THE COURT OF APPEAL

[Approved]
[No Redaction Needed]
Record Number: 2023/33
High Court Record Number: 2006/2002P
Neutral Citation Number: [2023] IECA 106

Noonan J.

Haughton J.

Allen J.

BETWEEN/

KEVIN TRACEY T/A ENGINEERING DESIGN AND MANAGEMENT

PLAINTIFF/APPELLANT

-AND-

MICHAEL BURTON AND ANNE O'CONNOR AS PERSONAL REPRESENTATIVE OF THE LATE CHARLES O'CONNOR AND BURTON AND O'CONNOR LIMITED AND FPQ CONSULTING ENGINEERS

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 2nd day of May, 2023

1. This appeal is brought by the plaintiff from a case management order made by the High Court (MacGrath J.) on the 19th January 2023 in the course of an ongoing trial.

2. The underlying proceedings have an extraordinarily protracted history and arise from events that occurred in 2004 when the defendants terminated a contractual relationship

between them and the plaintiff. The proceedings were commenced in 2006 and have already been the subject of a number of judgments of the Superior Courts. It is unnecessary for the purposes of this judgment to outline the progress of these proceedings in detail. They concern a claim for damages by the plaintiff arising out of the alleged breach of contract of the defendants, as a result of which the plaintiff claims he suffered losses including personal injuries of a psychological or psychiatric nature. The defendants dispute the latter claim on the basis that it is one unknown to law. After a lengthy period of time, and extensive case management in the High Court, the trial commenced on the 25th July 2019 before MacGrath J.

3. At the commencement of the trial, the court was informed by the plaintiff that he was awaiting a psychiatric report in support of his claim for damages for personal injuries. The plaintiff had in fact obtained earlier medical evidence in 2005 and 2007 from a general practitioner and psychologist respectively. On 9th April 2019, in the run up to the trial, the defendants obtained a report from a consultant psychiatrist. At the commencement of the trial on 25th July 2019, the plaintiff requested an adjournment on the grounds that he had not yet obtained a psychiatric report, stating to the court:

> *"The procurement of a response to the specialist medical report is in progress. It's in progress."*

4. The adjournment application was refused but the judge directed that the trial should proceed in the first instance on the issue of liability, with quantum to be determined subsequently, to facilitate the plaintiff obtaining this medical report and also because the second defendant, Charles O'Connor, was at that time unwell and has since passed away. The Court was told at the outset that the issue of liability would take a limited time, one estimate being one day. That transpired to be extremely optimistic as the evidence on

liability was subsequently heard over five days, those being the 26th, 30th and 31st July, 12th November and 17th December 2019. At that stage, the hearing of the liability module was unfortunately interrupted as a result initially of availability issues and later of the covid pandemic.

5. On the 10th March 2020, the plaintiff notified the defendants that he intended to call 22 witnesses and the defendants in response indicated that they intended to call 7 witnesses. Before the trial was interrupted the plaintiff had given evidence, as had Mr. O'Connor. The proceedings have since been reconstituted in the name of Mr. O'Connor's personal representative.

6. On the 11th November 2021, the defendants, with the leave of the Court given in May, 2019, issued a motion seeking, *inter alia*, the following reliefs:

(1) An order pursuant to O.36, r.42(3)(II) of the RSC giving directions as to
   (a) The issues on which the court requires evidence;
   (b) The nature of the evidence required to enable such issues to be determined;
   (c) The manner in which such evidence is to be put before the court.

(2) In addition, or in the alternative, an order pursuant to O.19, r.27 striking out the portion of the action herein which is pleaded in negligence;

(3) In addition, or in the alternative, an order pursuant to O.15, r.13 striking out the proceedings as against the first and second defendants.

