

THE HIGH COURT

[1993 No. 7410 P.]

BETWEEN

PATRICK O'REILLY

PLAINTIFF

AND

DERMOT J. MOLONEY, NICHOLAS J. O'KEEFE, SYLVESTER M. DUANE, EUGENE M. GLENDON, KEVIN O'KEEFE AND PATRICK DORGAN, PRACTISING AS COAKLEY MOLONEY SOLICITORS

DEFENDANTS.

JUDGMENT delivered by Mr. Justice White on 1st of July, 2016

1. This is an action by Patrick O'Reilly alleging professional negligence on the part of the defendants who are a firm of solicitors who acted for the plaintiff. A plenary summons was issued on 29th October, 1993, and an appearance was entered on behalf of the defendants on 16th March, 1994.
2. The plaintiff delivered a statement of claim in or around August 1994, but that statement of claim is missing and is not available for this Court. The defence was filed on 25th January, 1996.
3. No further steps were taken in the proceedings by the plaintiff until a notice of intention to proceed was served on 25th May, 2015, by the plaintiff in person.
4. The plaintiff originally instructed Anthony Murphy, Solicitor, who issued the plenary summons and served the statement of claim. The plaintiff has been acting as a personal litigant since 11th February, 1995.
5. The plaintiff swore an affidavit on 25th May, 2005, and filed same in the High Court. The purposes of this affidavit are unknown to the court but it was served on the defendants' solicitor on 12th August, 2015, together with a court order of the Circuit Court of 11th July, 1989. An advertisement for encumbrances of 10th February, 1995, and a report of the eviction of the plaintiff from his family home.
6. A notice of trial was served on 27th July, 2015.
7. On 9th October, 2015, Comyn Kelleher Tobin Solicitors came on record for the defendants instead of Michael Holohan & Sons.
8. The defendants issued a motion on 1st February, 2016, returnable for 11th February, 2016, seeking an order amending their defence.
9. The plaintiff issued a motion for discovery on 15th January, 2016, returnable for 1st February, 2016.
10. The matter was listed for hearing on 11th February, 2016, but was not reached and the substantive action and both motions were adjourned to 23rd February, 2016. The case was heard in full by this Court on 23rd and 24th February, 2016.
11. The court permitted the action to proceed without the statement of claim and allowed the plaintiff's affidavit of 25th May, 2015, to be considered as part of his direct evidence. The court allowed the amendment to the defence and directed that the discovery motion primarily related to allegations made by the plaintiff about the defendants' behaviour and that there was no requirement to make an order in respect of same.
12. The plaintiff and Patrick Dorgan, the solicitor who acted for the plaintiff in the disputed matter gave evidence and were cross examined.
13. Mr. Dorgan in his evidence stated that all the defendants' files in relation to the matter had been destroyed in 2007 or 2008 when the defendants' firm was moving office and he stated that he had a general recollection but not a recollection in detail because of the absence of these files.
14. There was a total conflict of evidence. There was no undisputed evidence. The relevant period of the alleged professional negligence is from November 1987 to January 1990. A lot of evidence was tendered in respect of events subsequent to 9th January, 1990, which is not relevant to the court's determination.
15. The court has been able from the evidence of the plaintiff and Mr. Dorgan and the consideration of the documents that are available to the court to come to conclusions on the conflict of evidence between the parties.

Dispute between the plaintiff and Patrick Daly

16. The allegations before this Court have their source in an alleged partnership agreement between the plaintiff and Patrick Daly.
17. I am satisfied that the plaintiff visited the offices of the defendants and gave instructions that he was entering into a partnership agreement with Mr. Patrick Daly to promote a fish farm. I am satisfied that Mr. Patrick Dorgan took instructions from the plaintiff before sending a letter of 14th December, 1987 to Peter Flemming & Co. Solicitors for Patrick Daly. I am also satisfied that the evidence adduced by the plaintiff that he knew nothing about the formation of a limited liability company Shornach Fish Farm Limited, is not true and I am satisfied that information was conveyed to Mr. Dorgan that the partnership agreement was to be run through a limited company. I cannot verify independently that Patrick Daly did invest monies in the partnership but it is clear that the letter of 14th December, 1987, envisaged that he would invest in the fish farm venture and by letter of 30th March, 1988, from Peter Fleming & Co. to the defendants it was confirmed that Mr. Daly had already introduced a sum of €27,000 into the business. Separately when proceedings were issued as a result of the breakdown of the relationship between the plaintiff and Mr. Daly subsequent to the receipt of replies to particulars, the defendants wrote to the plaintiff stating that they had received a comprehensive book of documentation comprising of receipts, vouchers, etc. which had been furnished, and inviting the plaintiff to call and collect this documentation before the defence was filed. The court implies that there was substantial documentation furnished on behalf of Patrick Daly to support his

claim that he had invested substantial monies in the partnership business. It is also obvious from the draft partnership agreement which the court has inspected which was furnished by Peter Fleming & Co. on behalf of Patrick Daly to the defendants that Mr. Dorgan in his own handwriting made amendments to the draft partnership agreement. I am satisfied these amendments were made on the instructions of the plaintiff and Mr Dorgan was careful to ensure that the family home of the plaintiff was not part of the partnership agreement which envisaged the transfer to the partnership of a portion of lands.

