Neutral Citation: [2014] IEHC 289

THE HIGH COURT

[2012 No. 1372 P.]

BETWEEN

GARETH MCCAY

PLAINTIFF

AND

MARK MCFEELY AND JOAN HEGARTY (PERSONAL REPRESENTATIVE OF SEAMUS HEGARTY, DECEASED) PRACTISING UNDER THE NAME, STYLE AND TITLE, HEGARTY MCFEELY SOLICITORS

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered the 30th day of April, 2014

1. The plaintiff in these proceedings resides at 1 Burnside Manor, Letterkenny Road, Co. Derry, Northern Ireland. On 16th June, 2000, he took part in a soccer match between Abercorn Bar and Don Boses as part of a competition known as the Malin Head Cup. In the course of the match, he suffered a serious knee injury, when he was tackled by an opposing player. The plaintiff was of the opinion that the tackle was, in fact, a deliberate assault upon him by the opposing player.

2. In the month of August 2000, the plaintiff says that he consulted with the defendants, who were a firm of solicitors which carried on business at 27 Clarendon Street, Londonderry, Northern Ireland and previously at 10 Queen's Street, Londonderry, Northern Ireland. It is the plaintiff's case that he was advised by the defendants that he should instruct them to institute proceedings in the State against the player, who assaulted him and against the owner's of the football pitch. It is the plaintiff's case that having received this advice, he duly instructed the defendants to institute proceedings on his behalf before the courts in this State. He says that he instructed the defendants to issue proceedings against the player who had tackled him and against the owners of the football pitch.

3. The plaintiff states that in the following years, he was given a number of verbal assurances by the defendants that proceedings had been instituted on his behalf before the High Court. He says that he was told that the action would come on for hearing before the High Court in Dublin or Sligo, but that the lists were very slow. The plaintiff further states that he provided medical reports to the defendants. He says that the defendants assured him that the file of An Garda Síochána and the official match report, had been requested and that the defendants were waiting for the case to be listed for hearing.

4. The plaintiff states that in or about the month of March 2008, he contacted the Courts Service in Dublin to inquire about status of his proceedings. He was informed that no such proceedings had been instituted before the High Court. The plaintiff says that he made several attempts to contact the defendants, but no response was forthcoming from them.

5. In or about the month of October 2008, the plaintiff attempted to make a complaint about this state of affairs to the Law Society of Northern Ireland. By letter dated 21st October, 2008, the Law Society of Northern Ireland informed the plaintiff that the defendants were practising under a practising certificate issued by the Law Society of Ireland and that the Law Society of Ireland therefore regulated the defendants in relation to the matters complained of by the plaintiff. The plaintiff then redirected his complaint to the Law Society of Ireland. Correspondence passed between the defendants and the Law Society, wherein the defendants stated, *inter alia*, that they could not locate the file relating to the plaintiff's case in their offices. It is not clear what became of that complaint. No conclusion is alluded to in the affidavits sworn on behalf of either party to the proceedings.

6. The plaintiff instituted these proceedings seeking damages for breach of contract and negligence against the defendants for their failure to comply with his instructions to institute proceedings before the High Court against the player who caused the injury and against the owners of the football ground. The present proceedings were commenced by plenary summons issued on 13th February, 2012, which was served on the first named defendant on 6th June, 2012 and on the second named defendant on 4th June, 2012. The statement of claim was delivered on 25th July, 2012. The appearance contesting jurisdiction was filed on behalf of the defendant on 28th November, 2012.

7. The first named defendant's version of events is markedly different to that given by the plaintiff. The first named defendant admits that the plaintiff consulted him in relation to the knee injury which he suffered in the football match on 16th June, 2000. He says that they discussed various options which might be open to the plaintiff. He states that he told the plaintiff that as the incident occurred in the Republic of Ireland, it would not be open to the plaintiff to receive compensation under the Criminal Injuries legislation in Northern Ireland. As there was no similar legislation in the Republic of Ireland, it would not be possible to pursue that avenue of redress. In a letter dated 23rd January, 2009, addressed to the Law Society of Ireland, the first named defendant stated that they explored the possibility of attempting to pursue the claim against the organisation who arranged the football match. He stated that he had been advised by counsel that there was no possibility of bringing a successful claim against the organising body. The first named defendant went on to state that they advised the plaintiff of these matters and suggested that he contact the gardaí and report his injury on the basis that it had occurred as a result of a blatant assault. This advice was given on the basis that if criminal proceedings were taken against the alleged offender, there was a possibility that the plaintiff would receive compensation from the criminal courts dealing with a prosecution. However, the first named defendant stated that the plaintiff subsequently informed him that following his report of the matter to the gardaí and their investigation that the gardaí had declined to take any criminal proceedings.

