THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 53

Record Number: 2019/82

High Court Record Number: 2013/7460P

Edwards J.
Whelan J.
Noonan J.

BETWEEN/

IAN COUGHLAN

PLAINTIFF/APPELLANT

-AND-

THE MINISTER FOR DEFENCE IRELAND
AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 4th day of March, 2020

Introduction

1. This appeal is brought from the judgment and order of the High Court (Meenan J.) dismissing the appellant's personal injuries action on the ground that it is bound to fail as being statute barred. The order was made on foot of a motion brought by the respondents which was heard on affidavit without oral evidence. The appeal raises issues concerning, *inter alia*, the status of documents exhibited in the respondents' affidavits and the correct approach to be adopted in determining such applications.

Background

2. The appellant (Mr Coughlan), who is now 44 years of age, is a former member of the Defence Forces. He is retired on an invalidity pension. He was formerly employed as an aircraft mechanic with the Defence Forces. Between approximately the years 1994 and 2004, Mr. Coughlan alleges that, during the course of his employment, he was exposed to toxic chemicals used for degreasing aircraft parts. He alleges that the respondents as his employer failed to provide him with proper protection against the effects of these chemicals and as a result he suffered personal injuries. He claims to have suffered, *inter alia*, symptoms of dizziness, skin rashes, nasal irritation, sores, sleep disturbance, chronic fatigue, mood changes, inability to concentrate, chronic headaches, yellowness of his skin and bloody diarrhoea. Some of these complaints are continuing.

3. Both during and after his employment with the Defence Forces, Mr. Coughlan attended a large number of doctors about his complaints. It is clear that Mr. Coughlan himself has long since believed that there was an association between his symptoms and his working environment. However, he says that he was repeatedly assured by the many doctors he consulted that he was wrong about this. He says that it was not until he received a verbal opinion from a clinical toxico-pathologist, Professor Howard, in November, 2011, that he became aware that there was a causal link between his symptoms and his

employment. Mr. Coughlan claims that this is his date of knowledge for the purposes of the Statute of Limitations (Amendment) Act, 1991, ("the 1991 Act"), and as his proceedings were issued within two years of that date, they are brought in time.

4. The respondents strongly dispute this and allege that Mr. Coughlan's date of knowledge long pre-dates the receipt of Professor Howard's opinion and is well in excess of two years prior to the commencement of proceedings which are thus statute barred. The respondents accordingly brought a motion before the High Court seeking an order dismissing the proceedings on the grounds that they are statute barred and therefore bound to fail. In the alternative, the respondents sought the trial of a preliminary issue as to whether the claim is statute barred.

Evidence in the High Court

5. The application was heard on affidavit and no oral evidence was given. On behalf of the respondents, three affidavits were sworn by Ms. Louise O'Rourke, a partner in Hayes Solicitors. Mr. Coughlan swore two replying affidavits. In her first affidavit, Ms. O'Rourke exhibits a significant volume of the plaintiff's medical records which are in the possession of his employer, the respondents, by virtue of Mr. Coughlan having attended various medical personnel engaged by the respondents. These also included medical reports obtained by the respondents arising out of an accident that befell him in the course of his employment in 2007. These reports included references to Mr. Coughlan's prior medical history upon which reliance was placed by the respondents in the context of his date of knowledge. Mr. Coughlan swore a replying affidavit on the 26th January, 2017. At paragraph 4 of his affidavit, Mr. Coughlan says:

> *"… At no time during that period [1994 – 2005] was I informed or advised that the symptoms and manifestation of illness were related to my working environment or an exposure to organic solvents or chemicals. Moreover, during that period I attended for frequent medical treatment, examination and investigation and I was repeatedly reassured that my symptoms were not related to my working environment …*
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> *At all times I relied upon [the] expertise [of the respondents' doctors] and at no stage prior to my contact with Professor Howard was I advised or informed of an association between my symptoms and my employment. In fact, I was advised to the contrary and repeatedly informed that there was no basis for such a connection to be made."*

