Neutral Citation Number: [2007] IEHC 14

THE HIGH COURT

[2006 No. 5050P]

BETWEEN

STEPHEN DOMICAN

PLAINTIFF

AND
AXA INSURANCE LIMITED

DEFENDANT

Judgment of Mr. Justice Clarke delivered the 19th January, 2007.

1. Introduction

1.1 The net issue in this case arises in the changing landscape within which claims relating to personal injury are now progressed. The background to the dispute between the parties stems, at least in part, from the operation of the Personal Injuries Assessment Board ("PIAB"). However the proceedings do not involve PIAB itself, but rather what are contended to be knock on effects of the establishment of PIAB on the negotiation of early settlement of straightforward personal injury claims.

1.2 In simple terms the issue between the parties concerns the question as to whether the defendant ("AXA"), in its capacity as insurer, is entitled to copy its correspondence concerning the claim made by the plaintiff ("Mr. Domican") to Mr. Domican directly notwithstanding the fact that Mr. Domican has given written instructions to the effect that all such correspondence should be addressed to his solicitors and that no contact is to be made directly with him.

2. Procedural History

2.1 The dispute between the parties having arisen, Mr. Domican issued proceedings and brought an application seeking an interlocutory injunction restraining AXA "from interfering in the solicitor/client relationship between the plaintiff and his solicitor by communicating .. directly with the plaintiff .. or otherwise howsoever harassing or molesting the plaintiff in connection .. with his claim for damages against one Patrick Doyle for personal injuries suffered and sustained as a result of an accident on 17th July, 2005 on the Collinstown Road, Clondalkin, Dublin 22."

2.2 A supplementary order was also sought directing AXA to abide by written authority signed by Mr. Domican of 28th August, 2006 relating to the same claim for damages. That written authority sought to direct AXA to communicate with Mr. Domican only through his solicitors.

2.3 AXA also brought a motion before the court which sought an order dismissing Mr. Domican's claim on the grounds that it failed to disclose a stateable cause of action or was frivolous, vexatious and an abuse of the court process and bound to fail.

2.4 It being clear that there were no significant issues of fact between the parties and that the question of law raised, while to an extent novel and undoubtedly of some importance, was nonetheless quite net, I suggested, and the parties readily agreed, that the trial of both motions would be treated as the trial of the action. Both applications were heard together on that basis and this judgment is, therefore, directed to the question of whether Mr. Domican is entitled, in all the circumstances of the case, to the relief which he claims.

3. The Facts

3.1 As is implicit in the orders sought, Mr. Domican claims to have been injured in a road accident, which injuries, he says, are attributable to the negligence of an insured of AXA. It does not appear to be in dispute but that AXA are liable to indemnify the person concerned and that, therefore, at a commercial level, the question of the payment of compensation to Mr. Domican arises, in practice, between him and AXA.

3.2 Mr. Domican's claim progressed in a normal manner. Messrs. H.J. Ward and Company Solicitors, ("Mr. Domican's solicitors") whom he had instructed, wrote to Patrick Doyle on 28th August, 2006 seeking an admission of liability on the part of Mr. Doyle in relation to the accident. Mr. Domican's solicitors were already aware of the fact that AXA appeared to be the insurers of Mr. Doyle and wrote on the same date to AXA enclosing a copy of the letter to Mr. Doyle and also a letter of authority from Mr. Domican. Amongst other things the letter of authority contained the following statement:-

> "I do not wish to receive any communication from you by way of correspondence. Similarly, if you wish to make contact with me by telephone, please do so by telephoning my solicitors and leave any message with them. Please do not contact me".

3.3 In accordance with the Personal Injuries Assessment Board Act 2003 ("the 2003 Act") and in particular ss. 11 and 50 of that Act, it was necessary for Mr. Domican to first make an application for an assessment of his claim to PIAB. This, together with appropriate supporting documentation, was done by letter of 15th September, 2006. PIAB having drawn attention to an incompleteness in the application, and having had that matter dealt with, acknowledged, on the 29th September, 2006, that the application was complete for the purposes of s. 50 of the 2003 Act.