8. The first named defendant also states that consideration was given to pursuing an action against the alleged assailant. However, as he was an unemployed gentleman, resident in Northern Ireland, it was considered that it would be unlikely that he would be able to satisfy any judgment which the plaintiff might obtain against him. The defendants state that legal aid was not available to the plaintiff, any attempt by him to proceed would have led to substantial outlay, which the defendants felt there was little or no possibility of recovering. The defendants stated that on this basis the matter did not proceed. The defendants stated that on this basis the matter did not proceed. In essence, they advised that proceedings should not be issued because there was little hope of

recovering on any judgment that might be obtained in favour of the plaintiff in those proceedings. They denied that they ever received any instructions to pursue the action before the High Court in this State.

9. In this application, the defendants seek an order from the court declining jurisdiction in these proceedings. The defendants state that they are domiciled in Northern Ireland, as is the plaintiff. They state that they never received any instructions to institute or prosecute any action on behalf of the plaintiff before the High Court. They state that all there was, was a giving of advice, which took place in Northern Ireland and that the advice was received by the plaintiff in Northern Ireland. That the plaintiff accepted their advice and that as a result thereof, there was never any question of taking any steps to institute any proceedings within this jurisdiction on behalf of the plaintiff. The defendants maintain that the courts in Ireland do not have jurisdiction to deal with the matter as the defendants are domiciled in Northern Ireland and as the advice which was given was imparted to the plaintiff in Northern Ireland. On the plaintiff's side, it is alleged, *inter alia*, that the court has jurisdiction pursuant to Art. 5.1 of Regulation 44/2001. This article provides as follows:-

> *"A person domiciled in a Member State may, in another Member State, be sued:*
>
> *1(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*
>
> *(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*
>
> *- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
>
> *- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided…"*

10. In *Ryanair Limited v. Unister GmbH* [2013] IESC 14, Clarke J. in giving judgment for the Supreme Court, made it clear that where a court is required to consider whether it has jurisdiction to deal with a case, it may be necessary for the court to hear evidence on matters which go to the substance of the case itself. He stated as follows at paras. 8.6 and 8.7 of his judgment:-

> *"8.6 As this Court is not currently called on to reach a view as to jurisdiction it is only necessary to indicate that it seems clear on the authorities that a court which is called on to consider whether it has jurisdiction will be required, at least in some cases, to determine questions of fact which may be material to the very question of jurisdiction even though some of the same questions of fact may also be material to the substantive issues which arise in the proceedings generally. To take but a simple example there might be a written document, purporting to be a contract between the parties, which contains a clear choice of jurisdiction clause which purported to confer jurisdiction on the courts of a member state other that those of the domicile of the defendant. However, the defendant might claim that its signature on the document was a forgery and that no agreement of any sort was ever entered into between the parties. In order to determine whether it had jurisdiction the courts of the Member States specified in the relevant choice of jurisdiction clause would need to determine, as a matter of fact, whether the defendant's contention that its signature was a forgery was correct for if that contention were true, and in the absence of any other facts which might allow for a finding that the parties had agreed a jurisdiction to determine disputes between them, then the court would clearly have no jurisdiction.*
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> *8.7 Likewise the guidance given by the ECJ in a number of the cases makes clear that inquiries into the facts may be necessary, at least in some cases, in order to decide jurisdiction. For example, some of the cases arise out of the provisions of the Regulation in its amended form which allow a choice of jurisdiction agreement to derive from a relevant usage in international trade or commerce of which the parties are or ought to have been aware and which is widely followed in the commercial area concerned (see Article 17(c)). In Hugo Trumpy the court determined that awareness of the relevant usage was to be assessed with respect to the original parties to the agreement allegedly conferring jurisdiction and in the light of whether a particular course of conduct is generally and regularly followed in the conclusion of the particular type of contract in question. The ECJ, therefore, clearly contemplated that a court would have to assess whether that test was met on the facts which assessment might well, at least in some cases, involve a consideration of conflicting evidence."*

11. As can be seen, there is a direct conflict between the plaintiff and the defendants as to the terms of the contract between the plaintiff and the defendants. This conflict cannot be resolved on affidavit. It would be necessary to hear oral evidence from the plaintiff and the first named defendant in order to decide which version is correct in relation to the terms of the contract entered into between the parties. If the defendants' version is accepted, then it would appear that no part of the contract, was to be performed within this State. Consequently, this Court would not have jurisdiction to hear the proceedings. If on the other hand, the plaintiff's version is accepted, then it would appear that the court would have jurisdiction under Art. 15.1 of Regulation 44/2001. It is not possible to resolve this conflict on the basis of the affidavit sworn by the solicitors acting for the parties in these proceedings. I am of opinion that it would be necessary to hear from the parties themselves.

12. As I have ruled that it is necessary to hear oral evidence in this matter, the application will have to be remitted to plenary hearing. In these circumstances, I do not make any finding on the delay point, or on the preliminary objection taken by the plaintiff against the provisions under which the defendant has moved this application. It is preferable that the judge dealing with the jurisdiction point should rule on all issues raised by the parties in this application.

13. I give the following directions in this matter:-

> (a) The plaintiff and the first named defendant are to provide affidavits setting out their side of the matter. I will allow a period of four weeks for filing the required affidavits.
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> (b) I remit this application for plenary hearing.
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> (c) The costs of this application are reserved to the judge dealing with the renewed application as directed herein.