18. Mr. Dorgan is hampered by the substantial delay in progressing these proceedings by the absence of the file which was destroyed in 2007 but there is a document available which, to some extent, is contemporaneous, that is a Bill of Costs sent on 12th March, 1991, to the plaintiff which states:-

"Lengthy attendance on you dated 10th December, 1987 in relation to proposed partnership with Patrick Daly and advising you in relation thereto, further correspondence with the Bank in relation to Title Documents, ultimately taking same up again on Accountable Receipt. Detailed negotiations with the Bank in relation to the possibility of obtaining Deed of Release of the part of the property proposed to be used in the proposed partnership bespeaking copy folio and file plan, further detailed attendance on you in relation to various changes in the proposed partnership agreement, ultimately having lengthy and detailed meetings at the offices of Mr. Daly's Solicitor, obtaining draft partnership agreement, noting and perusing same, making various changes and resubmitting same to Solicitor. Lengthy and detailed correspondence over a period of time with Daly's Solicitors and also with the Central Fisheries Board in relation to having charge registered by them on the property discharged, lengthy correspondence with Solicitors for the Central Fisheries Board in relation to the matter ultimately obtaining Deed of Discharge and arranging for stamping and registration of same on the Land Registry.

Further detailed attendance on you and also on Gerard O'Donoghue and other parties in relation to proposals in the matter.

Noting and perusing various agreements produced by Pat Daly and advising him and you in relation to contents of same, further correspondence with the Bank in relation to ongoing proposals to lease certain portions of the premises arranging for preparation of map and instructing Engineer on the map and obtaining maps."

19. I am satisfied that the plaintiff has not given truthful evidence to the court in alleging that there was no agreement between himself and Patrick Daly and no instructions given to the defendants in respect of same.

The breakdown of the relationship between the plaintiff and Patrick Daly and the issue of legal proceedings and the conduct of those proceedings

20. The agreement between the parties was running into difficulty as and from June 1988, as Peter Fleming & Co. Solicitors wrote to the defendants on 2nd June, 1988, requesting that the transfer of the land proceed. Subsequently, Mr. Patrick Daly changed solicitors and instructed Ann L. Horgan & Co. and that firm wrote on 11th August, 1988 to the defendants stating:-

"From perusal of the documentation herein based on the instructions which our client has given us herein, it would appear that a contract is in existence between your client and our client and it would appear that your client is in fundamental breach thereof. Moreover, we are instructed that our client entered into the contract herein as a result of misrepresentations which your client made to our client with regard to his expertise in salmon farming.

We would be obliged if you would take instructions from your client and confirm what proposals he intends to make in this matter as we have instructions that if he is not prepared to make satisfactory proposals to our client at this stage, he has no option but to institute proceedings against your client.

If your client is not in a position to make any such proposals can you confirm that you have instructions to accept service of proceedings herein."

21. Patrick Daly subsequently commenced proceedings in the Circuit Court by Equity Civil Bill of 17th November, 1988 [Record No. E12/1989]. While the Civil Bill is dated 17th November, 1988, it does not seem to have been filed in the Circuit Court until January 1989. The plaintiff has asserted that the defendants did not enter an appearance to the Civil Bill. That is incorrect. The solicitors entered an appearance on 5th January, 1989, and it was filed in the Circuit Court office on 11th January, 1989. I accept the evidence of Patrick Dorgan that he received specific authority from the plaintiff to accept service of the Civil Bill and to enter a notice of appearance. The defendants wrote to the plaintiff on 26th January, 1989, indicating that there had been a proposal to settle this matter. The court has already referred to a reply to particulars received on 15th May, 1989, and the court infers there was a notice for particulars served.

22. Subsequently on the 1st June, 1989, the defendants wrote to the Plaintiff stating:-

"Dear Paddy, I have now received a reply to my notice for particulars, I enclose herewith a copy of same. An extremely comprehensive bundle of documentation comprising of receipts, vouchers, etc., has been furnished in addition. You may wish to call to collect same to check it before we file our defence."

23. A notice of motion was issued on behalf of the plaintiff on the 22nd June, 1989, returnable for Fermoy Circuit Court on 11th July, 1989. That motion refers to judgment in default of defence.

