Neutral Citation: [2013] IEHC 462

THE HIGH COURT

[2010 No. 11346 P.]

BETWEEN

NEIL REIDY AND ELIZABETH REIDY

PLAINTIFFS

AND

ERIC H.W. BRADSHAW PRACTISING UNDER THE STYLE AND TITLE OF W. & E. BRADSHAW SOLICITORS

DEFENDANT

AND

JOHN A. SINNOT AND COMPANY

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered on 22nd day of October, 2013

1. The issue ordered to be tried before me has now resolved itself down to one question;

> was the settlement agreed herein on 7th May, 2013, such that the amount of €60,000 to be paid by the defendants to the plaintiffs was to be divided as between the plaintiffs in the amount of €35,000 and their solicitors, John A. Sinnot and Company, notice party herein, as per my order of today's date, in the amount of €25,000 towards legal costs and outlay.

2. It is clear from the evidence that the plaintiff's legal advisers on the day of the hearing were very concerned as to the prospect of success. Almost all of the case seemed clearly statute barred and it appeared chat fraudulent concealment was the only part likely to survive. The chances of success on that remaining element were considered to be limited - the risk of complete loss of the case was thought high.

3. The legal advisers for the defendant, according to their senior counsel, Mr. Ó Brolcháin were reluctant to make any offer because of the allegation of fraud against a firm of solicitors. I am told that because of the risk of irrecoverable costs of defending a five day case in the non-jury list, it was finally determined that an offer of an all in sum might be made. This was, however, conditional upon a dismissal of the action because of the allegation of fraud.

4. The evidence is that an all in sum of €50,000 was offered by the defendant to the plaintiffs. This was understood by the legal advisers, including senior counsel on both sides, to be on the basis of a split of €25,000 in respect of costs and outlay to the solicitors and €25,000 in damages for the plaintiffs.

5. This offer was conveyed to the plaintiffs. Here the evidence starts to conflict. The plaintiffs say that the proposal of providing €25,000 for costs out of the full sum was mentioned and was emphatically rejected by them. They say they insisted they wished the costs to be taxed.

6. The initial offer was rejected and the parties proceeded into court. A final offer was made by senior counsel for the defendants. He stated in evidence that senior counsel for the plaintiff told him that the problem was not with the costs amount but with the €25,000 to be allowed to the plaintiffs. If this amount could be increased, a settlement might be made. Mr. Ó Brolcháin obtained instructions to offer €10,000 more.

7. The evidence of Mr. Counihan, senior counsel and his solicitor was that, following brief discussion, this new figure of €60,000 was agreed. He further stated in evidence that he had no doubt that Mr. Reidy, the first plaintiff who was speaking for both, understood fully. Mr. Counihan recollects little of discussion about the breakdown. The real discussion, he recollected involved the amount in damages. He stated the plaintiffs were quite clear on what they were going to get. The plaintiff emphatically rejected this.

8. The conflict of evidence is complete on this point. It is therefore to other aspects of the case that the court must look in order to resolve this dispute. In this regard, the following seemed relevant to me.

> (i) In his initial letter of engagement dated 1st December, 2010, Mr. Murphy of Sinnot's Solicitors warned that costs of the action could be in the vicinity of €83,000. These would be just the plaintiff's own costs. The plaintiff was warned that in the event of loss, they could be liable for the defendant's costs as well. It is highly probable the costs would have exceeded the approximately 32,000 Euro made of amounts paid on account and the 25,000 Euro.
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> (ii) The offer that was made was indisputably an all in offer.
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> (iii) There is nothing unusual in a settlement being of such a nature. It is basic commonsense on the part of legal advisers at such a time to explain clearly that a certain portion of the amount being offered is for damages and the rest is for costs. Basic competence demands that the details of this are spelled out clearly for the plaintiff.
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> (iv) To proceed with the settlement of an all in figure in the teeth of the plaintiff's explicit refusal to accept that any part of the lump sum offered should be divided for costs would be foolishness of the highest order on the part of the legal advisers as well as being a grave breach of their professional obligations. It is highly improbable they did not do so.
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> (v) The solicitor for the plaintiff immediately following the agreement on the settlement phoned his office and dictated a letter stating clearly what the terms of the settlement were. This letter was then sent to the plaintiffs by email and by post and also to the solicitors for the defendant. Mr. Murphy describes this as the "drop dead" letter. This letter dated

7th May, 2013, states quite clearly that the sum of €60,000 is to be divided into €25,000 costs and €35,000 for damages. It also states that the €25,000 is in addition to the amount already paid by the plaintiff to the solicitors on account.

> According to the plaintiff - upon seeing this email when he returned home from court on 7th May, 2013, he tried to send an email disputing that the plaintiffs had agreed to the solicitor's costs being taken out of the settlement. In this email/letter, the plaintiffs demanded a bill of costs in order to refer it to taxation. They also stated the settlement was made under duress. The plaintiff says this email failed to send and he subsequently sent it by post to the solicitors. The solicitors say they never received either such a letter or such an email.
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> This email/letter seems to sit rather incongruously with the number of emails, seven in all, exchanged between the plaintiff and the solicitors after 7th May, 2013, in which no hint of dispute is raised.
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> The letter to the plaintiffs from the solicitors dated 10th May, 2013, is clearly predicated on the basis that all is well and no dispute exists. It is only on 13th May that, other than the alleged email/letter of 7th May, 2013, the plaintiffs first claimed that the settlement reached was made under duress and demanded a bill of costs.
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> Was this email/letter of 7th May really sent? I note no reference is made in either of the two letters sent on 13th May, 2013, by the plaintiffs to the alleged email/letter. There is no other incidents alleged of either emails or posts failing to send or be received. On this exact point, Mr. Lanigan O'Keeffe pressed Mr. Reidy to explain this apparent contradiction. Mr. Reidy's answer was evasive - he talked of other matters. In case he was being inadvertently evasive, I interrupted. I explained how important this question was to his credibility and urged him to address the question directly. His answer to me was equally evasive. He failed entirely to provide any explanation for the clear contradiction implicit in these pre 13th May emails and letter.
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> In my judgment, on the balance of probabilities, this alleged email letter was concocted after the events. I do not believe that it or a postal copy of it was ever sent to the solicitors.

(vi) In consequence of this finding, the high probability is that, for reasons unknown, having accepted the terms of settlement outlined in the solicitor's letter of 7th May, 2013, however reluctantly, the plaintiffs six days later thought better of it and decided to foreswear the terms, notably in relation to costs. In the light of my finding in relation to the alleged email/letter dated 7th May, 2013, the credibility of the plaintiff as a witness is gravely undermined. Thus, in relation to the conflict of evidence as to what was discussed at the time of settlement, the court is driven to conclude that the accounts given by Mr. Murphy, Solicitor; Mr. Counihan, Senior Counsel; Mr. Ó Brolchain, Senior Counsel; and Ms. Clarke, Solicitor are a true and accurate account of the settlement negotiations on 7th May, 2013. Thus the court 's decision on the issue raised is that the sum paid of €60,000 was to be divided out in the proportions of €25,000 and €35,000 and that this was agreed by the plaintiffs at the time. As to the points raised concerning s. 68(3) of the Solicitors Act 1994, and s. 4 of the Attorneys and Solicitors Remuneration Act 1870, I hold that the amount of €60,000 was not proffered as damages but as an all in sum comprising both a sum for damages and a sum for agreed costs. Thus, s. 3 of the 1994 Act does not arise nor ss. 4 or 5 either. As to the 1870 Act, the plaintiffs' solicitors did in fact make such an agreement in writing with the plaintiff dated 1st December, 2010.