6. In her first affidavit, Ms. O'Rourke referred to the fact that Mr. Coughlan's medical records disclosed that he had attended toxicologists since prior to August 2005. Mr. Coughlan deals with this at para. 10 of his affidavit:

> *"Insofar as Ms. O'Rourke at part D of her affidavit avers to your deponent having attended toxicologists since prior to August 2005 she is quite incorrect in this regard. She misidentifies Dr. O'Shea as a toxicologist and while I did attend him, I did not do so for toxicology. I am unaware of any toxicologist operating in Clane. In*

late 2007 or early 2008 Dr. O'Shea identified a locum consultant physician and clinical toxicologist practicing at Guys and St. Thomas' Hospital in London, Dr. David Wood. An appointment was eventually arranged for me to meet Dr. Wood for a consultation on the 26th March, 2008 and thereafter Dr. Wood provided a report in January 2009. Unfortunately due to the lack of information available to Dr. Wood with regard to the nature of the chemicals and solvents to which I had been exposed during the course of my employment with the Air Corps, he was very much limited in his capacity to provide an opinion as to any causal connection between my symptoms and my working environment. At that stage I was not aware of the precise nature of the chemicals involved and Dr. Wood required information in this regard. Ultimately he was not in the position to advance matters for me and it was therefore necessary for me to attempt to identify an appropriate expert to do so. Ultimately Professor C.V. Howard, a medically qualified toxico-pathologist, specialising in problems associated with the action of toxic substances on health was identified as being an expert in the area who would be able to provide assistance and in particular expert advice insofar as the cause of my symptoms was concerned. Professor Howard was contacted by me and Gavin Tobin [a work colleague] and I understand and believe that in the course of a telephone conversation with my solicitor, he provided a preliminary oral opinion (on the 17th November, 2011) to the effect that he believed that the symptoms experienced by me were, as a matter of probability, due to an unprotected exposure to toxic chemicals in the workplace."

7. Mr. Coughlan subsequently met with Professor Howard who provided a written report in May 2013. The proceedings issued shortly thereafter.

8. Arising from the references in Mr. Coughlan's affidavit to having consulted Dr. Wood, the respondents sought a copy of his report from Mr. Coughlan's solicitors. They declined to provide it on the ground that it was privileged. The respondents then applied to the High Court for an order for inspection of the report, presumably pursuant to O. 31 r. 18 of the RSC. On the 22nd of January 2018, the court (Faherty J.) made an order directing Mr. Coughlan to produce the report of Dr. Wood to the respondents for inspection. This appears to have been done by way of providing a copy to the respondent's solicitors. Ms. O'Rourke then swore a third affidavit on the 12th April, 2018 exhibiting a copy of Dr. Wood's report and commenting in detail on its contents. In her affidavit, Ms. O'Rourke avers at para. 3:

> *"… The reason why the Court ordered the plaintiff to produce Dr. Wood's report was because it was satisfied that it was necessary for the Court to have regard to the actual contents of the report in order to properly consider the averment made at para. 7 of Mr. Coughlan's second affidavit that he did not have the requisite knowledge for the purposes of s.2 of the Statute of Limitations (Amendment) Act, 1991 prior to the 10th June, 2011 because 'Dr. Wood could not establish a causal connection between my symptoms and my working environment…' "*

9. It seems clear therefore that the report was exhibited in Ms. O'Rourke's affidavit for the purposes, *inter alia*, of contradicting that averment of Mr. Coughlan, or at the very least, inviting the Court to consider whether the contents of the report supported what the plaintiff had sworn.

