NEUTRAL CITATION NUMBER [2009] IEHC 389

THE HIGH COURT

2008 8357 P

BETWEEN

RAYMOND BRADLEY, TERENCE DOYLE AND PATRICIE CROSBIE, PRACTISING UNDER THE STYLE AND TITLE OF MALCOMSON LAW, SOLICITORS

PLAINTIFFS

AND

MICHAEL MAHER

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered on the 31st day of July, 2009

1. Introduction

1.1 The plaintiffs ("Malcomson Law") are a firm of solicitors. The defendant ("Mr. Maher") is in dispute with Malcomson Law arising out of the administration by Malcomson Law, as a firm of solicitors, of the estate of Michael Maher, deceased, an uncle of Mr. Maher. Mr. Maher was a beneficiary of that estate and complains that the estate has not been properly administered by Malcomson Law.

In that context, it would appear that Mr. Maher picketed Malcomson Law's offices with placards setting out, it is alleged, untrue and defamatory statements to the effect that monies, relating to the administration of his late uncle's estate and amounting to €150,000, had been withheld by Malcomson Law, without reason, from Mr. Maher for a period of more than five years and questioning whether the monies were used to fund political parties. Malcomson Law further claimed that Mr. Maher, his servants or agents, published or caused to be published a number of defamatory statements on the "Rate your Solicitor" website, www.rateyoursolicitor.com. The alleged statements state, inter alia, that a sum of money was missing or was withheld from the account of the late Michael Maher. Malcomson Law claim that these statements have a defamatory effect, and that in their natural and ordinary meaning, the statements meant and were understood to mean that Malcomson Law were engaged in unlawfully withholding monies from the estate of the late Michael Maher.

Malcomson Law further claim that Mr. Maher, his servants or agents, have published or caused to be published statements on the "Rate Your Solicitor" website encouraging members of the general public to inform Mr. Maher as to when Malcomson Law and their representative are attending court so that Mr. Maher might have an opportunity to mount a picket, and that Mr. Maher, his servants or agents, have published or caused to be published, on the "Rate Your Solicitor" website, personal details of members of the firm such as their home address or type of car.

1.2 It was in that context that these proceedings were commenced by Malcomson Law against Mr. Maher. Malcomson Law applied for and obtained an interlocutory injunction on 10th October, 2008, restraining Mr. Maher from making any further entries to the "Rate Your Solicitor" website. Mr Maher was further restrained from watching, besetting or otherwise picketing Malcomson Law's premises and was restrained from communicating with members of the public by way of distribution of leaflets regarding any matter concerning Mr. Maher and Malcomson Law.

1.3 The basis of Malcomson Law's claim is to the effect that Mr. Maher has been guilty of defamation in the circumstances referred to and also it is said that Mr. Maher has engaged in unlawful picketing.

1.4 Mr. Maher has put in a full defence to these proceedings together with a counterclaim. Some interlocutory issues concerning discovery have already been dealt with, but an important question has arisen arising out of the service by Malcomson Law of a notice of trial which purports to specify that these proceedings are to be tried by a judge sitting alone, and thus without a jury.

1.5 Mr. Maher seeks to have that notice of trial set aside on the basis of an assertion on his part that he is entitled to a jury trial, at least in respect of the defamation aspects of these proceedings. This judgment is directed to that issue. It is first important to note the precise claim made by Malcomson Law.

2. The Claim

2.1 The relief claimed in both the plenary summons issued by Malcomson Law and statement of claim filed by them is as follows:-

1. Damages for libel;

2. Damages for slander;

3. Damages for unlawfully picketing, watching, besetting, loitering and otherwise interfering with Malsomson Law's quiet enjoyment of its premises and its ability to conduct its lawful business unfettered by interference from Mr. Maher;

4. An order preventing Mr. Maher from continuing to unlawfully picket, watch, beset, loiter and otherwise interfere with Malcomson Law's quiet enjoyment of its premise and their professional practices unfettered by inference from Mr. Maher;

5. Such further or other order as this Court shall deem fit; and

6. Costs and interest pursuant to statute.

2.2 As will be clear from the above, there are, in substance, two aspects to Malcomson Law's claim. The first is a claim for damages for defamation and damages for unlawfully interfering with Malcomson Law's quiet enjoyment of its premises.

2.3 The second aspect of the claim is one in which Malcomson Law seeks to restrain what is said to be unlawful picketing, together with other similar relief.

