

THE HIGH COURT

[2005 No. 420P]

BETWEEN

MARTIN MURRAY

PLAINTIFF

AND

CONAN P. BUDDS AND ANTHONY T. HANAHOE, TERENCE HANAHOE AND MICHAEL E. HANAHOE, TRADING AS MICHAEL E. HANAHOE, SOLICITORS

DEFENDANTS

Judgment of Ms. Justice Clark delivered on the 23rd day of November, 2010.

1. On the 2nd February, 2005, the plaintiff issued a plenary summons claiming damages for loss of his liberty, financial losses and expenses incurred by him as a result of negligence and breach of duty; including breach of statutory duty on the part of the defendants, their servants or agents, arising out of the provision of legal services and advices furnished to him within the last six years, more especially in the preparation and conduct of his criminal trial at Naas Circuit Court on or about the 10th February, 1999. Further and/or in the alternative, the plaintiff claims damages for breach of contract.

2. In his statement of claim which was delivered on the 12th June, 2006, having first claimed that the first defendant was at all material times employed in the practice of the other defendants, the plaintiff admitted that:

- (a) he had been arrested by Gardaí on the road from Dublin to Naas around October, 1996 in possession of a large quantity of drugs;
- (b) his trial occurred on the 10th and 11th February, 1999, at Naas before his Honour Judge Groarke and the jury;
- (c) he was convicted and sentenced to seven years imprisonment which he then served; and
- (d) he failed with an appeal to the Court of Criminal Appeal in May, 2000 and in June, 2000 to the same Court under the Criminal Procedure Act 1993.

3. The plaintiff then pleaded very specific facts against the defendants which were alleged to constitute breach of contract on the part of the solicitors, which exposed him to undue risks in his criminal trial and it was alleged ultimately led to his conviction. The main thrust of the allegations was that the defendants failed to instruct counsel properly or adequately and retained counsel only on the night of the trial, that they failed to have an advice on proofs or adequate and full directions regarding the conduct of the case when the facts should have created an awareness that conviction would result in a lengthy sentence. Further details were furnished relating to the actual conduct of the defendants during the trial

5. It was asserted that the plaintiff had spent just over five years in jail after remission and that the plaintiff believed himself to be innocent and suffered great mental distress and trauma as a result of imprisonment as well as loss of a normal family life. He pleaded damages for breach of contract and negligence, interest and costs.

6. The defendants filed a full defence on the 31st October, 2006, and pleaded the statute of limitations and delay. In the alternative they asserted that if the plaintiff has a cause of action such action is an abuse of the process of court in that it constitutes a collateral attack on the judgment of the Court of Criminal Appeal in the proceedings entitled "*In the matter of section 2 of the Criminal Procedure Act 1993 the People (at the suit of the Director of Public Prosecutions) v. Martin Murray* (Unreported, Court of Criminal Appeal, 11th April, 2005) or that the proceedings represented duplicitous use of process. They pleaded issue estoppel, and that the statement of claim was frivolous and vexatious, such that it should be dismissed as an abuse of process. The defendants particularly relied on the plaintiff's admission that he had been arrested in possession of a large quantity of drugs prior to the events complained of. The defendants then went on to deny each and every allegation of negligence or breach of contract or what were stated to be facts relating to them as outlined in the statement of claim.

6. Following on from that defence, the defendants brought a motion to strike out the proceedings on two grounds:

- (1) That the proceedings constituted an impermissible collateral challenge to the decision of the Court of Criminal Appeal and, in particular, that of Mr. Justice Geoghegan;
- (2) That the plaintiffs claim for personal injuries was statute-barred.

7. The heavily contested motion came before me at special sittings of the High Court, sitting in Nenagh Courthouse on the 15th and 16th December, 2008. The hearing established that the first defendant, Conan Budds, is a solicitor and a partner in Hanahoe & Co. in Dublin. Mr. Budds consented to act for Martin Murray under the criminal legal aid scheme in a trial where Mr. Murray was charged with possession of drugs. At the end of the trial the plaintiff was convicted by a jury of the offences with which he was charged and he was sentenced to seven years in prison. Following his conviction he appealed the sentence and conviction without success.

