Neutral Citation Number [2006] IEHC 282

THE HIGH COURT
DUBLIN

[1995 No. 7107P]

BRIAN FAUGHNAN (A PERSON OF UNSOUND MIND NOT SO FOUND) SUING BY HIS FATHER AND NEXT FRIEND JAMES FAUGHNAN

APPLICANT

AND

SHEILA MAGUIRE AND BY ORDER CHRISTOPHER PIDGEON, MOSTAFA ALI FAHNY ELKHASHAB AND BY FURTHER ORDER DAVID O'BRIEN

RESPONDENT

Judgment delivered by Mr. Justice O'Sullivan on Friday, 23rd June 2006

1. This is an application to set aside an order of the High Court by Mr. Justice Johnson, dated 7 November 2005, joining Dr. David O'Brien as the fourth Defendant.

2. It is brought pursuant to Order 15, Rule 14 of the Rules of the Superior Court, but as the case continued in court, it also emerged that it is brought pursuant to the inherent jurisdiction of the Court.

Background

3. First the parties. The Plaintiff was a 35-year-old pilot with Aer Lingus and suffered severe personal injuries from complications following an operation on his pituitary gland at Beaumont Hospital, carried out on 2 April 1992 by the third Defendant, under the supervision of the second. The first Defendant represents the hospital. The fourth Defendant, Dr. O'Brien, was a senior house officer at the time and following the operation, nursing staff became concerned about the Plaintiff's condition and drew this to the attention of medical staff, including the attention of the fourth Defendant who was on the neurosurgical team. The case to be made against the fourth Defendant is that he underestimated the deterioration in the Plaintiff's condition and that, for example, when told of the Plaintiff's severe headaches, informed the nursing staff, it is alleged, that the Plaintiff had a low pain threshold. The Plaintiff's injuries have left him, it is claimed, incapable of communicating and he is described in these proceedings as being of unsound mind not so found: it is therefore submitted that the statute of limitation period does not apply to him.

4. There is an issue in relation to this latter point, because the fourth Defendant at least, challenges this assertion. But it is agreed, and indeed correctly, that I cannot deal with that particular issue in the proceedings now before me.

The relevant history of the proceedings

5. On 13 July 1995, the plenary summons was issued, in the first instance against the first Defendant, but later that year, against the second and third. On 27 July 2005, a first application was brought by the first Defendant to join Dr. O'Brien as a third party. Counsel for Dr. O'Brien was permitted to make submissions to the Court and the application to join him failed on that occasion. I understand the learned Judge said that there was no explanation for the delay, but indicated that the application could be renewed if an explanation for the delay became available.

6. On 7 November 2005, a second application by the first Defendant was made to the Court to join Dr. O'Brien as a third party. Also on that date, it was known that the Plaintiff would apply to court to have Dr. O'Brien joined as a co-Defendant.

7. In light of this latter information, the application to join Dr. O'Brien by the first Defendant as a third party was abandoned, but on that occasion, Dr. O'Brien's counsel was in court, and applied for and got costs. On that day also, I am told, counsel for Dr. O'Brien was not served with any documents in relation to the Plaintiff's application to have him joined as a co-Defendant, was not informed of the application, was not aware of it and played no role in the matter. The order then was made by Johnson J. on that date, and it is against that or in respect of that order that this instant application is now being made.

8. It is clear from this recital of the information relayed to me that no arguments were made to Johnson J. on 7 November 2005 concerning the delay in joining the fourth Defendant. Dr. O'Brien was only informed that he had been joined as a co-Defendant therefore after the order was made and he has told me through his counsel that he was aware in 2004 that there was a possibility that he would be sought to be joined as a third party in the earlier motions. That information came to him therefore some 12 years after the operation. He has no recollection of his own involvement with the Plaintiff and his treatment, although he does recall the Plaintiff himself because the Plaintiff had a long stay in the hospital, and in fact Dr. O'Brien wrote a report when in the Plaintiff was discharged to the rehabilitation centre in Dun Laoghaire, which happened in mid-June of 1993; that is some 14 months after the operation.