2.4 It is clear that, in the ordinary way, a claim for damages for defamation in this Court is heard by a judge sitting with a jury. It is equally clear that a claim for damages for unlawful picketing, and the like, together with a claim for an injunction arising out of what is said to be such unlawful picketing, is a claim which would never have been tried before a jury but rather, given that an injunction is equitable relief, would have been heard by a Court of Chancery in historical times and would, after the unification of the various divisions of this Court, have been likely to have been listed for trial as part of the Chancery List of this Court.

In addition, regard has to be had to the defendant's counterclaim which seeks as follows:

1. General, special and punitive damages for negligence and breach of fiduciary duty;

2. Any further order as this Court seems fit; and

3. Costs and interest pursuant to statute

2.5 It is equally clear, therefore, that the claim made by Mr. Maher in his counterclaim would, ordinarily, fall to be decided by a judge sitting alone. It is also clear that there is a real risk that there would be a substantial overlap between the evidence relevant to at least one aspect of the defamation proceedings, and the evidence relevant to Mr. Maher's counterclaim. At the heart of the defamation proceedings are Mr. Maher's allegations concerning the way in which the estate concerned was administered. To the extent that Mr. Maher may seek to justify anything said by him about Malcomson Law, then it would be necessary for him to seek to establish the truth of any allegations which he may be found to have made. Likewise, it is likely that the same, or quite similar, facts would be at the heart of his counterclaim.

2.6 Against that factual background, it is next necessary to turn to the legal principles.

3. The Law

3.1 The starting point has to be the provisions of s. 94 of the Courts of Justice Act, 1924, which preserved, in the Courts of Saorstát Éireann, the right to trial by jury in any case where a right to trial by jury in civil proceedings had previously existed. Section 94 stated as follows:-

> "94. —Nothing contained in this Act shall take away or prejudice the right of any party to any action in the High Court or the Circuit Court (not being an action for a liquidated sum, or an action for the enforcement, or for damages for the breach of a contract) to have questions of fact tried by a jury in such cases as he might heretofore of right have so required in the Supreme Court of Judicature in Ireland, and with like directions as to law and evidence, but no party to an action in the High Court or the Circuit Court for a liquidated sum, or an action for the enforcement or for damages for the breach of a contract or in an action for the recovery of land shall be entitled to a jury unless the judge shall consider a jury to be necessary or desirable for the proper trial of the action, and shall of his own motion or on the application of any party so order. Subject to all existing enactments limiting regulating, or affecting the costs payable in any action by reference to the amount recovered therein, the costs of every civil action, and of every civil question and issue, tried by a jury in the High Court or the Circuit Court shall follow the event, unless, upon application made, the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct; and any order of a Judge as to such costs may be discharged or varied by the appellate tribunal."

There is no doubt but that a right to trial by jury in defamation proceedings existed as of that time and was, therefore, continued in force by reason of that Act.

3.2 It seems equally clear that any entitlement to trial by jury in defamation proceedings is purely statutory, and does not derive from the Constitution. For example, defamation proceedings in the Circuit Court do not involve a jury. It has never been suggested that there is any constitutional infirmity in that arrangement.

3.3 It is, of course, the case that one significant aspect of the entitlement to trial by jury in civil proceedings was removed by virtue of s. 1 of the Courts Act 1988, The relevant provision is as follows:-

> "1.—(1) Notwithstanding section 94 of the Courts of Justice Act, 1924 or any other provision made by or under statute, or any rule of law, an action in the High Court—
>
> (a) claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of any such contract or any such provision),
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> (b) under section 48 of the Civil Liability Act, 1961 , or
>
> (c) under section 18 (inserted by the Air Navigation and Transport Act, 1965) of the Air Navigation and Transport Act, 1936 ,

or a question of fact or an issue arising in such an action, shall not be tried with a jury.

(2) Subsection (1) of this section also applies in relation to—

(a) an action in which damages are claimed both in respect of personal injuries to a person caused as specified in subsection (1) (a), or the death of a person, and in respect of another matter, and

(b) an action in which—

(i) the damages claimed consist only of damages in respect of a matter other than personal injuries to, or the death of, a person, and

(ii) the claim arises directly or indirectly from an act or omission that has also resulted in personal injuries to, or the death of, a person,

and in relation to a question of fact or an issue arising in an action referred to in paragraph (a) or (b) of this subsection.