8. After a period of time and while serving his sentence he engaged his current solicitors who then commenced proceedings before the Court of Criminal Appeal for a declaration that the conviction should be set aside and a retrial ordered on the basis that the trial involved a miscarriage of justice due to the inadequacy of representation. The case was made that there had been a last minute change of counsel and that the newly engaged counsel was unfamiliar with the case. This application also failed and a written decision from Mr. Justice Geoghegan, who presided over the appeal, was furnished to me. The claim made by Mr. Murray was found to be unstateable.

10. Having heard submissions from both parties, I indicated that the proceedings as constituted did indeed represent an impermissible collateral challenge to a decision of the Court of Criminal Appeal and that the application would succeed on that ground. However, I recommended that if the plaintiff confined his claim to the alleged upset claimed for the short period before the trial when he became aware that his original counsel with whom he was familiar would not be available to represent him at the trial, and that no substitute senior counsel had been located or briefed, then he might possibly have a claim, but that the claim as constituted would fail. I also expressed doubt as to the propriety of commencing a negligence action against a professional without first obtaining an independent opinion from an expert in the area stating that the actions of the solicitor in question fell below the expected professional standard in such circumstances. The Court expressed its understanding that a practice direction to this effect existed.

11. The motion was then adjourned to allow the plaintiff/applicant an opportunity to consider his position and reflect on whether he proposed to amend his proceedings to reflect this finding. If so, then he was permitted until the 12th January, 2009, to bring his motion to amend which would be listed for hearing on the 26th January, 2009. In making that suggestion, it was made clear to the plaintiff/applicant that any amendment which he would consider bringing would be without prejudice to the defendants' right to oppose that amendment on the basis that it was statute barred or was prejudicial to his position.

12. The plaintiff/applicant sought to amend the proceedings. The amendment sought was more extensive than had been originally discussed but before any further steps were taken the defendants/respondents brought another motion to strike out the proceedings this time on the basis that they were an abuse of process on grounds that they had been commenced without first obtaining the opinion of an independent expert in relation to whether professional negligence had been established on a *prima facie* basis.

13. The motion came on before Charleton J. in April, 2009 who ordered that the proceedings would be struck out on the basis of the matters argued. The plaintiff then sought a stay on the High Court order made by Charleton J. so that he could consider an appeal to the Supreme Court. Twenty-two days after the striking out order by Charleton J. the defendant appeared before me and sought to have the motions originally part heard before me struck out. In the belief that the proceedings had been struck out by Charleton J. and that the extant motions were affected by that order in that they were now redundant, I acceded to the request for an order striking out those motions on the 13th May, 2009.

13. Subsequently, the matters were re-listed before me and the plaintiff argued that he had been taken by surprise by the application to strike out the motions in that he had been unaware of the application and at all times had formed the intention to appeal the order of Charleton J.. The Court was informed that an application had been made to the Supreme Court to extend the time for the bringing of the appeal and that the Supreme Court had granted such extension and had further directed that the part heard motions should be returned to this Court and that the order striking out the motions should be vacated.

14. Finally, on the 21st April, 2010, those motions were listed before me together with the motion to amend the pleadings. The proposed amendment "*loss and damage in the week of the 3rd to the 10th February 1999 as a result of the defendants negligence and breach of duty*". The particulars of loss and damage are stated in the following terms: - "*The plaintiff was exposed to the worry and stress that he might suffer both a loss of liberty and livelihood arising from the uncertain position where he found himself in the criminal justice system facing an imminent trial, all of which constituted an invasion of his constitutional right to fairness and justice*"

15. Mr. Murphy, counsel on behalf of the plaintiff, indicated that his client's claim essentially is that he was "messed about" between the 3rd and the 10th January, 1999, and that he no longer seeks any relief relating to the conduct of his trial or for his conviction and subsequent deprivation of liberty. He accepts the ruling of the Court that these claims constituted an impermissible collateral attack on a decision of the Court of Criminal Appeal. He argues this more limited claim is not a new claim but rather a modification of the original claim outlined in the plenary summons which was issued and served on the 2nd February, 2005, within six years of the events complained of. He claims no out of pocket expenses but seeks damages for the mental distress suffered by the alleged professional negligence/breach of contract of the defendant.