3.4 It is, of course, therefore, the case that, so far as court proceedings are concerned, the matter as and between Mr. Domican and Mr. Doyle (and in reality AXA on behalf of Mr. Doyle) is frozen until such time as PIAB have dealt with the case. That is not, however, a barrier to a settlement of the proceedings being reached between Mr. Domican and AXA at any stage.

3.5 Against that background AXA sought to progress the question of possible settlement by correspondence directed to Mr. Domican's Solicitors but, it would appear, copied in each case directly to Mr. Domican. There can be no doubt that the copying of the correspondence to Mr. Domican was in breach of his request to AXA not to contact him directly. The question that arises in this case is as to whether, in copying the correspondence directly to Mr. Domican, contrary to Mr. Domican's request, AXA are acting in anyway unlawfully such as would justify the court intervening by way of injunction. Those undisputed facts are sufficient for the issue to arise. However there are a number of other factual matters that were canvassed in the course of the affidavit evidence filed by the parties, on which it is necessary to touch before going on to consider the legal issues which arise.

4. Some Facts in some controversy

4.1 While there are no disputes between the parties as to the primary facts in this case there are some aspects of the factual contentions put forward that, while not directly material to the issues, are relevant to the background to the dispute and in relation to which there is at least some difference of opinion as to how the facts should be interpreted or characterised. I propose dealing

with some of those issues.

4.2 The first matter concerns the position adopted by Mr. Domican, on advice his solicitors, in relation to an early settlement. It is clear that Mr. Domican was advised that his best interests would lie in awaiting an assessment of his claim by PIAB. In the course of the hearing it was suggested that the reason for such advice stemmed from the experience of those advising Mr. Domican that the level of compensation likely to be assessed by PIAB would exceed, in many cases, any amount offered at that stage by AXA so that it was, it is said, in Mr. Domican's interest to wait and see what PIAB would award. It is certainly the case that it was maintained in correspondence on behalf of Mr. Domican by his solicitors that it was, in their experience, the case that offers made by AXA during a period while the case was under assessment by PIAB were, invariably, less than the amount which PIAB ultimately determined on. It is not for me, in this case, to determine whether that assertion is factually accurate. I should, however, comment that it seems to me that there is at least an arguable basis for the advice given to Mr. Domican and no established basis for suggesting that it was not reasonable advice designed to achieve the best possible award of compensation for his injuries. In substance, though not put this way, the advice was to the effect that it was likely that he would ultimately achieve a higher sum in compensation if he were to wait and see what assessment PIAB came up with.

4.3 A second factual issue arose in connection with correspondence in early October 2006 in which AXA states that "claims processed by Personal Injuries Assessment Board (PIAB) can take up to a year before an award is issued …". A number of observations seem to me to be appropriate. Firstly it is interesting that a significant insurance company appears to be suggesting to those who may have claims against it that there are delays in PIAB which are holding up the early resolution of proceedings. It is, again, neither necessary or appropriate for me to reach any conclusions as to whether that assertion is factually accurate. I note that Mr. Ward (the solicitor for advising Mr. Domican) has indicated in the course of his affidavit in these proceedings that the assertion concerned is in conflict with his experience and that any delays are, at least in material part, due to the failure of AXA to progress matters with PIAB in a timely manner. If it were to be true that the existence of PIAB was acting as a barrier to early settlement of any significant number of cases it would amount to an unfortunate consequence of legislation introduced to improve and streamline the resolution of straightforward personal injury litigation.

4.4 In particular, however, complaint is made on behalf of Mr. Domican that the communications containing those assertions amounted, in effect, to seeking to undermine the advice given to Mr. Domican by his solicitors. This is an issue to which I will have to return.

4.5 A further area of controversy concerns the circumstances surrounding a medical appointment arranged by AXA for Mr. Domican. It would appear that AXA raised the question of a medical appointment for Mr. Domican, with a medical assessor to be appointed by AXA, in correspondence and then proceeded, unilaterally it would appear, to make a specific appointment for Mr. Domican without ascertaining in advance his willingness to attend such an appointment. In the event he did not attend the appointment and in subsequent correspondence AXA drew attention to the fact that costs had been incurred by reason of the fact that the appointment was not met without prior cancellation. While it is, strictly speaking, true to state that the relevant correspondence, on a careful reading, does not purport to seek to make Mr. Domican responsible for those costs, it seems clear on the affidavit evidence that both he and his legal advisors interpreted the letter as seeking to impose such costs upon Mr. Domican. I have to say that I can see how the letter might have been so read even though, on a careful construction, no actual threat to seek to impose such costs is to be found in the letter.

