

Neutral Citation No: [2020] NIQB 37

Ref: MAG11205

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 21/02/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2015 No: 74852

Between:

CONRAD WILSON t/a BATHROOM PARADISE

Plaintiff

and

KILKEEL DEVELOPMENT ASSOCIATION LTD

Defendant

MAGUIRE J

Introduction

[1] In this case a hearing was convened on 14 February 2020 to consider the issue of whether an original writ of 2015 issued by the plaintiff could be discontinued and, if so, on what basis.

[2] This hearing was originally to have taken place three weeks earlier on 24 January 2020 but on that occasion the plaintiff did not appear and the matter had to be put back.

The 2015 Writ (2015 No: 74852)

[3] The writ at issue for the purpose of this ruling was issued by the plaintiff on 7 August 2015. The plaintiff is described as "Conrad Wilson trading as Bathroom Paradise" and the defendant is described as "Kilkeel Development Association Ltd". The writ was issued by a firm of solicitors on the plaintiff's behalf - Walker McDonald. In its material part, it reads:

"The plaintiff's claim is for damages for personal injuries, loss and damage sustained by him by reason of the breach of contract, negligence, breach of covenant for

quiet enjoyment and trespass occasioned when the defendant, their servants or agents wrongfully re-entered upon the premises situate at and known as Nautilus Centre, Rooney Road, Kilkeel, Co Down and therein detained and converted the plaintiff's goods and property."

[4] As a result of the service of the writ on the defendant, a firm of solicitors acting on its behalf - Worthingtons - whose address for service was given - entered an appearance on behalf of the defendant.

[5] No pleadings, it appears, have been exchanged since the appearance was entered, though there has been some correspondence between the parties.

[6] The correspondence culminated in the defendant issuing interlocutory proceedings with the object of striking out the writ on the basis that there had been default in the form of a failure to serve a Statement of Claim. This application was lodged with the court on 15 May 2019.

[7] The case first came before this court on 25 October 2019. On that occasion Mr Wilson, who appeared as a personal litigant, his solicitors having come off record, told the court that he wished to discontinue the 2015 writ and issue fresh proceedings. On that occasion, Mr Fee of counsel appeared for the defendant and asked for time to consider the defendant's position in the light of this development. The court agreed to this and the matter came back before it on 13 December 2019.

[8] When it returned on 13 December 2019 the plaintiff said he was discontinuing the 2015 writ. Mr Fee indicated that this would have to be done in accordance with the Rules of the Supreme Court and that an issue of costs would arise. In view of this, the court set the date of 24 January 2020 for a hearing in relation to this particular matter.

[9] As already noted, the plaintiff did not attend on the hearing date with the consequence that the matter was put back to 14 February 2020.

Collateral Issues

[10] The court wishes to clear away certain collateral issues which have been raised by the plaintiff.

[11] First of all, it is alleged by the plaintiff that the defendant's legal representatives have no standing in respect of this matter.

[12] The court does not consider there is substance in this contention. There is only one appearance which has been entered in this case in relation to the 2015 writ and that is the appearance referred to above which was entered on 19 July 2016 by

Worthingtons on behalf of the defendant. It was suggested by the plaintiff that another solicitor had purported to act for the defendant in the matter but, however that may be, no appearance or purported appearance was entered by any solicitor, other than Worthingtons. The court is unaware of any objection being taken to Worthingtons entry of an appearance at the time when it was filed and it can see that there was ongoing correspondence between the plaintiff's then solicitor and Worthingtons in connection with the litigation, but not raising this point, until eventually the plaintiff parted company with his own solicitor (which seems to have been in April or May 2019) and then for the first time raised it within the last few months. Additionally, the plaintiff claims that the appearance entered at the time was defective. The court accepts that while no issue in this regard was made at the time or until recently there is some basis in the Rules for the plaintiff's complaint. This arises from the terms of Order 12 Rule 2, which, *inter alia*, deals with the issue of the memorandum of appearance. In particular, the rule indicates that where an appearance is entered by a solicitor on behalf of the defendant it must be signed by the solicitor by whom the defendant appears. It seems arguable that in this case the memorandum of appearance does not comply with this rule in that the appearance is not signed by the solicitor by whom the defendant appears and is simply signed "Worthingtons". However, in the court's opinion, in the circumstances of this case, it could not be said that this has invalidated the appearance entered, especially when no objection was made despite the plaintiff being legally represented at the date of receipt of it, and the address of the solicitors for the defendant was provided. The court therefore sees no point of substance in respect of either of these matters and would regard any omission to comply with Order 12 Rule 2 (if there is one) as directory only.

