Neutral Citation Number: [2009] IEHC 182

THE HIGH COURT

1995 8934 P

BETWEEN

LOUIS BLEHEIN

PLAINTIFF

AND

THE MINISTER FOR HEALTH, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 16th day of March, 2009,

In the interests of clarity I propose setting out my understanding of how this matter came before the court on Monday 9th March, 2009.

On Monday 2nd February, 2009, there was before the court a motion brought by the plaintiff, who appeared in person, for an order that the plaintiff's motion dated 21st July, 2005, to re-enter these proceedings, which had been adjourned generally with liberty to re-enter by consent of the parties, "be now heard". On that occasion, counsel for the defendants informed the court that the defendants were consenting to the order sought being made. Apparently, there was a misunderstanding as to what order the defendants were consenting to, in that what the defendants intended was that an order would be made by consent re-entering the plaintiff's motion of 21st July, 2005, rather than, as the plaintiff may have assumed, an order re-entering the proceedings, which was the relief sought in the motion of the 21st July, 2005. Accordingly, the matter was re-listed for 9th March, 2009, to deal with the substantive issue on the motion of 21st July, 2005.

The history of the proceedings to date is as follows:

- On 10th November, 1995, the proceedings were initiated by plenary summons, the plaintiff being represented by a firm of solicitors.

- On 15th November, 1995, the Chief State Solicitor entered an appearance on behalf of the defendants.

- On 27th November, 1995, the plaintiff's statement of claim was delivered. The primary relief sought in the statement of claim was a declaration that ss. 185 and 186 of the Mental Treatment Act 1945, as amended (the Act of 1945) were invalid having regard to the provisions of the Constitution. The plaintiff also sought damages in respect of personal injury, loss and damage which it was alleged he sustained in consequence of three periods involuntary detention in St. John of God Hospital, Stillorgan, pursuant to orders made under s. 185 between 24th February, 1984 and 16th May, 1984, between 26th January, 1987, and 16th April, 1987, and between 17th January, 1991, and 7th February, 1991.

- The defendants delivered their defence on 4th March, 1996, in which they denied that ss. 185 and 186 were invalid having regard to the provisions of the Constitution. They also pleaded that the plaintiff's claim was statute-barred by reason of the provisions of the Statute of Limitations 1957, as amended by the Statute of Limitations (Amendment) Act 1991, or, alternatively, that the plaintiff had been guilty of laches.

- Notice of trial was served on 9th July, 1996, and the matter was set down. I attach no significance to the fact that a reply was not delivered on behalf of the plaintiff.

- Only three steps were taken thereafter before the proceedings were struck out. First, the defendants obtained an order for non-party discovery against St. John of God Hospital by order of this Court (Smyth J.) made on 28th July, 1997. Secondly, by order of this Court (O'Sullivan J.) made on 2nd February, 1998, it was ordered that the solicitors on record for the plaintiff had ceased to act. Thirdly, on 10th March, 1998, the Master acceded to an application of the plaintiff for non-party discovery against Superintendent Martin Lally.

- The circumstances in which the proceedings were struck out on 18th March, 1999, are deposed to in the replying affidavit sworn on 20th October, 2005, by Derek Elliott, a solicitor in the office of the Chief State Solicitor, based on enquiries he had made in the Central Office. Apparently, as the plaintiff had not certified the case as being ready for hearing, it was listed in a list of uncertified cases which were called over by the court on 18th March, 1999. As there was no appearance on the part of the plaintiff or the defendants, the case was struck out.

- The plaintiff obviously learned that the case had been struck out. On 30th November, 2000, he wrote to the Chief State Solicitor intimating that he wished to discontinue the case. However, the plaintiff changed his mind and, by letter dated 4th December, 2000, to the Chief State Solicitor, he stated that his letter of 30th November should be regarded as being "withdrawn".