10. In the same affidavit, Ms. O'Rourke puts forward a number of conclusions by reference to the content of the report. She says at para. 4:

> *"…. The report of Dr. Wood makes clear that at a point well before 10th June, 2011 and certainly by the date of Dr. Wood's report in January, 2009, the plaintiff was possessed with information which made it reasonable for him to begin to investigate whether he had a case against the defendants. Moreover, the report shows that he had by that point already actually begun the process of investigating whether he had a case against the defendants."*

11. In further commenting on the report, Ms. O'Rourke gives several quotations from the report concerning things that the plaintiff is alleged to have told Dr. Wood. These include, for example, at para. 10:

> *"Fifthly, Dr. Wood records that the plaintiff stated that '… He believes that up to five other employees developed symptoms including diarrhoea, jaundice and/or 'facial sores', which developed in relation to working in the aircraft engine sheds.' "*

12. Prior to the swearing of Ms. O'Rourke's third affidavit, an affidavit had been sworn by Dr. Brendan O'Shea who averred that he is a general practitioner specialising in occupational medicine and is not a toxicologist. He refers to his dealings with the plaintiff in the context of an onward referral to a suitable expert. Ms. O'Rourke comments on Dr. O'Shea's affidavit at para. 14 of her affidavit:

> *"… A further feature of note in the report of Dr. Wood is that he was privy to a draft report of Dr. Brendan O'Shea, dated 15th August, 2005, namely approximately eight years prior to the issue of the within proceedings. Dr. O'Shea makes no reference to the fact he prepared a draft report for the plaintiff in the affidavit sworn by him dated 12 January 2018. This omission is notable."*

13. It is difficult to see how this can be construed as other than a criticism of Dr. O'Shea amounting to a suggestion that he was remiss in failing to disclose to the Court in his affidavit the existence of this draft report. No replying affidavit was sworn in response to Ms. O'Rourke's third affidavit.

14. When the matter came on for hearing before Meenan J. in the High Court, counsel for Mr. Coughlan raised an objection to the documentary evidence put before the Court by way of exhibits to Ms. O'Rourke's various affidavits. At p. 48 of the transcript, counsel for Mr. Coughlan said:

> *"What I respectfully submit, judge, is that the burden is on the moving party to establish facts which justify the making of the order which they seek. In that*

regard, judge, the vast bulk of what is offered to you is, in fact, hearsay evidence offered through the affidavits of Ms. O'Rourke. It is from time to time, as I will come to hereafter, even secondary hearsay evidence.

'A man told me and I am telling someone else.'

In my respectful submission, judge, in general in fact whilst hearsay evidence is clearly admissible in interlocutory applications, this isn't an interlocutory application. This is seeking a final order dismissing the plaintiff's case."

Judgment of the High Court

15. Having set out the facts and issues, Meenan J. went on to discuss the legal principles to be applied in applications of this nature noting, correctly, that the Court is bound to accept the facts as deposed to by the plaintiff for the purpose of determining whether the case is bound to fail. The trial judge appears to have considered that the determination of the issue arising fell to be decided by reference to Dr. Wood's report. Thus, he says at paragraphs 9 and 10 of the judgment:

"9. The case before this court does not involve the interpretation of a contract or agreed correspondence. It does, however, involve the interpretation of an expert report received by the plaintiff…

10. Though the Court is bound to accept the facts as deposed to by the plaintiff it is, nonetheless, entitled to look at a particular document, in this case an expert report, and conclude whether or not it supports the plaintiff's contentions as to when his 'date of knowledge' was."

16. Clearly therefore, the trial judge was of the view that the plaintiff's evidence fell to be analysed by reference to the report of Dr. Wood which he appears to have accepted as evidence for that purpose. The court does not appear to have considered or ruled upon the objection that the evidence was hearsay and inadmissible.

17. The court then analysed the provisions of s.2 of the 1991 Act and the various authorities which deal with that section. The judge went on to a consideration of the issues arising. He referred to two of the medical reports obtained in the context of the plaintiff's accident in 2007 dealing with his prior medical history. He noted (at para. 22):

"This is a motion to dismiss proceedings on the grounds that they are bound to fail. I have referred to the authorities that state that in an application such as this the Court is required to accept the facts as deposed to by the plaintiff. It therefore follows that the reports referred to do not fix the plaintiff with knowledge so as to start time running."