(3) Subsection (1) of this section does not apply in relation to—

(a) an action where the damages claimed consist only of damages for false imprisonment or intentional trespass to the person or both,

(b) an action where the damages claimed consist of damages for false imprisonment or intentional trespass to the person or both and damages (whether claimed in addition, or as an alternative, to the other damages claimed) for another cause of action in respect of the same act or omission, unless it appears to the court, on the application of any party, made not later than 7 days after the giving of notice of trial or at such later time as the court shall allow, or on its own motion at the trial, that, having regard to the evidence likely to be given at the trial in support of the claim, it is not reasonable to claim damages for false imprisonment or intentional trespass to the person or both, as the case may be, in respect of that act or omission, or

(c) a question of fact or an issue arising in an action referred to in paragraph (a) or (b) of this subsection other than an issue arising in an action referred to in the said paragraph (b) as to whether, having regard to the evidence likely to be given at the trial in support of the claim concerned, it is reasonable to claim damages for false imprisonment, intentional trespass to the person or both, as the case may be, in respect of the act or omission concerned."

3.4 As is clear, therefore, a right to trial by jury in personal injury actions as defined in that provision was removed and is no longer available, except in claims for false imprisonment and trespass to the person, as set out in s. 1(3) of the Courts Act 1988.

3.5 In that context, the Supreme Court had to consider in *Sheridan v. Kelly* [2006] 1 I.R. 314, a situation which arises where multiple claims are made, some but not all of which would, in the ordinary way, attract an entitlement to a jury trial. In that case the Supreme Court came to the view s. 1(3) allowed for a trial by jury in a claim for damages for personal injuries caused by negligence, or other means, provided damages were claimed in respect of either false imprisonment or intentional trespass to the person. However the two causes of action must be linked by a claim that the damage arose in respect of the same act or omission. In *Sheridan*, the Supreme Court found that all of the plaintiff's allegations, being a claim for personal injuries for negligence and for trespass to the person, could be traced back to the core allegation of the plaintiff's claim. At page 319, Fennelly J. stated as follows:-

"(T)he subsection allows a plaintiff, in certain cases, and provided he claims damages as a result of one of the two specified cause of action, namely "false imprisonment or intentional trespass to a person", or both also to seek jury trial where he pleads that he has suffered damages caused by, for example, negligence. The subsection requires, however, that there two causes of action be linked by a claim that the damages arose "in respect of the same act or omission"…The same act may give rise to a claim under different legal headings. Acts giving rise to a breach of contract may also, depending on the factual context, constitute negligence or trespass. The subsection does not require that the damages be identical."

3.6 However, it seems clear that an important aspect of the consideration of the Supreme Court in *Sheridan* was the proper interpretation and application of s. 1 (3) of the Courts Act 1988.

3.7 More recently Dunne J. had occasion to consider an analogous issue in *Kerwick v. Sunday Newspapers Limited Trading As Sunday World*, (Unreported, High Court, Dunne J., 10th July, 2009). In that case the plaintiff concerned brought proceedings for defamation, a breach of the right to privacy, and negligent infliction of emotional distress. On the facts of the case concerned, Dunne J. determined that, notwithstanding the fact that, in the ordinary way, the defamation claim brought by the plaintiff concerned would have been tried by a jury, nonetheless, in all the circumstances, the interests of justice required that there be a single trial of all issues and that such a trial could not be before a jury. Dunne J outlined the difficulties of separating the claims into separate proceedings as follows:-

"Imagine that this case was set down for trial without a jury and that the plaintiff made an application to have the trial of two of the causes of action heard at the same time and the trial of the third cause of action held at a later time. Imagine that there would be two separate assessments made in respect of damages. There would be a duplication of evidence, the case would take longer, the costs would be greater and it is arguable that there could be an overlap in respect of the damages that might be awarded. It is difficult to see how such an approach could be permissible in any circumstances."

3.8 Against that background it seems to me that the following general principles seem to apply. In the ordinary way, a plaintiff or defendant is entitled to a jury trial in this Court in defamation proceedings. However, that entitlement is not absolute. Where a single set of proceedings involve more than one cause of action, the court has to exercise a discretion as to the appropriate way in which all issues in the case can be disposed of. That discretion arises even in cases where no question of a right to trial by jury exists. For example, the question of whether all issues in a single case which is to be tried by a judge alone should be determined at a single unitary hearing, or in two or more separate hearings, is a matter over which the court retains a discretion which should be exercised, as should all judicial discretion, on a principled basis. For discussion of the principles to be applied in such cases see *Cork Plastics Manufacturing & Ors v. Ineos Compound UK Ltd & Ors* [2008] IEHC 93.

