APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023/6

Whelan J.
Binchy J.
Allen J.

Neutral Citation Number [2023] IECA 57

BETWEEN

ALAN SHERRY

PLAINTIFF

AND

JOHN MURPHY, FITZPATRICK CONSTRUCTION LIMITED,

DARRAGH KEOGH TRADING AS D KEOGH ROOFING, OISIN HAYES

AND

LAUREN MURPHY

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 13th day of March, 2023

1. This is an appeal by the first defendant against the judgment and order of the High Court (Meenan J.) made on 30th November, 2022 the substance and effect of which was to refuse to fix a date for the hearing of a motion brought on behalf of the first defendant

challenging the adequacy of a personal injuries summons and seeking to have the action dismissed against him.

2. On 16th December, 2020 the plaintiff was involved in a serious accident in the course of his work as a roofer. While working on the roof of a new house in the course of construction in the side garden of the first defendant's house at 24 Seaview Park, Shankhill, Dublin 18, the plaintiff fell through an ope in the roof which was to accommodate a skylight.

3. By personal injuries summons issued on 30th August, 2021 the plaintiff commenced proceedings against the first defendant – who was said to reside at and to have been the owner of the property at 24 Seaview Park – the second defendant – who was said to have been the main contractor on the site – and the third defendant – who was said to have been the plaintiff's employer, a roofing contractor retained by the second defendant. The building works were described as renovation works. The first defendant's property at 24 Seaview Park was said to have been a *"place of work"* and a construction site within the meaning of the Safety, Health and Welfare and Work Act, 2005 and the Safety, Health and Welfare at Work (Construction) Regulations, 2013.

4. Following some correspondence from the second defendant's solicitors the summons was amended on 31st March, 2022 pursuant to an order granting leave made on 28th March, 2022 to join the first defendant's son-in-law and daughter by whom or for whom the new house had been built. According to the amended summons, the works were carried out pursuant to a contract made between the second defendant and the fourth and fifth defendants.

5. It was alleged in general terms that it was a term of the plaintiff's contract of employment – express or implied – and that it was the duty of the defendants that the defendants would take all reasonable care for his safety, not to expose the plaintiff to a risk of damage or injury of which they knew or ought to have known, and to provide him with a safe

place of work and a safe system of work. Strikingly, the indorsement of claim did not allege that the first defendant was the occupier of the property or that he was responsible for the building work.

6. By notice of motion issued on 5th September, 2022 and originally returnable for 28th November, 2022 the first defendant sought a number of orders based on the alleged failure of the personal injuries summons to comply with the requirements of Part 2 of the Civil Liability and Courts Act, 2004, specifically because – it was said – the indorsement of claim did not set out:-

(a) Full particulars of the acts of the first defendant alleged to constitute the wrong;

(b) Full particulars of the circumstances relating to the alleged commission by the first defendant of the alleged wrong;

(c) Full particulars of each instance of negligence alleged against the first defendant;

(d) Full and detailed particulars of the claim against the first defendant which the action consists of;

(e) Full and detailed particulars of each allegation, assertion or plea comprising the plaintiff's claim as against the first defendant.

7. The notice of motion sought declarations as to the alleged deficiencies on the summons; orders striking out the claim against the first defendant pursuant to O. 19, rr. 5(1) and 28 of the Rules of the Superior Courts and the inherent jurisdiction of the court; and in the alternative an order pursuant to O. 19, r. 7 directing the plaintiff to comply with the requirement of Part 2 of the Act of 2004 and to deliver further and better particulars.

8. The first defendant's motion had been preceded by a letter of 23rd May, 2022 asserting that the summons had not been pleaded correctly; that the affidavit of verification

was incorrect – specifically because the building works had been described as renovation works rather than the construction of a new infill dwelling, and the property had been described as 24 Seaview Park rather than 24A Seaview Park – and protesting that the first defendant ought not to be a party to the proceedings because he, the first defendant, was not the occupier of the building site and because his son-in law, the fourth defendant, was the employer under the building contract. The plaintiff's solicitors did not reply to that letter.

9. The first defendant's motion was grounded on an affidavit of the first defendant the focus of which was on the alleged inadequacy of the pleading but which set out in some detail the arrangements made between the first defendant – and his wife, who is a co-owner of No. 24 –and the fourth and fifth defendants for the construction and eventual use of the new house and the planning history of the project.

10. In response to the motion a long affidavit was sworn on behalf of the plaintiff by his solicitor. The plaintiff's solicitor – by reference to the planning file and the Personal Injuries Assessment Board application – protested that the first defendant had been correctly joined. He asserted that the summons was in the usual format and complied with the Rules of the Superior Courts and argued that any issues which the first defendant had in relation to the proceedings could be rectified by way of a notice for particulars and replies thereto. The plaintiff's solicitor acknowledged receipt of the first defendant's solicitor's letter of 23rd May, 2022 but did not say why he had not replied to it.