4.6 There is nothing, of course, wrong with AXA seeking to have Mr. Domican, or any person in his position, attend to a medical examination. Such an examination may well facilitate settlement of the proceedings, for if there is relative unanimity in the medical opinion as to the actual injury suffered, then it will be much easier to arrive at an agreed valuation of the appropriate compensation to be paid. It is also clearly the case that the court has a discretion to stay proceedings for personal injuries where a plaintiff unreasonably fails or refuses to attend a medical examination arranged by the defendant or, in practice, the defendant's insurers. However there is no legal obligation on a potential plaintiff to attend for such a medical examination until proceedings have been commenced and have reached a stage where it is appropriate for the defendant to seek such an examination. Since the advent of PIAB, proceedings will be postponed (in those cases which ultimately go to court) until after the claim has been through the PIAB process. That will, inevitably, lead to a situation where the legal entitlement of a defendant to obtain a medical examination will be delayed. However that situation is an inevitable consequence of the freezing of legal proceedings which is an inherent part of the PIAB process.

4.7 While it is, therefore, open to an insurer, such as AXA, to seek a medical examination while a plaintiff's claim is frozen, so far as court proceedings are concerned, pending a decision from PIAB, it is equally clear that a claimant, such as Mr. Domican, is entitled, at that time, to refuse any such invitation. In such circumstances I do have to say that it seems to me that it was somewhat foolish of AXA to arrange an actual medical appointment at a time when they had not secured Mr. Domican's agreement to attend to any appointment. In those circumstances the tone of the letter of complaint could reasonably be described as unfortunate.

4.8 Finally a further factual issue has arisen concerning an offer of settlement which was contained in correspondence from AXA to Mr. Domican's solicitors and copied directly to Mr. Domican. There is, again, nothing objectionable in AXA making such an offer and indeed such a practice is to be encouraged given the public policy considerations which favour the early settlement of potential litigation. Nothing in either the principles behind or the detailed provisions of the 2003 Act, have altered the policy considerations which favour the early settlement of claims. However it must equally be said that the position taken by Mr. Domican, on advice from his solicitors, that he would be best advised to wait and see what came out of PIAB by way of an assessment of his claim is equally a sustainable position. What gives rise to controversy is that it does not appear that Mr. Domican's solicitors were informed of the fact that the letter making the offer in settlement had been copied directly to Mr. Domican. This is stated on behalf of AXA to be an oversight. It would appear that in respect of all other elements of correspondence copied to Mr. Domican the original was sent to his solicitor (frequently by fax) but in so sending it was made clear that the relevant correspondence was being copied to Mr. Domican. This does not appear to have occurred in relation to the letter of offer.

4.9 It would also appear that Mr. Domican's solicitors were able to point to another case (unconnected with these proceedings) in which an identical practice appears to have been engaged in by AXA, in that all correspondence was copied directly to the claimant concerned, and in respect of all of the relevant correspondence with the exception of a letter of offer, it was made clear in the communication to the solicitors concerned that the relevant correspondence was being copied to their client. Whether or not the case of Mr. Domican and the other relevant case represent two coincidental errors, or a practice on the part of AXA, is not possible to conclude on the evidence currently before me. However it must be said that it is somewhat suspicious that the same error should have occurred at the same point in the process in two separate cases. That is particularly so when the error appears to have related to what might well be regarded as the most important part of the process, that is to say the communication of a specific offer in settlement. If it were to be the case that AXA has or had a deliberate practice to that effect then it could only be inferred that the purpose of such a practice was to attempt to communicate an offer directly to the claimant concerned without the claimant's

solicitors being aware of the fact that such an offer had been directly communicated to the client.