3.9 The available options, at the level of principle, in a case where defamation is but one of the issues arising seem to me to be the following:-

A. A single unitary trial in which all issues are determined at a single hearing. It seems clear that if that is the option which justice demands then it necessarily follows that such a trial will not be a trial by jury as it would be inappropriate to extend trial by jury to issues which are not properly tried, in civil proceedings, by a judge sitting with a jury. Obviously where one of the claims made is a personal injury claim then the application of s. 1(3) of the Courts Act 1988, would need to be considered.

B. Two fully separate trials. In such circumstances, the court has a discretion to direct that there should be a separate trial before a jury of the defamation aspect of the proceedings with a further trial of all other issues before a judge sitting alone. Clearly whether such a course of action is satisfactory will be highly dependent on the inter connection between the issues likely to arise at the respective hearings. Factors such as whether or not there is likely to be a significant waste of court time and parties expense in the duplication of evidence where the facts relevant to both matters are the same or similar will be an important factor. Likewise, the necessity to ensure consistency in relation to all findings of fact must be taken into account and may give rise to difficulties in circumstances where a jury will simply deliver a verdict on the basis of general questions asked of the jury concerned, and without giving detailed reasons or detailed findings of fact. The possibility of a judge being placed in the difficult position of having to assess the same facts as a jury had previously addressed with an obligation to give proper recognition to the findings of the jury, but at the same time being unaware of the precise factual basis on which the jury came to its conclusion needs to be weighed significantly in the balance. In addition, regard should be had to the circumstances in which the dispute between the parties as to whether there should be a jury trial has arisen. For example, note should be taken of the fact that it is normally a plaintiff who decides the causes of action which are to arise in a single set of proceedings (although, of course, as here, a defendant may add to those causes of action by reason of raising issues in a counterclaim). Care should be exercised to ensure that a plaintiff should not be allowed to exclude the possibility of a jury trial simply by adding some form of relief to a claim which is substantially one in defamation. It is, of course, the case that other factors may loom to a greater or lesser extent as important matters to be weighed in the balance on the facts of any individual case.

C. A hybrid trial. Order 36, rule 7 of the Rules of the Superior Courts provides as follows:-

"The court may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or party of fact and partly of law, arising in any cause or matter which, without any consent of parties, can be tried without a jury, and such trial may, if so ordered by the court, take place at the same time as the trial by a jury of any issues of fact in the same cause or matter."

It is clear from that order that the court has an entitlement to direct that there be a trial of certain issues before a jury with the same trial judge continuing on to deal with other issues (not appropriate for jury trial) after the jury has reached its conclusions. It follows that, in such cases, the evidence heard before a jury will also form part of the evidence which the judge will be entitled to consider when dealing with any other issues which remain for decision by the judge sitting alone. Whether such a form of hearing is satisfactory (and that is the test for the rule speaks of it appearing "desirable")will again depend on the circumstances of the case. The extent, for example, that it might be necessary to call the same witnesses again will be important. Such witnesses may have to be called again because lines of cross examination that might not have been relevant to the jury trial (and would therefore have been inappropriate to pursue before the jury) might nonetheless be appropriate in respect of issues which the judge had to try. All proper weight would need to be attached to any complications of that variety which might arise. Likewise, dependent on the facts of the case under consideration, the difficulties which the judge might encounter in having to approach the issues which were for the judge to determine on a consistent basis with the findings of the jury, but without knowledge of the precise basis on which the jury came to its conclusions, would arise under this heading as well. Furthermore, there is always the possibility that other individual aspects of any case under consideration might prove important to weigh in the balance under this heading as well.

3.10 It is clear, therefore, that the court retains a discretion as to which form of the conduct of the trial or trials necessary to resolve all issues between the parties is appropriate in all the circumstances of the case. I have sought to identify the principal factors that might be likely to influence a court's decision as to where the justice of the case lies. However, it seems almost certain that each case will depend, to a significant extent, on its own facts.