[13] Secondly, the court has read a variety of claims made by the plaintiff impugning the conduct of Worthingtons as criminal and fraudulent and of such a nature that they should be excluded from participating in the proceedings. The court will not set out these allegations but it will suffice to say that, for the purpose of the matter before the court, it can find no merit in any of them.

Discontinuance or Withdrawal

[14] The court is satisfied that the Rules of Court provide the answer to the issue which is before it. In fact there are two parts of the Rules which touch on this issue. The court will set them out.

[15] Firstly, Order 21 Rule 2(1) is relevant. It states, under the heading "Discontinuance of Action etc without leave", as follows:

"Subject to paragraph 2A [which has no relevance for present purposes] the plaintiff in an action begun by writ may, without the leave of the court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time

not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice to that effect on the defendant concerned.”

[16] The above needs to be read with Order 63 Rule 5(3). This deals with costs. It states in its material part:

“(3) Where a party by notice in writing and without leave discontinues an action or counterclaim or withdraws any particular claim made by him as against any other party, that other party shall be entitled to his costs of the action or counterclaim or his costs occasioned by the claim withdrawn, as the case may be, incurred to the time of receipt of the Notice of Discontinuance or withdrawal.”

[17] It seems clear from these provisions that:

- (a) There is a formal process to initiate a discontinuance or withdrawal of an action begun by writ. In particular, the discontinuer or withdrawer must serve a Notice on the affected defendants to that effect.
- (b) If this process is used, it has costs implications as spelt out at Order 63 Rule 5(3). These are stipulated in the Rule and occur automatically in accordance with the terms of the Rule. The affected defendant is, in short, entitled to costs as described in the Rule.

[18] As regards these provisions the court has not seen any notice issued by the plaintiff in conformity with Order 21 Rule 2(1). It will follow from this that at this time the above provisions have not been triggered. In other words, there has to date, under these provisions, been no withdrawal or discontinuance. Had there been a withdrawal or discontinuance, the terms of Order 63 Rule 5(3) would have applied but at the present time they do not apply as there has been no lawful withdrawal or discontinuance.

[19] The second part of the Rules which is relevant are the provisions dealing with discontinuance or withdrawal with the leave of the court. This is dealt with under Order 21 Rule 3. This states as follows:

“3(1) Except as provided for by Rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the court, and the court hearing an application for the grant of such leave may order the action or counterclaim to be

discontinued, or any particular claim made therein to be struck out, as against all or any of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

(2) An application for the grant of leave under this rule may be made by summons or motion.”

[20] It seems to be clear from these provisions that –

- (a) There is a formal process to initiate a discontinuance or withdrawal with leave as stipulated in Rule 3(2).
- (b) If this process is to be used, it will be the court which decides what then should occur.
- (c) The court, in particular, shall determine the terms as to costs upon which a discontinuance or withdrawal may take place.

[21] As in respect of the earlier Rules discussed, the court has not seen or received any summons or motion from the plaintiff triggering the court’s powers as discussed above.

Outcome

[22] The court is clear in its view of how matters in respect of the 2015 writ stand at present. In the court’s opinion, the writ is to be viewed as a live writ. It has not been discontinued or withdrawn. If the plaintiff wishes to take one or other of these courses, he will have to initiate the requisite formal process.

[23] In the meantime, just as the 2015 writ is live so also is the defendant’s application to strike out that writ on the basis of default in serving a statement of claim.

[24] At the hearing before the court on 14 February 2020 the plaintiff indicated that he was minded to seek the leave of the court to discontinue or withdraw the 2015 writ. If he wishes to do, he must act in accordance with Order 21 Rule 3(2). This will mean that he must serve any summons or motion on the court and on the defendant. If this is done, the matter will be brought to a hearing in the usual way. It will be open to the defendant to pursue its strike-out application, however, in the meantime.

[25] The position of a fresh writ apparently issued dated December 2019 is not before the court at this time and the court makes no comment about it.