9. In an affidavit sworn to oppose the instant application, Paul Carlos, solicitor for the Plaintiff, quotes from another affidavit sworn by Ms. Aisling Gannon, who was a solicitor for the first Defendant. That affidavit in turn was sworn to ground the first Defendant's application to have Dr. O'Brien joined as a third party. In that quoted affidavit the deponent says that both the second and fourth Defendants were indemnified by the Medical Defence Union, and refers to communications from those with the second Defendant, in regard to who would be representing the interests of Dr. O'Brien, which Ms. Gannon appears to have said in her affidavit dated 'as far back as 25 June 2004'. She also refers to an agreement between insurers. In her affidavit Ms. Gannon further says 'The MDU had been aware of the involvement of Dr. O'Brien and any issues as arise for him, we believe, since the date proceedings were issued, namely the 13th day of July 1995.' The fact remains, however, that the first time that Dr. O'Brien was himself personally made aware that he was likely to have an involvement as a party in the proceedings was, I am informed, in 2004. It further remains a fact and I accept that he has no recollection of his part in the Plaintiff's treatment.

10. The first issue that I have to decide is whether I have jurisdiction to deal with this application at all. Mr. Maher, senior counsel for the Plaintiff says that this application is misconceived. He refers to Order 15, Rule 14, which is a short rule and I quote it: 'Any application to add or strike out or substitute a Plaintiff or Defendant, may be made to the Court at any time before trial by motion or at the trial of the action in a summary manner.' That rule, he says, is linked to the preceding Rule 13 and these rules are really concerned with the simple joinder and non-joinder of parties and, he says, and do not cover the instant application. Both counsel agree that there is no rule precisely in point, which might be analogous, perhaps, to order 8 Rule 2, which specifically provides for the setting aside by the Court of an order renewing a summons.

11. Mr. Maher further says that the proper method of attack by Dr. O'Brien on the order of Johnson J. would be to appeal it to the Supreme Court. He says that it is inappropriate that a judge of coordinate jurisdiction should be asked effectively to reverse the decision of another judge in the High Court.

12. Mr. Fitzgerald, senior counsel, submits on the contrary that the Court has jurisdiction to administer its own procedure, and in that

regard quotes from the judgment of Hamilton CJ in *Primar PLC & Others -v- Freeley & Others*, reported in 1996, Volume 2, IR 459, from page 475, where the learned Chief Justice says, 'The Courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so.'

13. Secondly, he submits that his client was not a party to the decision of Johnson J. and therefore was not in a position to appeal the matter to the Supreme Court.

14. Thirdly, counsel submits that the Supreme Court would not deal, as it has made clear on a number of occasions, with arguments made to it for the first time. From the recital of facts earlier, it is clear that arguments in relation to delay in the context of the challenged order, were not made.

15. My conclusion on the first issue is that I do have jurisdiction. The Courts, I agree, are masters of their own procedure and have an inherent jurisdiction, even if the statutory period limited for the bringing of an action has not yet run, to dismiss a claim against a proposed Defendant where justice requires it. I refer specifically to *Toal -v- Duignan (No.2)* reported in 1991, ILR Monthly, at page 140.

16. The procedure of the Supreme Court would not, I think, readily accommodate the first time entry at that level by a party such as Dr. O'Brien in this case. I think that the High Court can, where appropriate, effectively set aside an order of a court of coordinate jurisdiction and an example is specifically available in Order 8, Rule 2, to which I have already referred. It may be, but I doubt it, that Order 15,Rule 13 covers the instant application but if it does not, I am convinced that the application can and should be made to this Court in the first instance and that this Court as a matter of inherent jurisdiction, does have jurisdiction to deal with it.

17. Having suggested that that might be my conclusion to Mr. Maher, I, in the course of the hearing, offered him an opportunity if he felt that he was taken short by the fact that the notice of motion does not refer to the inherent jurisdiction of the Court, and that if that meant that his client was taken short, that I would be prepared to consider, not necessarily to grant, but to consider an application for an adjournment. Mr. Maher declined that particular offer.

18. With regard to the main issue in the application, I would also refer initially to the Primar decision and to the principles enunciated by the Chief Justice in that case, a number of which are relevant as follows: The Chief Justice said, 'It must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution, on the ground that delay in the prosecution thereof, that the delay was inordinate and inexcusable.'

19. Secondly, he said, 'even where the delay has been both inordinate and inexcusable, the Court must exercise a judgment on whether in its discretion on the facts, the balance of justice is in favour of or against the proceeding of the case.' In considering that, he said, *'Inter alia*, the Court would have regard to whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the Defendant to allow the action to proceed and to make it just to strike out the Plaintiff's action.' He said further, 'The Court will consider whether the delay gives rise to a substantial risk, that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the Defendant.' And finally the court will have regard to 'the fact that the prejudice to the Defendant referred to above may arise in many ways and be other than merely caused by the delay, including damage to the Defendant's reputation and business.'