7. The motion came on for hearing before the High Court on the 21st December 2021 and as appears from the order eventually made on the 19th January 2023, the matter was heard over two days, being 21st December 2021 and the 25th November 2022. It would appear that in the afternoon of the first day of the hearing, the plaintiff sought leave to issue his own motion but claims he was not permitted to do so. The plaintiff's proposed cross motion was,

to say the least, unusual in its terms in seeking to dismiss the defendants' motion; to "*dismiss*" the report of the defendants' psychiatrist; to "*recuse*" the defendants' senior counsel; to split the trial into three parts rather than two and, *inter alia,* for an order that the trial judge visit the defendants' former offices at 68 Amien Street, Dublin 1, which were no longer in their possession. The draft motion was stated to be filed "*on the basis of a rebuttal of the mid trial notice of motion*" of the defendants.

8. Following the hearing of the defendants' motion, the judge reserved his judgment and delivered a written judgment on the 19th January 2023. In it, the judge outlined the background to the proceedings and the defendants' motion. He noted that on the first day of the hearing of the motion, the plaintiff sought liberty to bring his own motion, to which I have referred. The judge noted that in response to the defendants' motion, the reliefs sought in the plaintiff's own motion included orders dismissing the defendants' application and directing that there should be no alteration to the case management orders made at an earlier juncture, before the commencement of the trial.

9. The judge also summarised the defendants' submissions with regard to the legal principles applicable to the issues canvassed in their motion. The judge referred to the fact that he had been informed by the plaintiff at the most recent hearing – presumably that on the 25th November 2022 – that he had not yet managed to arrange a consultation with the psychiatrist for the purpose of obtaining a report and that the reason for the delay was a backlog in obtaining appointments caused by the pandemic.

10. The judge commenced the "*Discussion*" section of his judgment by setting out the relevant provisions of the RSC including O.36, r.42(2) which provides:

"(2) The trial of proceedings shall, as regards the time available for any step or element, be under the control and management of the trial Judge, and the trial Judge may, from time to time, make such orders and give such directions as are expedient for the efficient conduct of the trial consistently with the interests of justice."

11. The judge also set out the provisions of O.36, r.42(3) which provides as follows:

"(3) The trial Judge may:

(a) having regard to the period of time fixed for the trial, and

(b) having considered any materials (including any reports and summaries or statements of the evidence of any witnesses) delivered to him or her in advance of the trial in accordance with any provision of these Rules or any order or direction of the Court, and

(c) having heard the parties,

make such orders and give such directions as are expedient for the efficient conduct of the trial consistently with the requirements of justice which may, without limitation, include:

(I) orders fixing or limiting the amount of time allowed to each party for opening and closing the case (including, subject to paragraph (II)(d), the making of oral submissions on points or issues of law) and for examining and cross-examining each witness, which may include an order allowing each party an amount of time (out of the total time set aside for the trial of the proceedings) for its presentation of its case, which may be used in opening the case, in closing the case, in examining in chief or in re-

examining any witness called by that party, and in cross-examining any witnesses called by any other party, and

(II) directions:

(a) as to the issues on which the Court requires evidence;

(b) as to the nature of the evidence required to enable such issues to be determined;

(c) as to the manner in which such evidence is to be put before the Court;

(d) where written submissions on points or issues of law have been lodged in advance of the trial, as to whether the Judge shall require any oral submissions on points or issues of law in addition to those written submissions, or

(e) requiring the parties or any party at any stage of the trial to identify the issues which arise or remain for determination by the Court and the questions which the Court is required to decide in order to determine each such issue."

12. Having cited the relevant provisions of the RSC, the judge went on to say:

"22. I am satisfied that, while the Court has jurisdiction to entertain this application during the course of the trial, this is not an appropriate case with which to intervene at this point in time and to make a ruling on the defence application. That is not to say that the application is not one which cannot be made at the conclusion of the plaintiff's case on liability."

