Neutral Citation: [2015] IEHC 675

THE HIGH COURT

Record No. 2015/596P

BETWEEN:-

RIZWAN ASLAM MUGHAL

Plaintiff

- and -

NADIR SHER

Defendant

Judgment of Ms. Justice Murphy delivered the 27th day of October, 2015

1. The plaintiff in this case seeks the sum of €228,815.72 in damages. He also seeks a declaration from the Court that he is entitled to 50% partnership in a medical practice known as the Walk in Clinic in Dooradoyle, Limerick and to 50% of the sums due to the medical practice, the subject matter of the now agreed partnership, from the HSE.

2. The plaintiff's claim for a declaration of a 50/50 partnership in the medical practice operated by the parties in Dooradoyle ran for four days before this Court in March 2015. During that hearing the defendant vigourously denied the existence of a partnership and maintained that the plaintiff was simply someone who worked in the practice. In the course of the hearing the defendant denied that he had signed a partnership agreement produced to the Court by the plaintiff. Following the hearing, the defendant, by letter dated 13th April, 2015, conceded the existence of a 50/50 partnership. Had he not done so the Court would have had no hesitation in finding that such a partnership existed. On every issue in dispute, the Court preferred the cogent and coherent evidence presented by the plaintiff, to the rather evasive and self-serving evidence offered by the defendant personally. It remains for the Court to determine what sums are now due to the plaintiff. The Court acknowledges the work done by the parties' accountants in an effort to narrow the areas of dispute. The plaintiff sets out his position on the basis of a 50/50 partnership. The income to the partnership practice arose from two streams; cash payments and HSE payments. The work shifts in the practice were divided into fourteen equal shifts per week. Both cash payments and Special Type Consultation (STC) payments from the HSE were allotted to the parties depending on the doctor rostered on each particular shift. Non-STC HSE payments were to be split 50/50 between the parties. The plaintiff acknowledged in his evidence that he had agreed that Dr. Huma Sikander, the defendant's wife, could complete one shift a week. As such, the shift allowed to Dr. Sikander represents 1/14th of the shifts available or 7.14%. of the total. This would entitle the plaintiff and the defendant to shares of 46.43% each. Therefore the plaintiff has submitted calculations based on a 46.4% share in the practice income.

Locum Profit

3. The plaintiff contends that had he been recognised as a partner he could have hired a locum to replace him while he was ill. This would have cost the plaintiff €50 per hour or €300 per 6 hour shift. The sum of €7,943.00 has been agreed by the parties for the plaintiff's loss of locum profits from the period between 16th September, 2014 and 5th December, 2014, the period when it is agreed that the plaintiff was unfit to work. That represents €722 per week of absence.

HSE Payments

4. The plaintiff contends that he is entitled to a 46.4% profit of the HSE payments to the practice on the basis of the agreement between the plaintiff and the defendant relating to the allocation of one shift per week to Dr. Sikander. The defendant contends that the course of conduct between the plaintiff and the defendant allowed for each doctor who carried out HSE/GMS work to recover payment for it, notwithstanding the 50/50 partnership. On that basis, the defendant argues that a 41% breakdown applies.

2013

5. In 2013 the practice received €250,156.80 from the HSE. If the plaintiff's percentage is accepted the plaintiff is entitled to €116,072.80 for the year 2013. The 41% breakdown, which the defendant contends is applicable, would entitle the plaintiff to an apportionment in the amount of €102,564.29.

2014

6. The HSE monies due to the practice for the year 2014 amount to €177,021.61. 46.4% of this amount is €82,138.03. A 41% apportionment would entitle the plaintiff to €72,578.86.

7. However, the defendant further submits that even if the 46.4% breakdown applies, there is still a deduction to be made for the year 2014, to take into account that the plaintiff did not do HSE work for at least 11 weeks in that year on account of his TB condition. The defendant claims that since he has acknowledged that the plaintiff is entitled to recover for the loss of locum profit during that period, it would amount to unjust enrichment for the plaintiff to recover for HSE work done. Therefore the defendant submits that a figure of €49,566.05 should be the figure owed to the plaintiff as this figure represents the work actually done by the plaintiff in 2014. In the alternative, the defendant argues that the Court should deduct 11/52ths from the 46.4% apportionment to account for the missing 11 weeks. This would entitle the plaintiff to €64,762.67.

Loss of HSE earnings from 1st January 2015 to 10th May 2015

8. Between 1st January, 2015 and 10th May, 2015 it is agreed between the parties that the defendant received €38,934.00 from the HSE. The plaintiff claims 46.4% of this i.e. €18,065.00. The defendant submits that the plaintiff is entitled to 41% only i.e. €15,963.00.