18. The judge then embarked on an analysis of Dr. Wood's report and held that "it clearly establishes the link between at least some of the injuries which the plaintiff complains of and his working environment" (at para. 29). He continues:

"29 …In my view, this inevitably leads to a finding that as of January 2009 the plaintiff acknowledged that the injury complained of was attributable 'in whole or in part' to the negligence and breach of duty alleged on the part of the defendants.

30. In his affidavit the plaintiff states: -

> '[T]hat unfortunately due to the lack of information available to Dr. Wood with regard to the nature of the chemicals and solvents to which I had exposed during the course of my employment with the Air Corps, he was very much limited in his capacity to provide an opinion as to any causal in connection between my symptoms and my working environment. At that stage I was not aware of the precise nature of the chemicals involved and Dr. Wood required information in this regard'

31. In my view, the plaintiff's view of the report of Dr. Wood is incorrect. Though the plaintiff was of the view that the report of Dr. Wood did not provide him with all the information he required this did not stop time running for the purposes of the Act of 1991. What was stated in the report of Dr. Wood was more than sufficient to make it reasonable for the plaintiff to seek further expert advice. In my view, on receiving this report the plaintiff 'knew facts as would be capable of at least upon further elaboration of establishing a cause of action', (as per Geoghegan J. in Gough v Neary). Thus, as of January 2009, the date of receipt of the report of Dr. David Wood, the plaintiff had the knowledge provided for in s.2(2)(b) 'from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek' ".

19. The judge accordingly dismissed the plaintiff's claim.

Discussion

20. It is relatively unusual for "date of knowledge" issues to be determined without the benefit of oral evidence. The date of knowledge of any particular plaintiff will normally have a significant subjective element rendering it necessary in most cases for the plaintiff to give evidence *viva voce* and be subject to cross examination. When there is a live issue about what the plaintiff knew and when he or she knew it, it is in the normal way difficult to see how this can be resolved by the Court on affidavit, save perhaps in the clearest of cases. As the trial judge noted, the court is obliged to accept the facts deposed to by the plaintiff as correct. It is for that reason that there needs to be absolute clarity as to the evidential status of documents which are put before the court that are ultimately found, as here, to be determinative of the issue. Although the trial judge observed that "It therefore follows that the reports referred to do not fix the plaintiff with knowledge so as to start time running", it is I think difficult to avoid the conclusion that this is precisely what the court decided. This only goes to emphasising the importance of establishing at the outset the status of Dr. Wood's report.

21. A very similar issue was considered by the Supreme Court in *RAS Medical Limited v The Royal College of Surgeons in Ireland* [2019] 1 IR 63, a judgment delivered subsequent to the hearing of this matter in the High Court. The applicant sought judicial review of a

decision of the respondent to refuse accreditation for a plastic surgery masterclass due to be held by the applicant. One of the central issues in the case was whether the application for accreditation was determined by reference to existing guidelines or guidelines introduced subsequent to the date of the application. The applicant, having obtained discovery from the respondent, contended that this correspondence demonstrated that the respondent had in fact improperly relied on the new guidelines.

22. However the respondent's sworn evidence was to the effect that the application was dealt with under the original guidelines. Based on this evidence, the High Court refused judicial review. The Court of Appeal however, took a different view and held on the basis of the discovered documents exhibited in the applicant's affidavits that the application had in fact been decided, improperly, under the new guidelines and granted the reliefs sought. The Supreme Court allowed the appeal with the sole judgment being delivered by the Chief Justice, with whom the other members of the Court agreed.