- Nothing further happened in these proceedings until the plaintiff issued his motion to have the proceedings re-entered on 21st July, 2005. However, the plaintiff had been involved in other proceedings, which, as I understand the position, had the same factual basis as these proceedings. Of relevance for present purposes are proceedings initiated in this Court in 2002 between the plaintiff and the defendants (Record No. 2002 No. 9652P), in which judgment was delivered in this Court by Carroll J. on 7th December, 2004 ([2004] IEHC 374) and by the Supreme

Court on the defendants' appeal on 10th July, 2008, ([2008] IESC 40) (the 2002 proceedings). As is explained in the judgment of the Supreme Court, delivered by Denham J., in the 2002 proceedings, those proceedings were preceded, and I would assume prompted, by a judgment of the Supreme Court, delivered on 31st May, 2002, by McGuinness J., in proceedings entitled *Blehein v. St. John of God Hospital and Anor.* (the *Hospital* proceedings) ([2002] IESC 43) in which a late application to amend pleadings to include a constitutional challenge to s. 260 of the Act of 1945 was refused, but it was stated that, if the plaintiff wished to challenge the constitutionality of the legislation, the correct course would be to commence new proceedings by plenary summons. The third defendant was a notice party in the *Hospital* proceedings. The plaintiff did commence the new proceedings, namely, the 2002 proceedings. As I have stated, in the judgment of the High Court in the 2002 proceedings which was delivered on 7th December, 2004, Carroll J. found that s. 260 was unconstitutional having regard to Article 6 and Article 34 of the Constitution. That decision was upheld by the Supreme Court in its judgment of 10th July, 2008.

• The plaintiff's motion of 21st July, 2005, was initiated at a time when the defendants' appeal against the judgment of the High Court in the 2002 proceedings was pending before the Supreme Court. It is common case that the reason the motion of 21st July, 2005, was adjourned generally was because the appeal to the Supreme Court was pending, although, as will be clear from what I will outline later, the parties were not *ad idem* as to the relevance of the pending appeal.

The basis advanced by the plaintiff in his grounding affidavit sworn on 20th July, 2005, for seeking liberty to re-enter and prosecute these proceedings was that ss. 185 and 186 were protected by s. 260, which he described as "an umbrella section", and he could not see much prospect of success in these proceedings while s. 260 remained unchallenged. However, in the light of the judgment of Carroll J., he believed it was opportune to bring the case forward for hearing. The plaintiff made the same argument on the hearing of the motion, namely, that he had been pre-empted by an invalid law, s. 260, from prosecuting the proceedings. The position adopted by the defendants in Mr. Elliott's replying affidavit sworn in 2005 was that s. 260 did not in any way prevent the plaintiff prosecuting his challenge to the constitutionality of ss. 185 and 186, that the plaintiff could have incorporated his challenge to those sections in the 2002 proceedings given that he was aware that these proceedings had been struck out, and that at that stage there had been inordinate and inexcusable delay in seeking to re-enter these proceedings.

Since the plaintiff issued his motion in 2005, ss. 185 and 186 have been repealed by the Mental Health Act 2001, with effect from 1st November, 2006, (Mental Health Act 2001 (Commencement) Order 2006/ S.I. No. 411/2006). When the defendants' appeal in the 2002 proceedings was heard, a similar position pertained in relation to s. 260, which had also been repealed with effect from 1st November, 2006. However, Denham J. stated that the issue as to the constitutionality of s. 260, although historic, was relevant to the plaintiff, who had a claim for damages outstanding. For the purposes of this application, I am proceeding on the assumption that, while the issue here is also historic, the plaintiff's claim is nonetheless maintainable.

Section 185 of the Act of 1945 dealt with an application for, and the making of, what was termed "temporary private patient reception order". Section 186 dealt with the effect of a temporary private patient reception order, as well as a temporary chargeable patient reception order, the authority for the making of which was to be found in section 184. Section 260 provided, in subs. (1), as follow:

> "No civil proceedings shall be instituted in respect of an act purporting to have been done in pursuance of this Act save by leave of the High Court and such leave shall not be granted unless the Court is satisfied that there are substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care."