4.10 There are, therefore, certain aspects of the facts which justify adverse comment about AXA's practice. The manner in which the missed medical appointment was dealt with seems to me to be unreasonable. There is the possibility that there might be a practice of communicating a copy of an offer in settlement made to the solicitor, directly to the client, in circumstances where the solicitor concerned was not informed of the copying. It is also common case that the direct copying of communications, of what ever form, and even if not subject to the above criticisms, to Mr. Domican was against his expressly communicated wishes.

However the real issue in this case is not as to whether the practice engaged in by AXA (which appears to be a standard practice of the company) might be the subject of legitimate complaint by Mr. Domican but rather whether there is anything unlawful about it. I now turn to that question.

5. The Law
5.1 A variety of possible bases for suggesting that the largely agreed facts of this case demonstrate a legal basis for the reliefs claimed were canvassed in the course of argument.

5.2 Firstly, although not pressed as the strongest point, it was suggested that the receipt of communications from AXA which Mr. Domican, to the knowledge of AXA did not wish to receive, amounted to a breach of Mr. Domican's constitutional right to privacy. That such a right exists has been clear since *Magee v. Attorney General* [1974] I.R. 284 and *Kennedy v. Ireland* [1987] I.R. 587. As I observed in *Cogley v. RTE* [2005] 4 I.R. 79:-

> "It is … clear from *Kennedy v. Ireland* that a right to privacy is one of the personal rights of the citizen guaranteed by, though not specifically mentioned in, the constitution.
>
> However it is also clear from Kennedy that the right to privacy is not an unqualified right but is subject to the constitutional rights of others and to the requirements of public order, public morality and the common good."

5.3 As against those undoubted rights must also be considered AXA's undoubted constitutional right to communicate. Such a right has also been identified in such cases as *Attorney General v. Paperlink* [1984] ILRM 373 and *Murphy v. Independent Radio and Television Commission* [1999] 1 I.R. 12. Equally such a right is not absolute and is subject to qualification.

5.4 It must also be noted that the background to the relationship between the parties to these proceedings is that they are, inevitably, involved with each other. The plaintiff has a claim which, in commercial substance though not in form, is as against AXA. They are not, therefore, total strangers, and it is necessary that there be some communication between them with appropriate respect for both parties rights. I am not satisfied that it has been established that Mr. Domican's right to privacy extends to the narrow question of the manner in which communication with him is to be conducted. Indeed most of the decided cases involve obtaining and disclosing information rather than communicating information. Clearly if the manner of such communisation were oppressive different considerations might apply. However it can hardly be said that the simple receipt of information by being copied directly with it in circumstances where the person concerned will, necessarily, have to receive the same information indirectly through his solicitors could in any event amount to a breach of the constitutional right to privacy.

5.5 In similar vein it does not seem to me that the actions of AXA could be said to be in breach of the right to privacy guaranteed by the European Convention on Human Rights as applied in Ireland by the European Convention on Human Rights Act, 2003.

5.6 For similar reasons I have come to the view that the actions of AXA could not amount to a private nuisance or to harassment or molestation. I leave for consideration to a case where, on the facts, the issue arises in an appropriate manner, the question as to whether excessive communication by letter, fax, telephone or any other medium might amount to a private nuisance and the question of whether similar actions might among to harassment sufficient to give rise to a civil wrong. Certainly *Khorasandjian v. Bush* (1993) 2 FLR 66 suggests such a possibility. If such a cause of action is found to exist it seems to me that it could only arise where the extent of the communication was such as might interfere, to a material extent, with the reasonable enjoyment by a person of their home, place of business, or life. It is difficult to see how the communications in this case would qualify under that heading. Irrespective of the legal parameters that might apply to any such claim, such a claim some could not, it seems to me, arise on the facts of this case under either of those headings.

5.7 That leads to the last, and most difficult, of the issues raised. It is suggested that the course of action adopted by AXA amounts to an infringement of the plaintiff's solicitor/client relationship. That any claimant is entitled to the benefit of legal representation in proceedings, or potential proceedings, cannot be doubted. It may well be that any action taken by an opposing party or potential party whose object or significant effect was to impair the entitlement to obtain and benefit by such legal advice and representation might well amount to a sufficient interference in the course of justice as would entitle a court to intervene.