3.11 In the light of those general principles, I propose approaching the facts of this case.

4. Application to the facts of this case

4.1 There is likely, on the facts of this case, to be a significant overlap between the factual matters that would need to be addressed in the defamation aspect of these proceedings, on the one hand, and the other aspects of Malcomson Law's claim together with Mr Maher's counterclaim, on the other hand. It is clear, therefore, that either a separate trial of the defamation aspects of the proceedings from those other aspects of the claim and counterclaim or a hybrid trial of the type which I have sought to describe, would involve at least many of the same facts having to be considered in both parts of any trial. In those circumstances an entirely separate trial of the non-jury issues which arise in these proceedings would seem to me to be highly unsatisfactory. There would be a considerable waste of court time and parties expense in having to go through the same evidence again. There would also be the risk of the judge dealing with the non-jury aspects of the case being placed in the sort of difficult position which I have sought to identify. In all the circumstances,

it does not seem to me that the justice of the case could possibly lead to the view that two entirely separate trials could be satisfactory.

4.2 The question of a hybrid trial is somewhat more finely balanced. The trial judge who presided over the jury trial would, of course, have the opportunity to hear the evidence which the jury had to consider, and that evidence would form part of the evidence which the judge would need to take into account in determining the issues which arose at the non-jury part of the trial. However, it seems to me to remain the case that there would be a significant risk that some of that evidence would need to be revisited and subjected to different forms of examination (both in chief and as to cross examination), in order to properly deal with the issues which would arise in the non-jury aspect of the case. Likewise, the potential difficulties for the judge dealing with the non-jury aspect of the case in interpreting the precise factual basis on which the jury had come to its conclusions would remain and could well be important to the judge's decision on the aspects of the case which were for the judge to decide.

4.3 On balance, I have come to the view that a hybrid trial would not be in the interests of justice in this case. Neither am I satisfied that this is a case where there is anything inappropriate in the joinder of the defamation and picketing aspects of the case so that is could be said that their joinder was device to deprive Mr. Maher from an entitlement to a jury trial. Rather it is obvious that both aspects of the claim are real, connected and proper to be decided in one set of proceedings.

4.4 I also gave consideration as to whether it was appropriate to have regard to the fact that Mr. Maher is a litigant in person in coming to a view in relation to any of the questions which I have addressed. It is, of course, the case that litigants in person frequently experience difficulties in presenting proceedings before the courts because they are, for entirely understandable reasons, often unfamiliar with procedural or evidential law. In a trial before a judge sitting alone, it is normally possible to get round any such difficulties even though same may well lead to the proceedings taking a lot longer than might otherwise be the case. Such difficulties have the potential to come into particularly sharp relief in a civil jury action. Even when parties in such actions are represented by experienced counsel, it is not unknown for a jury to have to be discharged because of some turn in the case which, in the view of the trial judge, has given rise to prejudice which could not be remedied by an appropriate charge to the jury concerned. The risk of such an occurrence must be very great indeed in a case where one of the parties is unrepresented.

4.5 However, it does not seem to me that this is an appropriate factor that could be properly taken into account in deciding whether there should be a jury trial. A litigant in person has the same right to jury trial as any other party. Such litigants must, of course, be aware (and should, in my view, be warned in advance by the trial judge) of the consequences of matters being said to the jury which might cause prejudice to the jury such as comments being made for which there was no evidence. The fact that the jury might have to be discharged in such circumstances and that the costs of the aborted trial might well have to be visited on the party who had caused the jury to be discharged, would also need to be emphasised. However, it seems to me that such a consequence (i.e. the award of costs for any aborted trial) is the proper means of dealing with any such problem, at least in respect of an initial occurrence of such a problem. I would not, however, rule out the possibility that a litigant in person who proved unable, despite being given the opportunity on all appropriate guidance from the bench, to conduct a jury trial in a proper fashion might lose any such entitlement to a jury trial. A party is not entitled to a infinite number of chances to get it right. However, it seems to me that a party, such as Mr. Maher, would, ordinarily, be entitled, if all other factors pointed in that direction, to be given the opportunity to conduct a jury trial himself. I did not, therefore, take into account, in reaching my decision, the fact that Mr. Maher is a litigant in person.

5. Conclusions

5.1 For the reasons which I have sought to analyse, I am not satisfied that the balance of justice in this case would favour two separate trials of the jury and non-jury aspects of the issues which arise in these proceedings. Likewise, I am not satisfied that the balance of justice would favour a hybrid trial.

5.2 In those circumstances, I am driven to the conclusion that the only fair and just way of resolving all of the issues between these parties is by a single trial, and for the reasons which I have already set out, such a trial must be a trial without a jury. In those circumstances, it does not seem to me to be appropriate to set aside the notice of trial without a jury which has already been served.