When these proceedings were instituted, s. 260 had the benefit of the presumption of constitutionality. Leaving aside the fact that it has since been found to be invalid, for proceedings to have come within its ambit, they would have had to have been "civil proceedings" and they would have to have been instituted "in respect of an act" which was done on the basis that it was authorised by the Act. Therefore, to have come within the ambit of s. 260, proceedings founded on s. 185 would have had to relate to a claim for a civil law remedy against a person alleged to have acted in a manner which did not confer the authority given by section 185, although he was purporting to act under it. In my view, these proceedings were not within the ambit of s. 260, in that they were proceedings in which the plaintiff, broadly speaking, sought civil remedies, a declaration that s. 185 was invalid and damages for failure on the part of the defendants to vindicate the plaintiff's constitutional rights. They were not proceedings for civil remedies to redress a wrong which arose from the defendants having purported to act in pursuance of s. 185 or section 186. Accordingly, the plaintiff was not precluded by s. 260 from prosecuting these proceedings.

It is significant that the defendants, in defending these proceedings, did not assert that the leave of the court was necessary under s. 260 before it was struck down, or that s. 260 had any bearing on the prosecution of the proceedings. They appear to have adopted a similar approach in the 2002 proceedings. In her judgment in the 2002 proceedings, Carroll J. set out the position adopted by the defendants in those proceedings as follows:-

> "The State emphasised that the presumption of constitutionality applied. It was not a prohibition but a curtailment of access to the courts confined to civil proceedings and did not apply to judicial review or *habeas corpus*."

Moreover, in her judgment in the *Hospital* proceedings, having quoted s. 260 (1), McGuinness J. stated that its wording on its face did not "apply to a challenge to the constitutionality of the section". She stated that, in her view, the plaintiff did not require leave to initiate such proceedings. While those *obiter* remarks were directed to a challenge to the constitutionality of s. 260, they clearly could have been made in relation to a challenge to the constitutionality of any provision of the Act of 1945.

In support of his submission that s. 260 had precluded him from prosecuting these proceedings, the plaintiff cited the decision of the Supreme Court in *Croke v. Smith* No. 2 [1998] 1 I.R. 101, in which there was an unsuccessful challenge to s. 172 of the Act of 1945, which he suggested can only be understood by reference to the existence of section 260. He submitted that, if he had gone ahead with these proceedings prior to the definitive declaration of the invalidity of s. 260

by the Supreme Court, he would have been met with the same answer as the plaintiff in the *Croke* case. In my view, that submission does not stand up to scrutiny.

Section 260 did not come into play at all in *Croke v. Smith*. The genesis of the decision of the Supreme Court in that case was an application for an inquiry pursuant to Article 40.4.2 of the Constitution as to the lawfulness of the applicant's detention in the Central Mental Hospital. This Court (Budd J.), being satisfied that the applicant's detention was in accordance with the provisions of the Act of 1945, and, in particular, s. 172 thereof, but that such law was invalid, having regard to the provisions of the Constitution, referred to the Supreme Court by way of case stated, pursuant to Article 40.4.3, the question of the validity of s. 172 of the Act of 1945, having regard to the provisions of the Constitution. The section in issue, s. 172, dealt with the effect of the chargeable patient reception order.

The decision of the Supreme Court in *Croke v. Smith*, which was delivered on 31st July, 1996, would have had relevance to the case being made by the plaintiff in these proceedings, but not because of the existence of section 260. The structure of Part XIV of the Act of 1945, which dealt with the reception orders, distinguished between two types: chargeable patient reception orders and private patient reception orders. Chapter I, which included, *inter alia*, ss. 163 to 172, dealt with the first type, chargeable patient reception orders, whereas Chapter II dealt with the second type, private patient reception orders. Chapter III, which included, *inter alia*, ss. 184, 185 and 186, dealt with temporary orders of each type.