11. The plaintiff's solicitor averred that in advance of filing his affidavit he had delivered a notice giving further particulars of negligence and breach of duty and breach of statutory duty on the part of the first defendant. This notice identified a number of the provisions of the Safety, Health and Welfare at Work (Construction) Regulations, 2013 which had allegedly been breached by the first defendant and suggested that he had failed to appoint an appropriate project supervisor and had assumed the role of a project supervisor but – I will

content myself for present purposes by saying that – it is not immediately obvious how any of the obligations created by the regulations applied to the first defendant who was not alleged to have commissioned the works and was not alleged to have been the occupier of the building site. Peculiarly, the notice of further particulars suggested that the first defendant as the owner of the property breached the duty of care owed to the plaintiff pursuant to s. 3 of the Occupiers Liability Act, 1995.

12. In response to the affidavit of the plaintiff's solicitor the first defendant's solicitor swore a long affidavit.

13. It is not necessary or appropriate that I should dwell on the detail of the affidavits but I cannot forbear to observe that the language used – on both sides – was intemperate and calculated to distract rather than focus attention on the complaint of the alleged inadequacy in the pleading of the case against the first defendant.

14. The motion, as I have said, was originally returnable for the Monday common law motion list 28th November, 2022. It was one of 87 motions in the common law list No. 4. The grounding affidavit ran to four pages; the plaintiff's solicitor's replying affidavit to eight pages, and the first defendant's solicitor's affidavit to eight pages. Counsel for the first defendant indicated that it could not be dealt with in fifteen minutes and asked that it be transferred to the list to fix dates when a date could be fixed for at least a one-hour hearing. The plaintiff's solicitor agreed that the motion could not be dealt with in fifteen minutes but opposed the application to transfer it to the non-jury list because, he said, only the third defendant was insured and he – the plaintiff's solicitor – was struggling to get the case on.

15. When the motion was called on 30th November, 2022 counsel for the first defendant asked for a date to be fixed for the hearing of the motion. This was opposed by counsel for the plaintiff who argued that the progress of the case was impeded by the fact that the first defendant had not delivered his defence. Counsel stressed the severity of the injuries

sustained by the plaintiff and argued that the first defendant – to whom counsel referred as the owner of the property – was seeking to have his defence assessed by way of a motion. The first defendant, it was said, had put certain averments on affidavit as to why he was not the appropriate defendant but *"clearly they are matters as between defendants that are always heard in full trials."* The first defendant, it was said, had brought his motion and counsel for the plaintiff said he was not saying that he was not entitled to bring his motion but the motion was delaying the trial and could be dealt with at the trial. Despite counsel for the first defendant's protestation that there was *"no case made out"* against the first defendant, the judge ruled that he should first deliver his defence and then bring his motion, which could be dealt with alongside the hearing of the action. The judge declined an application by counsel for the plaintiff to strike out the motion but rather adjourned it generally and reserved the costs.

16. The first ground of appeal is said to arise from an error on the face of the High Court order which recites that the notice of motion filed on 5th September, 2022 was read. I am satisfied that there is nothing in this. While the court may not have had the booklet of papers it will have had the original notice of motion.

17. Secondly, it is said that the judge erred in adjourning the motion generally in circumstances in which it was not properly before the court. I will come to the order made but the motion was properly before the court, having been adjourned from the previous Monday, if only for mention.

18. The substance of the appeal is that the High Court judge exercised his discretion to adjourn the motion generally – or not to assign a hearing date – in a manner which irredeemably prejudiced the first defendant. It is said that the effect of the order was to irredeemably defeat the objectives of Part 2 of the Civil Liability and Courts Act, 2004 and that the order made failed to have regard to where the balance of justice lay. I think that the

first defendant in suggesting that the effect of the order was to irredeemably defeat the objectives of the Act probably puts it too high but it seems to me that the first defendant had an argument to make that the requirements of the Act had not been met in the manner in which the claim against him was pleaded and – as the indorsement of claim stood – that it disclosed no cause of action against the first defendant who was alleged only to be the owner of the property and not to have had any involvement in the building work.

19. For the avoidance of doubt, I express no view on the merits of that argument but in principle the first defendant was entitled to be heard as to whether the case against him was properly pleaded and if it was not, as to whether he should be obliged to deliver his defence. The first defendant, if he had delivered his defence, would have been entitled to challenge the adequacy of the summons to make the case at trial that the plaintiff ought not be permitted to seek to make any case against him that had not been properly pleaded but I do not believe that he was bound to proceed in that manner. In practical terms, if the first defendant's motion succeeded, his costs – which might or might not be recoverable if the action were ultimately dismissed – would be a fraction of the costs of preparing for a full trial.