16. However, the pleadings as read do not reflect any such acceptance of the ruling. All the originally recited allegations for breach of contract and negligence remain in an unaltered condition and the claim for worry and stress is based on an asserted constitutional right to fairness and justice. The defendants oppose any amendment on the basis that the claim for personal injuries is statute-barred and that the plaintiff has attempted to reformulate his limited claim as a constitutional tort to circumvent the provisions of the Statute of Limitations Act 1957, as amended. Such an amendment would prejudice their position

17. The Court has a wide discretion pursuant to Order 28 of the Rules of the Superior Courts 1986, to amend or alter pleadings to do justice between the parties and to determine the real questions in controversy between the parties. It seems to this Court that it is now clear that the only issue in controversy between the parties is the issue of mental distress and upset alleged to have been suffered by the plaintiff in the period between when he was made aware that his expected counsel would not be available to represent him or to have a further consultation with him and his trial which was listed for a week later. He alleges that during that week he was 'messed about'. This is not a collateral attack on the decision of Court of Criminal Appeal to the effect that the trial was fair and that the plaintiff was adequately represented but rather recites the ingredients - subject to proof- of a claim for negligence and breach of contract. It is no function of this Court to determine the merits of that claim. That function falls to another judge. The claim the plaintiff makes is that due to the lack of communication with his legal representative he suffered distress during the period that he was in limbo when he had no idea who would represent him at his forthcoming trial. The issue will be whether this constitutes professional negligence and breach of contract.

18. It is now established that in certain circumstances where a contract has been established, the negligence of a solicitor in the performance of that contract to provide professional services can ground a claim for distress provided that the claim passes the test of foreseeability. See *Hamilton-Jones v. David & Snape (a firm)* [2004] 1 W.L.R. 924; *Farley v. Skinner* [2002] 2 A.C. 732; *Heywood v. Wellers* [1976] Q.B. 446 or that damages for distress can arise from breach of contract since *Jarvis v. Swan Tours Ltd* [1973] 1 Q.B. 233. See also, *Hussey v Dillon & Others* [1995] 1 I.R. 111.

19. It is not, however, open to the plaintiff to plead an ill defined constitutional tort in the manner sought or indeed at all at this stage of the proceedings. The issue of whether a plaintiff on the facts of this case or indeed at all, can plead a constitutional tort against an individual rather than an organ of the State is not one which falls to be determined in this case. The Court adopts the dictum of Barrington J. in *McDonnell v. Ireland* [1998] 1 I.R. 134 at p.148 when he said:-

"... constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules. If the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different cause of action."

20. In all the circumstances, I do not believe that it is appropriate for the plaintiff to be permitted to ground his claim for worry and

stress in the guise of a constitutional tort. If he has a cause of action it lies in the perfectly well recognised tort of professional negligence. I am prepared to allow a limited amendment to determine the real questions in controversy between the parties which is confined to a claim for *"loss and damage in the week of the 3rd to the 10th February 1999 as a result of the defendants negligence and breach of duty"*. Particulars of loss and damage: - *"The plaintiff was exposed to the worry and stress from the uncertain position where he found himself in the criminal justice system facing an imminent trial without knowing who his counsel would be."*

21. While the defendants seek to resist any amendment to the proceedings on the basis of the provisions of the Statute of Limitation (Amendment) Act 1991, in particular, section 3(1), as amended, and further seek to have the proceedings struck out on that basis, the Court will not accede to that motion as to do so would deprive the plaintiff of any opportunity to pursue his asserted and now limited grievance. Courts must be slow to use their inherent power to strike out proceedings in their entirety unless it is clearly evident that the claim is unsustainable or bound to fail. Mindful of that restraint on the power to strike out proceedings, the limited amendment will be allowed with costs but the costs of the application will be in favour of the defendants. The issue of the application of the statute of limitations will be one to be determined by the trial judge.

22. For the sake of completeness, I should reiterate that all parts of the claim which relate to the conduct of the trial and the verdict of the jury are struck out for being an abuse of process in that they constitute a collateral attack on a previous decision of the Court of Criminal Appeal. I propose to make no order for costs in the first application to strike out the proceedings.