The kernel of the decision of the Supreme Court in *Croke v. Smith* was that, in view of the requirements set forth in ss. 163 and 171, which did not, of themselves, constitute an unjust attack upon personal rights of the citizen affected thereby, or a failure to defend and vindicate such rights, the provisions of s. 172, having regard to the citizen to whom it was applicable, did not constitute a failure by the Oireachtas to respect and, as far as practicable, to defend and vindicate the right of such citizens affected thereby. A comparison of s. 185 and s. 171 and of s. 186 and s. 172 suggests that the plaintiff may well be correct in his submission that after these proceedings had been set down in July 1996, the challenge to the constitutionality of ss. 185 and 186 would have had the same fate as the challenge to s. 172 in *Croke v. Smith*. However, that outcome would have resulted from the application of the *ratio decidendi* of the decision of the Supreme Court to the provisions he was seeking to impugn. The existence of s. 260 would have been wholly immaterial to the outcome.

There is no factor relevant to the application by the plaintiff to re-enter these proceedings at this juncture which was not in existence in July, 2005. The plaintiff's success in the 2002 proceedings at first instance was not a good reason for re-entry in 2005, no more than success on the appeal is a good reason for re-entry now. Moreover, in my view, it would not be proper to infer from the fact that the defendants consented to an adjournment of the motion to re-enter in 2005, that they were acknowledging that the plaintiff's success on the appeal would be material. The defendants' position was stated as follows in Mr. Elliott's affidavit:

> "However, since the Plaintiff relies on his success in the [2002 proceedings] as providing the reason for which he now wishes to re-enter these proceedings (which I do not believe is a good reason), if that be the case, then the Plaintiff's re-entry of these proceedings is premature while the appeal . . . is pending. If the Defendants succeed on that appeal, then on the case made by the Plaintiff, there would be no basis for re-entering these proceedings."

On the core issue which is now before the court on the 2005 motion, whether liberty should be given to re-enter these proceedings, in my view, the proper approach is to determine the issue by analogy to the jurisprudence which has been developed in the Superior Courts in relation to the dismissal of proceedings on the ground of delay in prosecuting them. As the defendants did not insist on the issue being determined when it was first raised in 2005, it seems to me that it falls to be determined by reference to the circumstances which prevailed in July, 2005. I understood counsel for the defendants to concede that, properly, in my view.

In relation to the principles of law applicable in determining an application to dismiss proceedings on the grounds of delay, in the judgment of the Supreme Court in *Desmond v. M.G.N. Ltd.* [2008] IESC 56, which was delivered by Macken J. on 15th October, 2008, it was pointed out that the court has to apply two tests:

> (i) to ascertain whether the delay complained of is inordinate and inexcusable, and,
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> (ii) if it is so established, where the balance of justice lies.

In relation to the first test, six and a quarter years had elapsed since these proceedings were struck out by March 1999, when the application to re-enter was initiated in July, 2005. Twenty-one years had elapsed since the first of the periods of detention complained of, and fourteen years since the most recent period of detention complained of. I have no doubt that, in all of the circumstances, the delay in applying to have the proceedings re-entered was inordinate. The excuse advanced for not moving sooner was that the plaintiff was awaiting the outcome of the 2002 proceedings. For the reasons I have outlined earlier, I consider that that was not a good reason and was not an excusing factor. Therefore, the delay was both inordinate and inexcusable.

On the second question, I consider that the balance of justice lies in favour of refusing the application to re-enter because of all of the circumstances, including the following factors:

> (a) the multiplicity of proceedings in which the defendants collectively and the Attorney General have been involved by the plaintiff arising out of the same factual circumstances since 1995, which I must assume has involved the State in incurring costs;
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> (b) the antiquity of the factual circumstances on which the proceedings are founded, the earliest period of detention having occurred twenty-five years ago and the most recent having concluded more than eighteen years ago;

(c) the fact that the impugned sections have been repealed, and

(d) the fact that the Supreme Court remitted the 2002 proceedings to this Court to deal with the question of damages and the assessment of the damages to which the plaintiff is entitled in the 2002 proceedings is listed for hearing later this month.

There will be an order dismissing the motion to re-enter.