20. I can understand that the judge may have been sceptical of a motion to dismiss a personal injuries action on the ground that the summons – which had been settled by counsel – disclosed no cause of action or pursuant to the inherent jurisdiction of the court on the ground that it was bound to fail but the first defendant had brought a motion which the plaintiff acknowledged he was entitled to bring and it seems to me that if the first defendant was entitled to have brought the motion he was entitled to have it heard. As the motion was summarised by counsel for the plaintiff in resisting the first defendant's application for a hearing date, the impression created was that there were contested issues of fact which the first defendant sought to have summarily determined. But on closer examination, that is not quite accurate.

21. Broadly speaking there were two strands to the first defendant's motion; first, that the indorsement of claim did not comply with the requirements the Civil Liability and Courts Act, 2004 and secondly, that it disclosed no cause of action against the first defendant. There is tension between these arguments. On one view, the proposition that the summons did not comply with the requirements of the Act is premised on the existence or at least the possible existence of a cause of action which had not been sufficiently pleaded. On the other hand, the premise of the motion to dismiss is that on the facts alleged – which it must be accepted for the purposes of the motion are true or that the plaintiff will be able to establish – the first defendant has no liability in law.

22. It is well established that the bar for a defendant seeking to have an action dismissed on the statement of claim is very high but the rules contemplate such applications and a defendant who can meet the threshold will be released from the action much earlier and at a fraction of the cost of a trial.

23. The parties are agreed that this court will be slow to interfere with a case management direction. Both parties cite the *dictum* of Clarke J. (as he then was) in *Dowling v. Minister for Finance* [2012] IESC 32 that:-

> *"Ordinarily it would seem to me that it would be necessary for this Court to be satisfied that the relevant measures under appeal created a substantial risk of significant procedural unfairness coupled with the likelihood that no remedial action could be put in place either by the trial judge or by this Court on appeal which would have the effect of significantly remedying any unfairness which might be demonstrated to have occurred."*

24. It is accepted that the High Court judge was not formally engaged in case management but the plaintiff contends that the judge was entitled to make an assessment of the first defendant's motion and to determine that it would have been more appropriately

brought after a defence had been delivered. The plaintiff argues that it has always been his position that he cannot engage in litigation by correspondence and that *"it would be remiss to let him [the first defendant] exit the proceedings without having formally engaged therewith."* In my view, this misses the point in two respects. Firstly, the first defendant's motion is formal engagement. Secondly, it is not a matter of the plaintiff allowing the first defendant to exit the proceedings. The issue is whether the personal injury summons discloses a cause of action against the first defendant. That is ultimately a matter for the court.

25. There was some argument as to the significance – if any – of the fact that the order under appeal did not give liberty to re-enter. I do not consider this to be a matter of any significance. It is clear that the High Court judge contemplated that the motion might be re-entered and dealt with at the trial of the action. The effect of the order was not to permanently deprive the first defendant of the opportunity to make the arguments he wished to make but the effect of the refusal to fix a date for the hearing of the motion was to permanently deprive the first defendant of his opportunity to persuade the court that he should not be required to defend the action or to go to trial.

26. It was inevitable that if the hearing of the motion – or the determination of the issues raised by the motion – was postponed to the trial of the action that the first defendant's costs would be greatly increased. If, theoretically, the first defendant had the prospect that the plaintiff would be ordered to pay those costs it was by no means clear that the plaintiff would ultimately be in a position to meet any such order or that there would be an order over against any of the other defendants who would be able to pay.

27. I acknowledge that in the management of busy lists and scarce resources a significant margin of appreciation must be afforded to the list judge but in my view, he was led into error by the summary of the issues. In my view, the refusal of the High Court judge to fix a date

for the hearing of the motion created a substantial risk of significant procedural unfairness coupled with a likelihood that no effective remedial action could be put in place later to address the very significant additional costs to which the first defendant was exposed in the event that his application proved to be successful.

28. It seems to me that the true nature and effect of the order under appeal is illustrated by the plaintiff's cross appeal against so much of the order as reserved the costs. The plaintiff contends that the judge ought to have made an order for his costs because, it is said, it was always the plaintiff's position that the motion was unnecessary and inappropriate. This, I think, fairly represents the position taken by the plaintiff on the first defendant's application for a hearing date. The difficulty with it is that the motion was never heard because the plaintiff objected to the assignment of a date on which it could be heard. If the motion was not necessary to allow the first defendant to successfully defend the claim against him, it was necessary – and appropriate – if he hoped to persuade the court to dismiss the claim *in limine*.

29. For these reasons I would allow the appeal and dismiss the cross appeal, and remit the motion to the High Court for hearing.

[Whelan and Binchy JJ. agreed.]