23. Clarke C.J. placed considerable emphasis on the need to establish at the outset of any trial the status of discovered documents. In that respect, the Court observed (at pp 81 – 82):

> *"6. The status of discovered documents*
>
> *[63] It is important to commence a discussion of this issue with a restatement of first principle. Factual issues in all Court proceedings are determined on the basis of evidence properly before the Court. That is so whether the evidence is presented by a witness giving sworn oral testimony in Court or by affidavit evidence.*
>
> *[64] That fundamental principle applies equally to documentary evidence (and, indeed, other forms of evidence such as physical objects) which must be properly established in an appropriate way before reliance can be placed on same in determining the facts. I will shortly return to the question of the importance of that fundamental principle and the need, therefore, for there to be clarity about what is, or is not, properly in evidence before the Court."*

24. In commenting on documents exhibited in affidavits, Clarke C.J. had the following to say (at p. 84):

> *"Parties may be required, as part of our procedural law, to make disclosure of relevant documentation prior to trial. But the disclosure of the existence of such documentation does not, of itself, prove the documents as evidence for the purposes of a trial, whether conducted on oral evidence or by affidavit. Still less does the disclosure of such documents provide evidence of the truth of the contents of the documents concerned."*

25. In a similar vein, the Chief Justice continued (at pp 85 – 86):

> *"[79] That being said it is particularly important to emphasise that the mere fact that a document is exhibited in an affidavit does not, in and of itself, turn that document*

into admissible evidence. As already noted, discovered documents are not evidence of anything unless properly placed before the Court and proved in the ordinary way …

[80] … The fact that hearsay evidence may, therefore, be admissible in certain circumstances in interlocutory matters does not mean that the rule against hearsay does not have equal application in a substantive hearing (such as an application for judicial review) which is determined on affidavit just as much as the same rules apply in a matter heard on oral evidence. The fact that documents were exhibited in an affidavit sworn by [the applicant's director] did not, in and of itself and without agreement, necessarily render those documents receivable before the Court (in the absence of [the director] being able to prove the documents) and, more importantly, did not render those documents admissible as to their content."

26. The Chief Justice pointed to the distinction between documents which are receivable and those which are admissible, an issue previously considered by the High Court (at p. 87):

"[83] It is also of some relevance in this context to note the difference between a document which may be receivable as evidence and one which is admissible. These matters are fully described by Edwards J. in his judgment in Leopardstown Club Limited v Templeville Developments Limited [2010] IEHC 152 (unreported, High Court, Edwards J., 29 January 2010) at paras 5.27 and 5.28, pp 159 and 160. In order to be receivable a document must be proved as to its authenticity. However, the mere fact that a document is proven to be authentic does not mean that, for example, its contents may be admissible evidence as to their truth for that may offend the rule against hearsay."

27. As noted by the Supreme Court, one of the difficulties that arose in RAS came about because there was no discussion before the High Court as to the status of the documents discovered by the respondent and exhibited in the applicant's affidavits. They were simply put before the Court without objection or comment. The present case is, however, different. At the outset of his submissions, counsel for Mr. Coughlan made clear that he was objecting to the documents exhibited in Ms. O'Rourke's affidavits on the grounds that they were hearsay, and thus, inadmissible as to their content. That objection appears to me to have been well founded but unfortunately not taken on board by the trial judge.

28. The fact that Dr. Wood's report was directed to be produced for inspection by an order of the court does not of course in any way affect its evidential status. It is in precisely the same category as a document produced in the course of discovery. The document does not prove itself and exhibiting it in an affidavit does not alter that position. It must be remembered that Dr. Wood's report was put before the court for the purpose of reliance upon its contents. That was abundantly clear from the third affidavit of Ms. O'Rourke which exhibited it.

29. In their written submissions, the respondents contended that the documents in issue, including Dr. Wood's report, were admissible even if they were hearsay because the rules

permit the court to receive hearsay evidence in interlocutory applications. It was contended that this was such an application. I, for one, would have difficulty in accepting the proposition that an application which has the effect of finally determining the plaintiff's date of knowledge for the purposes of the 1991 Act resulting in the dismissal of his claim, could properly be regarded as interlocutory in nature – see in that regard the discussion in *F & C Reit Property Asset Management Plc v Friends First Managed Pension Funds Limited* [2017] IEHC 383 followed in *Joint Stock Company Togliattiazot v Eurotoaz Limited* [2019] IEHC 342.