5.8 However it is necessary to identify the extent to which the actions of AXA in this case, even taken at their height, could be said to amount to an interference in the solicitor/client relationship. With the exception of the contention, to which I have referred, concerning the comments made by AXA in correspondence concerning delays likely to be encountered in PIAB, none of the other elements of the correspondence seems to touch directly on any aspect of the relationship between Mr. Domican and his advisors. All of the correspondence is, as a matter of form, directed to his solicitors. The correspondence is merely copied to Mr. Domican, albeit against his wishes. The contents of the correspondence contains entirely appropriate matter to be communicated in a process such as that with which all concerned were involved. As previously indicated there was nothing wrong in seeking to have a medical examination. Furthermore it was entirely appropriate for AXA to make an offer in settlement.

5.9 This leads me to one somewhat curious aspect of the argument in this case. It was expressly stated on behalf of AXA that no criticism of any sort was being levelled against Mr. Domican's advisors. In passing it should be noted that the practice shown on the facts of this case appears to be a general practice engaged in by AXA. It, therefore, applies irrespective of what firm of solicitors may be instructed on behalf of the claimant concerned. It should also be noted that it was asserted, and would appear to be the case, that it is a general practice on the part of the solicitors advising Mr. Domican (and also possibly other firms of solicitors) to obtain a written authority from their clients in a similar form to that obtained from Mr. Domican in this case. There would appear, therefore, to be a significant number of cases in which various firms of solicitors communicate on behalf of their clients to AXA that the client concerned does not wish to receive direct communication. It appears to be the universal practice of AXA to ignore such requests. Hence the issues which arise in these proceedings appear likely to arise in a significant number of cases.

5.10 I note these matters to emphasise that no criticism was voiced on behalf of AXA, in general terms, in respect of the solicitors involved in any such cases where a dispute may arise as to the appropriateness or otherwise of correspondence being copied directly

to the client. The reason why I touch upon the absence of criticism is that it seems to me, at least to some extent, to be inconsistent with the stated basis for the desire on the part of AXA to copy correspondence directly to the client. That stated basis is to the effect that it is desired to bring about early settlement where possible. It follows that it must be the view of AXA that the copying of correspondence directly to the client is more likely to lead to an early settlement than merely corresponding directly with the solicitor concerned. For that to be true there must be at least an implicit criticism to the effect that solicitors in general are insufficiently proactive in progressing possible settlement negotiations on behalf of their clients and that it is necessary to involve the client directly to keep pressure on the solicitor so as to achieve such an early settlement. If AXA did not believe that to be the case then it is hard to see how the practice engaged could be of any benefit. The only reasonable inference to draw is, therefore, that the practice is designed to make it more likely that the client concerned will raise the questions dealt with in correspondence directly with their solicitor quicker than the solicitor might, if left to his or her own devices, raise the question with the client.

5.11 The only authorities to which I was referred which touch upon the question of communications directly with parties who have legal representation, do not seem to me to deal, in any material way, with the issues which I have to decide in this case.

AXA draws attention to *Re Margetson and Jones* (1897) 2 Ch 314 where it was held by Kekewich J. that:-

> "It is a professional rule that where parties to a dispute are represented by solicitors neither of those solicitors should communicate with the principle of the other touching the matters in question. That is a rule binding the profession as gentlemen, but it is only highly consonant with good sense and convenience …".

However the court went on to observe:-

> "But the courts have uniformly held, without in the least degree impeaching the propriety and advantage of that rule, that if the solicitor for the one party meets the principal on the other side and a bargain is made, that bargain is good. It cannot be said that the principal's authority is gone, because such a thing as that is impossible; and therefore, whether there is a litigation pending or not, if the solicitor for the defendant meets the plaintiff and effects a comprise with him, that comprise is binding upon the plaintiff or the defendant, as the case may be, notwithstanding that up to that time had had been represented by a solicitor. That is as consonant with common sense as the rule itself; but what the court has also said is that it must be done honestly and in a straightforward way to get rid of the litigation for the sake of peace, and not with a view to depriving the solicitor of his costs. If the one solicitor meeting the party on the other side, or the two parties comprise knowing of the lien of the solicitor and intending to defeat it, that shall not be allowed; and the only question, therefore, is whether that was the intention".