Total HSE loss

9. The plaintiff acknowledges having received €75,403.06 of the HSE monies due and owing to him and this is therefore factored into the amounts argued for on both sides. The plaintiff's case therefore is that he is due €140,872.72 in unpaid HSE monies on the basis of a 46.4% breakdown. The defendant submits that the plaintiff is owed €92,690.34 on the basis of a 41% breakdown. This figure accounts for the deduction of the €75,403.06 which has already been paid to the plaintiff. The defendant further submits that, if a

46.4% breakdown is upheld by the Court that the plaintiff is due €123.452.84, on the basis of an 11/52ths deduction for his absence in 2014.

Loss of HSE earnings outstanding as at 31st December, 2014
10. The defendant appears to be in a dispute with the HSE regarding HSE payments. The plaintiff submits that his understanding is that the HSE are withholding large sums of money due to the practice however he states that he has not been provided with any documentation regarding the dispute with the HSE with the exception of a letter. The plaintiff submits that his award in respect of this category of loss should be contained within two distinct and direct orders. He submits therefore that the Court should make a declaration that the plaintiff has a 50% interest in the sums due from the HSE to the practice and in addition, that the Court should grant an injunction restraining the defendant from recovering any part of the payment due from the HSE without the consent of the plaintiff.

Loss of Cash Earnings
11. Around June 2014 the plaintiff became ill, suffering from an intermittent cough, sore throat and hoarseness. The plaintiff believed he was suffering from the same illness from which his wife had suffered some weeks earlier. On 16th September, 2014, the plaintiff was medically advised to stop working because he might have tuberculosis, which was confirmed on 18th September, 2014.

12. The plaintiff claimed that by letter dated 6th November, 2014, the defendant's solicitors made the following malicious and injurious assertions about the plaintiff:

> (i) that it had belatedly come to the defendant's attention that the plaintiff was suffering from TB;
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> (ii) that the defendant had grave concerns about the way in which the plaintiff had dealt with the matter;
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> (iii) that the plaintiff had neglected to inform her client, the staff of the practice or the HSE of his concerns;
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> (iv) that the plaintiff's failure to inform the defendant in a timely fashion that he had or may have exposed the defendant, the staff, their associates and families to TB;
>
> (v) that the plaintiff needlessly exposed the patients of the practice;
>
> (vi) that due to the defendant's concerns and the concerns of staff and their families, the defendant intended to review the plaintiff's "locum position" at the end of January 2015, and that in the interim it was not appropriate for the plaintiff to attend the clinic.

13. The plaintiff claims that this letter was written for the purpose, *inter alia*, of ousting the plaintiff from the practice in which he was a partner.

14. On 5th December, 2014, the plaintiff's treating doctor, Dr Brian Casserly, Respiratory Consultant for University Hospital Limerick, certified the plaintiff fit to return to work. The plaintiff immediately informed the defendant and the practice manager but no response was received. The plaintiff returned to work in the practice on 11th May, 2015.

15. The locum fees agreed between the parties cover the plaintiff's absence between 16th September, 2014 and 5th December, 2014, following his TB diagnosis. However the plaintiff was absent from the practice for a further 22 week period between 6th December, 2014 and 10th May, 2014. It is agreed between the parties that the amount of private income that could have been earned in that 22 week period was €80,000. The plaintiff contends that he is entitled to the entire sum of €80,000 on the basis that he could have returned to work on 6th December, 2014 but did not return until 11th May, 2015. The defendant contends both that the plaintiff was not in a position to return on 6th December, 2014 and that he was in a position to return long before 11th May, 2015.

16. The defendant accepts that the plaintiff could have physically worked as a doctor from 6th December, 2014, but notes that the certificate provided on the plaintiff's behalf required the plaintiff to take the precaution of wearing a surgical mask in the presence of immune-compromised patients. The defendant submits that this qualification was of enormous significance in the context of a walk-in medical practice where the medical history of many patients would not be known in advance. The defendant further notes that it was accepted by the plaintiff's own witness that a TB condition is a very serious condition for a doctor. Therefore the defendant submits that having the plaintiff return to work in the medical practice whilst the surgical mask qualification was still in being was too great a risk to run and the presence of a mask on a doctor would give rise to questions from patients with consequent risk to the reputation of the practice.

17. The defendant also notes that on the second or third day of the trial, i.e. 27th March, 2015 or 30th March, 2015, the defendant accepted that the plaintiff was able to return to work in the practice and made it clear that he had no objection to this. The defendant had retained an occupational health doctor, Dr. Madden, to give an opinion on the TB issue, and his report issued immediately prior to the trial. The report indicated that Dr. Madden required some further clarification before giving the all-clear. This was obtained during the trial and the defendant then accepted that the plaintiff was able to return to work.