13. The judge gave his reasons for this conclusion but importantly, it is clear from the above that the judge did not accede to, or make any order in respect of the defendants' motion, at that stage at any rate. Having made that determination, the judge then indicated that he was satisfied that the time estimates provided for the completion of the liability module were inordinate and completely at odds with previously suggested estimates. He referred to the judgment of the Supreme Court in *Talbot v. Hermitage Golf Club* [2014] IESC 57, where the court emphasised the need for cases to be managed in a just and proportionate way to foster the court's resources and control the level of costs incurred by parties. The judge expressed himself satisfied that in the light of those factors, the court should intervene to impose strict time limits in respect of the remaining evidence to be adduced, consistent with the interests of justice and the proper assignment of the court's resources.

14. The judge went on to express the view that having been apprised of the issues from the evidence of the plaintiff and the late Mr. O'Connor and bearing in mind previous time estimates, any outstanding evidence on liability ought to be dealt with within a total period of five days to be allocated equally i.e., two and a half days each.

15. On the issue of the plaintiff's medical condition and how it came about, the judge said that the court would not wait indefinitely for the arrangement of medical appointments and obtaining of reports and given the length of time that had elapsed since issues surrounding delay in the obtaining of a further medical report arose for consideration, any such report ought to be capable of being obtained within a period of no more than two months.

16. Following the making of that order, the matter came before MacGrath J. again for mention on the 27th March 2023, when he made a further case management order that witness

statements should be delivered in respect of each witness whom it was proposed to call to give oral evidence.

17. It is against the earlier order of 19th January 2023 that the plaintiff brings this appeal. The plaintiff has raised four grounds of appeal which can be summarised as follows:

1. The order of the High court was made without reference to the plaintiff's *"counter"* notice of motion;
2. Allowing the plaintiff a further two and a half days to present his case would be insufficient and a denial of justice;
3. Two months is not enough time for the plaintiff to obtain a psychiatric report as he is in a post-Covid queue.
4. The order of the High Court imposed an unfair burden on the plaintiff and would lead to an unfair trial.

18. As I have already pointed out, the order now appealed by the plaintiff was not made pursuant to the motion brought by the defendants. The judge expressly declined to make the orders sought by the defendants and instead, of his own motion, decided to impose a further case management order on the parties, having regard to the manner in which the trial had proceeded up to that point in time. While the plaintiff complains that his *"counter"* notice of motion was not heard, there can be no basis for such complaint in circumstances where the motion was never issued. If the plaintiff has a complaint about that, it is not one that can be considered by this Court. In any event, it is quite clear that the judge took on board, and had regard to, the terms of the plaintiff's draft motion and grounding affidavit in reaching his decision.

19. As noted at the outset, this is an appeal from a case management order made by the High Court. It is by now well settled that an appellate court will be very slow to interfere

with such an order and the threshold to be crossed by an appellant against such an order is a high one. Quite apart from that, it seems to be clear that the further directions made by the court on 27 March 2023 subsequent to the filing of the plaintiff's notice of appeal herein, have rendered this appeal, to a large extent, moot. The provision of witness statements will potentially remove the necessity for calling the witnesses at all, save to the extent that they confirm their statements on oath and are subject to cross examination, if required or necessary.

20. In *Dowling v. Minister for Finance* [2012] IESC 32, Clarke J. (as he then was) considered the parameters within which an appellate court might appropriately consider an appeal from a case management order. He said (at para. 3.1):

> *"The trial court must retain a very large measure of discretion over the directions which are appropriate and the measures to be adopted in the event of failure to comply. There would be no reality to the achievement of the undoubted advantages which flow from case management if this Court were, on anything remotely resembling a regular basis, to entertain appeals from parties who were dissatisfied with either the precise directions given or orders made by the Court arising out of failure to comply."*

21. He acknowledged the high threshold that applies to such appeals and observed (at para. 3.5):

> *"[I]t seems to me that this Court should only intervene if there is demonstrated a degree of irremediable prejudice created by the relevant case management directions such as could not reasonably be expected to be remedied by the trial judge (or at least where the chances of that happening were small) and where therefore, unusually, the safer course of action would be for this Court to intervene immediately to alter the case management directions."*

