 1999. Likewise categories 29 and 42. The only actionable wrong (per the analysis above) is the failure to hear the plaintiff. The plaintiff can himself give evidence of this.

The appointment of and transactions involving the mediator are the subject of categories 20 to 24, and 26. For the reasons above outlined, these matters are surplus.

Either the plaintiff was furnished with a draft petition, or he was not. The plaintiff wants to prove the latter – let him do so: he is best placed to confirm he did not receive it, whether or not there is any written record otherwise. Category 27 refers.

The plaintiff refers to his conspiracy claim in the reasons for several of the categories of documents. I suppose it is notionally possible that a fact which might be immaterial in the context of another claim might be material as part of the conspiracy claim. Categories 25, 28, 30, 31, 38, 39 and 40 refer. I do not think it is referred to elsewhere. Category 28 is the principle reference. It is, I think, one and the same conspiracy which is being referred to namely "*to undermine the Plaintiff's statutory position, reputation, good name, authority or standing in UCC".* The means alleged are both lawful and unlawful – the latter in the sense of being in breach of contract etc. etc. as aforesaid.

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Frankly, if any of these categories had not survived the analysis of materiality above, but remained as ingredients of a conspiracy claim alone, I would be reluctant to allow discovery on the present state of the pleadings: it is a fishing expedition. In any event, the facts suggestive of such alleged conspiracy are easily capable of proof: the establishment of the O'Flaherty inquiry, the mediator's conclusions, the discontinuance of proceedings against the plaintiff, the undermining of the plaintiff's standing within the college. These would not have occurred without the involvement of College personnel: it is self evident.

Whether that involvement constituted an actionable conspiracy is another day's work. Conspiracy is an economic tort. There are no particulars of special damage in this Statement of Claim. Economic loss is not pleaded: the plaintiff's claim is for general damages, not for damages for special damage.

Category 31 is a non-starter concerning post summons events.

None of the categories 32 to 40 concerns a material issue, for the reasons above discussed.

All of which leaves category 1. I will order discovery of all documents created prior to the 5th January, 1999 meeting of the parties, in which reference is made to discussions or agreement between the parties concerning joinder of their individual efforts for the purpose of defending the Barlow proceedings.

And category 6: Discovery is ordered of any written record concerning discussions between staff members of the College and which record references to the subject matter of any of the agreement terms alleged at paragraph 12 (a) to (h) of the Statement of Claim.