30. Even if this application could be regarded as interlocutory in nature, which I do not accept, the same cases deal with the admissibility of hearsay evidence in interlocutory applications pursuant to Order 40 rule 4 of the RSC and make clear that the rule does not give a party an entitlement to rely on hearsay evidence but rather, gives the court a discretion to admit such evidence where there is a good reason for doing so. I, therefore, reject the respondents' submission that they "were entitled to include hearsay evidence in an affidavit" – at para. 25 of their written submissions.

31. In the respondents' oral argument in this court, that contention was not pursued and a different argument was advanced which does not appear to have found its way into the respondents' written submissions. Counsel for the respondents submitted that Dr. Wood's report was admissible in evidence because it had been relied upon by Mr. Coughlan in his affidavit and further, no replying affidavit had been sworn in response to Ms. O'Rourke's third affidavit taking objection to it. Dealing with the latter point first, it is not the function of an affidavit to take objections and make legal submissions. Affidavits should be confined to facts within the knowledge of the deponent. Indeed, the practice of including argument and submission in affidavits is one deprecated by the Supreme Court in RAS – see in particular para. [95] at p. 90 of the judgment of Clarke C.J.

32. Nor can I accept the former contention that because Mr. Coughlan refers to having consulted Dr. Wood in his affidavit, this somehow rendered Dr. Wood's report admissible in evidence. As I have said, Ms. O'Rourke in her first affidavit exhibited an extensive collection of medical records and reports concerning Mr. Coughlan which were available to the respondents as his employer. Those documents contained a reference to the plaintiff having attended Dr. Wood, a toxicologist, which the plaintiff, not unreasonably, felt called for some form of response in his replying affidavit. I have set out above what the plaintiff had to say about Dr. Wood as did the trial judge in his judgment. I fail to see however, how this can be construed as reliance by the plaintiff on Dr. Wood's report such as to render it admissible in evidence.

33. I am therefore satisfied that the report of Dr. Wood, upon which substantial, if indeed not exclusive, reliance was placed by the trial judge in determining Mr. Coughlan's date of knowledge, was inadmissible as hearsay and ought to have been ruled as such by the trial judge. For the same reason, the criticism of Dr. O'Shea in the respondents' affidavits was unwarranted.

34. Even apart from that consideration, it seems to me that there was a separate and distinct difficulty arising from the admission of Dr. Wood's report which also has echoes in RAS. As I have already noted, Dr. Wood's report was relied upon by the respondents to undermine the evidence of the plaintiff as to his date of knowledge. Indeed, the trial judge expressly discounted Mr. Coughlan's evidence by reference to the report of Dr. Wood (at para. 30 – 31 cited above).

35. Clarke C.J. described a similar issue in the following terms in *RAS* (at pp 89 – 90):

> *"[92] But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the Court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceedings and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in his favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition on the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.*
>
> *[93] A similar principle applies where it is suggested that there is documentary evidence, properly before the Court, which might cast doubt on the reliability of sworn testimony. It is not permissible to invite a Court to reject sworn testimony either on the basis that there is sworn testimony to the contrary or that the testimony might be said to be either lacking in credibility or unreliable (on the basis of, for example, a documentary record) without giving the witness concerned an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to credibility or reliability."*

36. It is to my mind clear, therefore, that even if Dr. Wood's report had been properly admitted into evidence, insofar as it was relied upon to challenge the sworn evidence of the plaintiff, fair procedures required that the contents of the report, once properly proved in evidence, be put to the plaintiff in cross-examination so that he be afforded a fair opportunity to deal with it.

Conclusion

37. In my judgment therefore, the trial judge was in error in acceding to the respondents' application for the reasons I have explained. I would accordingly allow this appeal and set aside the order of the High Court. I would propose to remit the respondents' motion to the High Court to be determined in accordance with the terms of this judgment.