5.12 That case was, as the above passages demonstrate, concerned with a situation where both sides were represented by solicitors and where the solicitor on one side effected a settlement directly with the client on the other side. In principle the settlement was upheld subject to the caveat that if the agreement was reached for an improper purpose it might be set aside. There might, of course, be other situations where a settlement arrived at in such circumstances might also be set aside. The case is, nonetheless, authority for the proposition that direct contact with a client, even though he may have a solicitor, is not necessarily unlawful even though it may, if done by a solicitor, be unprofessional.

5.13 However it would seem clear that what the court was concerned with in *Margetson* was a case where the client, or principal, on one side was happy to engage in negotiations directly with the solicitor on the other side and without the benefit of his own solicitor being present. The case has little, therefore, to say about a situation, such as arises here, where the principal, or client, has expressly stated that he does not wish the communication to take place.

5.14 Mr. Domican drew attention to the decision of MacMenamin J. in *O'Brien v. PIAB* (Unreported, High Court, MacMenamin J., 25th January, 2005). In that case MacMenamin J. determined that the practice adopted by PIAB in declining to accept or act upon client authorisation and by corresponding directly with the client concerned was in breach of s. 7 of the 2003 Act. The case was, therefore, principally about statutory construction and the question of whether it is appropriate or possible to exclude a client from having his solicitor, if he so wished, be the point of contact. It should also be noted that that case is under appeal. In any event it seems to me to deal with a different issue to the one with which I am faced in this case. O'Brien was not about excluding the client from being subject to direct contact.

6. Conclusions

6.1 There does not, therefore, seem to be any significant authority on the point in issue in these proceedings. I have come to the view that, as a matter of principle, a party's entitlement to have access to the courts and to have the benefit of legal assistance in so doing, carries with it an entitlement to restrain any action which would amount to a material or significant interference with such parties relationship between them and their legal advisors in the context of litigation or potential litigation.

6.2 The real issue which falls for decision in this case is as to whether the actions of AXA can be so characterised. I have come to the view that they cannot. It does not seem to me to be appropriate to conclude that the mere copying of information directly to the client, which information the solicitor would, in any event, be under a duty to tell the client about, to advise the client on, and to act on the client's instructions arising out of, amounts to a significant or material interference in the solicitor/client relationship.

6.3 If it were to transpire to be the case that any of the actions of a party such as AXA were designed to or would objectively speaking, be likely to, undermine the solicitor/client relationship in any material respect then I would come to a different conclusion. Under that heading the only matter that could conceivably be advanced as being likely to give rise to such a consequence is the statement contained in the AXA letter concerning the delays likely to be encountered in PIAB. It is said that that statement had the potential to undermine the advice given to Mr. Domican to await the PIAB determination. I am not satisfied that that is a reasonable assessment of the AXA letter. The AXA letter simply contains a generalised statement about delays in PIAB as a means for suggesting that there should be an early settlement independent of PIAB. The merits or otherwise of engaging in such an early settlement are a matter upon which parties can form there own view and will, in so doing, doubtless take into account a variety of factors. It does not seem to me to be an issue which could be said to have the potential, to any material extent, to undermine the relationship between a client and his or her solicitor. It should be noted, however, that there might well be aspects of correspondence that might pass between an insurance company and a firm of solicitors acting for a claimant in the course of progressing a claim which correspondence may be less routine than that engaged in in this case. Some such cases may become acrimonious. The correspondence may reflect that fact. There may well be circumstances where the copying of such correspondence directly to the client might be reasonably understood by a client to amount to a suggestion on the part of the insurers that the client's best interests were not being looked after by the solicitor concerned. In such circumstances the direct copying of correspondence might give rise to different inferences and might amount to a material interference in the solicitor/client relationship. Nothing in this

judgment should be taken, therefore, as implying that the copying of correspondence is always, and in all circumstances, lawful. Similarly the volume of communication, or its manner, might, in a different case, amount to nuisance, harassment or molestation.

6.4 However for the reasons which I have set out, and on the facts of this case, which concern merely the copying of a small number of letters of a relatively normal, almost routine, nature could amount to any of the legal wrongs asserted. In those circumstances I would propose to dismissing the plaintiff's claim.