22. Indeed, these points are reiterated in an earlier judgment of the Supreme Court in these proceedings - *Tracey v. Burton & O'Connor* [2016] IESC 16 - where MacMenamin J. cited with approval the earlier observation of the Supreme Court in *Talbot v. Hermitage Golf Club* [2014] IESC 57 (at p.16), also referenced by the trial judge here:

> *"Courts are entitled, and indeed are required, to foster their resources. This is both a matter of public and private interest… Litigants should not be faced with cases that are longer or more expensive than they need to be for a fair resolution. In many instances, costs if awarded against a losing party may not be recovered. In that regard, putting reasonable limits on submissions in terms of time and allowing a measured number of hours or days for each side to litigate their case is both right and appropriate."*

23. MacGrath J. has now had seisin of these proceedings for a number of years and is intimately familiar with all aspects of the same. He is clearly in a far superior position to this Court to assess how best to manage the conduct of this litigation in the interests of justice having regard to the valuable and limited resources of the court and the accrued and future costs for both sides likely to be incurred. These proceedings have already endured for an inordinate length of time and must now proceed to a final resolution, as the judge recognised. I cannot see any basis upon which it could reasonably be said that there was any unfairness to the plaintiff in the order he now seeks to appeal.

24. One of the plaintiff's complaints is that prior to the commencement of the action, case management orders were made, and they should not now be disturbed. That fails to recognise the fact that case management orders are, almost by definition, not set in stone and the court remains free at any stage of the proceedings to further direct how the case should proceed at that moment in time. Indeed, that is demonstrated in the present case by the fact

that the judge did in fact modify his earlier order by directing the furnishing of witness statements. Cases commonly change and evolve as they proceed, both before and during trial, and a case management order made at an earlier stage of the proceedings may transpire to be less than optimal at a later stage, calling for revision. The court must be in a position to control its own processes to facilitate the conduct of litigation both on foot of its inherent jurisdiction and the jurisdiction expressly now conferred by the RSC already referred to.

25. I am satisfied that the complaints made by the plaintiff in this appeal fall very far short of the threshold that I have identified from the authorities. The days when parties could take as long as they liked to prosecute their cases have long since passed and the courts have now, more than ever, an obligation to ensure that court resources are efficiently deployed for the benefit of all litigants.

26. Even if there were any basis for the suggestion by the plaintiff that allowing him a further two and a half days to complete his case on liability is somehow unfair, and I am satisfied that there is none, any such concern has since been addressed by the judge directing the furnishing of witness statements which will greatly truncate the amount of time required for the giving of oral evidence. There is no conceivable unfairness arising from this.

27. As regards the requirement that the plaintiff obtain his psychiatric report within two months, here again I can see no unfairness in this direction in circumstances where the plaintiff informed the court in July 2019, now over three and a half years ago, that the obtaining of such a report was in progress and indeed was the reason he relied upon to justify seeking an adjournment. In this he was partially successful in that the judge deferred the quantum issue, where such report would become relevant, until after liability had been determined. The plaintiff can hardly now be heard to say that what he told the court in 2019 was inaccurate as a justification for seeking yet further time to prepare a case now the best

part of two decades in the making. Indeed, in the course of the appeal, in response to a question from the court, the plaintiff confirmed that his general practitioner had not yet identified an appropriate psychiatrist to approach with a view to seeking a report.

28. I would accordingly dismiss this appeal.

29. My provisional view on costs is that as the defendants have been entirely successful, they are entitled to the costs of this appeal. If the plaintiff wishes to contend for an alternative form of order, he will have fourteen days from the date of this judgment to deliver a written submission not exceeding 1000 words and the defendants will have fourteen days to respond likewise. In default of such submissions being received, an order in the terms proposed will be made.

30. As this judgment is delivered remotely, Haughton and Allen JJ. have authorised me to record their agreement with it.