20. Clearly in my opinion, the delay between April 1992 and 2004, which was the earliest point in time when Dr. O'Brien was personally made aware of his potential involvement in the case as a party, that delay was inordinate. It is four times the usual statutory limitation period, and in fact Dr. O'Brien, not surprisingly, has no recollection whatsoever of his involvement in the Plaintiff's treatment. As I have already indicated, if the statutory period has not run, there is nonetheless inherent jurisdiction, as has been clarified particularly by the judgment of Chief Justice Finlay in *Toal -v- Duignan (2)*; the principal ratio being that if the Court had no jurisdiction where the statutory period had not run, it would seem to amount to an improper assumption by the law making authority of the proper jurisdiction of the Courts. The question then arises whether the delay is excusable. The excuse advanced on affidavit seems more to suggest that Dr. O'Brien is to be joined for his benefit, so that he can answer criticisms to be made against him. He has, through his counsel here, declined this facility. Mr. Maher, senior counsel, submitted more cogently, I would think, in argument, the onus of showing inexcusability rests on the Applicant. He said, in fact, that the Plaintiff only became aware that the words, 'low pain threshold' were to be attributed to Dr. O'Brien when the Plaintiff's solicitor read the affidavit of Aisling Gannon, which was sworn in July 2005 and could not reasonably be expected to have initiated proceedings against Dr. O'Brien before then. Moreover he submitted that the Plaintiff is incommunicado and cannot therefore be subject to any blame for delay.

21. In response, Ms. Egan said that the case against Dr. O'Brien is much wider than the element resting on the alleged attribution to him of the words 'low pain threshold', and all relevant information in regard to that case were available in the documentation to the plaintiff from the beginning. She refers to such words as "obvious" and "evident" in the nurses notes, which were also available to the Plaintiff from the commencement. Moreover the attribution of the words 'low pain threshold' could have been explored, if necessary, from the beginning, if (what she doubted) it was so central to the Plaintiff's case against Dr. O'Brien.

22. Concerning the suggestion which is made in general terms and in terms of her belief in the affidavit of Aisling Gannon, that the MDU were aware since 1995 of Dr. O'Brien's involvement and all issues relating to him, she submitted that there is a world of difference between an insurance company being so aware, if that is true, and him being personally apprised of the information that he is to be made a party. It is only when individuals become aware of their exposure as parties, that memories will crystallise and this only happened, as I said, in 2004.

My conclusion is

23. I am not impressed with such attempts as are made in the affidavits to excuse or explain the delay involving Dr. O'Brien. The medical records, which were available from the beginning, show the nurses brought their concerns to the attention of Dr. O'Brien. Aisling Gannon's affidavit, if I am to rely on it, says, 'It is obvious from available medical and nursing records that there was a deterioration in the Plaintiff's condition post-operatively, and that it is evident from the nursing notes that the deterioration was brought to the attention of Dr. O'Brien, who appears to have underestimated their significance.' The reference to 'low pain threshold' is then suggested as an example. Neither the author of the note nor Aisling Gannon says upon what basis that remark is attributable to Dr. O'Brien.

24. In my opinion the delay in proceeding against Dr. O'Brien in this case is both inordinate and inexcusable. On the authority referred to, I must now therefore consider whether the balance of justice favours the case proceeding against him.

25. From the point of view of Dr. O'Brien, I have no doubt that there would be very significant prejudice if that happens. He has simply no recollection of his involvement in the Plaintiff's treatment. He cannot in any way respond to a suggestion that he was slow

off the mark in coming from the A&E, or that it was in fact he who used the words 'low pain threshold' in relation to the Plaintiff and if so, in what context. Nor can he, from his memory, say anything at all about the surrounding circumstances or the role of the other personnel involved at the time. He would therefore be denied both his right to give evidence from his own recollection and, to a large extent, his right to cross-examine. Furthermore, there is nothing in his conduct to show that he should take responsibility for any of this.

26. From the point of view of the Plaintiff, if it does transpire that a court can be satisfied that Dr. O'Brien is in some way legally responsible for his injury, *prima facie* (and I accept that this point has not been conceded by the Plaintiff) the first Defendant as employer of Dr. O'Brien, would be accountable. Furthermore, other Defendants have been joined, including the consultant surgeon in charge of the Plaintiff and the doctor who carried out the operation, each of whom appears to be insured.

27. In my opinion therefore, the balance of justice favours the discontinuance of the action against Dr. O'Brien and I will make an order striking him out as a Defendant in the proceedings.

That concludes the judgment.