24. The defendants wrote to the plaintiff on 27th June, 1989, stating:-

"Dear Paddy, notice of motion for judgment and default for defence has now been issued against you. This is an application to the court to have the matter heard and judgment given against you for failure to file your defence. Please contact me in relation to the matter."

25. The reference to appearance in the order is a clerical error as the order of the court on the 11th July, 1989 directed that the motion be struck out and that the time limited for the filing of the defence be extended up to the 22nd August, 1989.

26. The plaintiff received instructions from the defendants by way of a letter of 21st July, 1989 which states:-

"Dear Paddy, at Fermoy Circuit Court on the 11th inst., Judge Murphy made an order allowing you 21 days to file your defence in this case.

You will not be allowed any further time. It is accordingly imperative that you should let us have your instructions immediately if you wish to defend this case. If we do not hear from you in the matter we shall have to assume that your instructions are terminated and come off record for you and submit our bill of costs."

27. I am satisfied from the contents of that letter that the evidence of Patrick Dorgan that it was difficult to get instructions from the plaintiff is accurate.

28. I am also satisfied that there is evidence which supports Mr. Dorgan from the bill of costs of the 12th March, 1991, which states:-

"Further attendance on you in relation to correspondence received from Anne L. Horgan and Company acting on behalf of Daly, claiming damages for breach of the partnership agreement and various other matters, lengthy attendances over a period of months on you in relation to the matter proceedings having been issued, entering Appearance thereto and sending papers to Counsel to draft Defence, further attendance on you in taking your instructions in relation to proposed charge to the ACC issuing letter of undertaking to them on your instructions, advising you in relation to Notice of Motion issued in default of Defence, requesting instructions in relation thereto and also in relation to further matters outstanding between you and BIM."

Lengthy correspondence on your instructions with solicitors for Daly when trying to negotiate settlement proposals of the matter."

29. A further motion in default of defence was issued on 7th December, 1989 returnable for 9th January, 1990. There are two date stamps on this motion, one on 14th December, 1989 and the second on 19th December, 1989.

30. It may well be that there was a breakdown of communication in relation to the furnishing of this motion to the plaintiff but the defendants had sent papers to counsel to draft a defence.

31. It is common cause between parties that Patrick Dorgan did call at the plaintiff's home on the morning of 9th January, 1990 and informed him of the motion and asked him to come to Fermoy Circuit Court. Mr. Dorgan would have been in a position to communicate to the presiding Circuit Court Judge that the defence was ready and in a position to be filed forthwith, and I am satisfied that judgment had not been entered by the court, but there was obviously concern that because it was the second motion the Circuit Court Judge may not accede to the filing of the defence.

32. I do not accept that Patrick Dorgan would have drawn up an agreement without the express instructions of the plaintiff. He was entitled to give trenchant advice to the plaintiff that it was in his best interests to conclude an agreement and there is nothing wrong with that. It is the responsibility of a legal advisor to advise a client on the appropriate course to take.

33. The settlement seemed satisfactory. The partnership would be severed for the sum of €20,000 which was €7,000 less than Patrick Daly had alleged he had invested in the partnership and costs were agreed at £1,500 which was not unreasonable for an equity Circuit Court action.

34. It was at this stage when the compromise of these proceedings was signed by the plaintiff that his family home was in jeopardy and again the court accepts the evidence of Patrick Dorgan and this is brought out to an extent by the evidence of the plaintiff who did accept that he was told that his family home would be under threat. I am satisfied that the plaintiff voluntarily consented to compromise the Circuit Court proceedings and subsequently made efforts to discharge the amount due. The evidence of Patrick Dorgan is that the matter continued on for another year and eventually as he could not get the plaintiff to discharge the amounts due he sent his bill of costs on the 12th March, 1991.

35. The plaintiff reneged on two agreements, the original partnership agreement and the compromise of litigation. The defendants acted with competence and gave appropriate legal advice.

36. The plaintiff has distorted the situation to consider himself the victim. The court is satisfied to infer that Patrick Daly invested at least £20,000 in the business and possibly much more and that the plaintiff refused to abide by his agreements. The compromise of the proceedings was not an illogical or unfair document.

37. Since 1988 the plaintiff has engaged in mendacious behaviour. Mr. Dorgan acted professionally in the conduct of the litigation and in negotiating the compromise.

38. It is very unfortunate and tragic that the plaintiff lost his family home that is not due to any professional negligence on behalf of the defendants.

39. It was also unconscionable that the plaintiff issued proceedings and waited 19 years from the date of filing the defence on the 25th January, 1996 to the notice of intention to proceed on 25th May, 2015 to proceed with the action.

40. For this reason alone as the plaintiff has not provided appropriate adequate reason for this delay, the proceedings could be dismissed, however the court has proceeded to deal with the matter on the merits and dismisses the plaintiff's claim against the defendants.