18. The defendant submits in the alternative that in his letter of 13th April, 2015, he accepted the existence of the partnership and invited suggestions as to the plaintiff's return to work. The defendant submits that the plaintiff could have immediately returned thereafter but did not seek to do so. The defendant states that the plaintiff unilaterally decided to return to work on 11th May, 2015, which was not a date set by the defendant.

19. As such, the defendant submits that the 22 week period sought by the plaintiff is a wholly unreasonable one and that it would be invidious for the defendant to have to pay the plaintiff for work done by other doctors during this 22 week period.

Total Amounts
20. The plaintiff seeks a sum of €7,943 in respect of loss of imputed locum profits from 16th September, 2014 to 5th December, 2014, a sum of €140,872.72 in respect of unpaid HSE payments and a sum of €80,000 for loss of private earnings between 6th December, 2014 and 10th May, 2014. The plaintiff therefore seeks a total sum of €228,815.72.

21. The defendant in the first instance argues that the plaintiff should be awarded a sum of €7,943 in respect of loss of imputed locum profits from 16th September, 2014 to 5th December, 2014, €92,690.34 in respect of unpaid HSE payments and should be entitled to no monetary compensation in respect of his absence from the practice between 6th December, 2014 and 10th May, 2014.

This gives a total sum of €100,633.34.

22. In the alternative, if the Court accepts the plaintiff's argument for a 46.4% apportionment of the HSE monies, the defendant argues this should be subject to the appropriate 11/52ths deduction for the plaintiff's absence through illness. This would entitle the plaintiff to damages in the amount of €123,452.84.

23. The defendant also submits that if the Court is minded to award the plaintiff damages in respect of his absence from the practice between 6th December, 2014 and 10th May, 2014, that the Court should award an appropriate fraction of the €80,000 which would apply in respect of the 22 week period.

Basis of calculation of the distribution of HSE payments.
24. The Court is satisfied that the HSE payments should be apportioned on the basis of 46.4% as between the parties. The plaintiff's concession of one work shift to the defendant's wife Dr. Huma Sikander was a benefit to both the defendant and to his wife. The cost of that concession should be borne equally by the partners.

Imputed Locum income
25. The parties have agreed a figure of €7,943 as income which the plaintiff might have earned had his right to appoint a locum during his illness been honoured. The basis upon which such a figure was calculated is not apparent to the Court from the parties' submissions but the Court assumes that this represents potential income from private patients only and does not include the plaintiff's share of HSE payments for that period.

HSE Payments for 15th September, 2014 to 5th December, 2014
26. The Court is satisfied that the plaintiff is entitled, as a partner, to his 46.4% share of the HSE payments during this period. However, it is also clear that the practice had to meet the expense of hiring a replacement doctor during that period. The cost of such replacement should be deducted from the relevant HSE payment due to the plaintiff for that period. The amount of the deduction should be capped at €300 per shift as that would have been the cost to the plaintiff had his right to appoint a locum been honoured.

Loss of Private Income from December 2014 to May 2015
27. The parties are agreed that had the plaintiff been afforded an opportunity to work during this period, he would have earned €80,000. The Court proposes to allow the plaintiff the whole of this sum. Had the defendant conducted himself appropriately in and about the plaintiff's return to work following his being certified fit to return by his respiratory consultant on the 5th December 2014, the Court has little doubt that with good will an arrangement could have been arrived at to allow the plaintiff to return to work immediately. There was however no good will on the part of the defendant and instead he sought to use the plaintiff's misfortune to oust him from the practice. The letter sent on the defendant's behalf on the 6th November, 2014 cannot, on the evidence heard by this Court during the four day hearing, be construed in any other light. To refer to the plaintiff as a mere locum when the defendant knew that he had entered a partnership agreement with him was insulting and undoubtedly the cause of unnecessary anxiety for the plaintiff. The Court is satisfied that the plaintiff's loss during this period is entirely attributable to the conduct and attitude of the defendant. The defendant's suggestion during the course of the hearing in late March that the defendant then accepted that the plaintiff was fit to return to work did not mitigate the plaintiff's loss because it was not accompanied by an acceptance of his status as a partner. Similarly the defendant's belated acknowledgement of the existence of the partnership in a letter from his solicitor of the 13th April, 2015 simply invited suggestions as to the plaintiff's return to work. In the circumstances it was not unreasonable for the defendant to take a few weeks thereafter to establish that conditions were suitable for a return to practice.

Ongoing dispute with the HSE
28. To protect the plaintiff's interest in monies due but not yet paid by the HSE the Court will make a declaration that the plaintiff is a 50% partner in the "Walk-In Medical Centre" at 13 St. Nessan's Road, Dooradoyle and is entitled to a 46.4% share of those monies. Further the Court grants an injunction against the defendant restraining him from receiving any part of the payment due from the HSE without the knowledge and consent of the plaintiff.