



THE COURT OF APPEAL

2015/253

Kelly J.
Irvine J.
Hogan J. .
BETWEEN

LUCAS WALISZEWSKI

PLAINTIFF

AND

MCARTHUR AND COMPANY (STEEL AND METAL) LIMITED.

DEFENDANT

Ex tempore JUDGMENT of Mr. Justice Kelly delivered on the 19th day of October 2015

1. Mr. Waliszewski, the plaintiff in High Court proceedings seeking damages for personal injury against the defendant his employer, was unsuccessful in his claim. In a judgment in written form delivered by Barton J. on 25th of April this year he dismissed the claim on two bases.

2. First, he did so pursuant to the provisions of s. 26 of the 2004 Act. He then went on to say that had the court decided to take a different course, that is to have refused the application which was made under s. 26, he would in any event have dismissed the plaintiff's claim since he was satisfied that, insofar as the plaintiff did suffer an injury to the back in the course of his employment, the most likely cause arose as a result of something in respect of which the employer was not liable. So, the case was dismissed both by reference to s. 26 and, even if the judge was wrong to do so under that section, he would have dismissed the case in any event.

3. From that decision an appeal was brought by Mr. Waliszewski. The notice of appeal was defective because no grounds were specified which would be relied upon by him in prosecuting the appeal. When the appeal came before Mrs. Justice Finlay Geoghegan she gave directions in relation to the matter and made orders, the contents of which I need not recite in any detail or indeed at all now.

4. Suffice it to say that a firm of solicitors, Messrs. Darcy Horan & Company, provided assistance to Mr. Waliszewski to assist in lodging his appeal. The issue before the court this morning turns upon an exchange of correspondence between those solicitors and the solicitors acting for the employer. I will come to that correspondence in a moment.

5. The contention which is made is that this appeal should not be allowed to proceed any further because there has been a settlement of the matter, an agreement between the solicitors authorised by Mr. Waliszewski and the employer's solicitors which brought the matter to the end. That contention has given rise to the bringing of this motion which seeks a declaration that the appeal has been discontinued or compromised by Mr. Waliszewski and the defendant seeks an order dismissing the appeal.

6. The correspondence which is relied upon took place over just three days. On 1st July 2015, Mr. Waliszewski's legal advisors, D'Arcy Horan & Company wrote to Kent Carty solicitors for the defendant in the litigation and this is what they said:-

"Dear Sirs,

We refer to the above mentioned matter and to our telephone conversation of earlier today. We were initially instructed by Mr. Waliszewski at the eleventh hour to assist in lodging his appeal of the judgment against him for 22nd May 2015. We agreed to assist in terms of lodging the appeal only. We did not agree nor intend to come on record to deal with the appeal. Mr. Waliszewski has now instructed us to file a notice of discontinuance on his behalf. We would be most grateful if you would kindly confirm that your client will not make an application for costs against our client. Furthermore, can you also confirm that you won't seek recovery of any costs against this firm personally. We sincerely apologise for any inconvenience caused. We would be very grateful if you would revert at your earliest convenience."

7. On the following day, Kent Carty solicitors for the defendant in the litigation wrote as follows:-

"We refer to yours of 1st inst. We have taken our clients instruction in relation to your proposal. Our client is agreeable to not seeking recovery of its costs against your client and/or your firm subject to receipt of a filed copy of a notice of discontinuance by close of business tomorrow the 3rd inst."

8. That letter was responded to on 3rd by Messrs. Darcy Horan as follows:-

"We refer to your previous correspondence of 2nd inst. We enclose herewith Mr. Waliszewski's notice of discontinuance duly signed by him."

9. Attached to that letter was a notice of discontinuance. It is admittedly headed 'The High Court' but it does say that the plaintiff wholly discontinues these proceedings against McArthur & Company (Steel and Metal) Limited. It is dated 3rd July 2015. There is provision in it for it to be signed by the solicitor for the plaintiff but it is in fact signed by Mr. Waliszewski himself.

10. The fact that the notice of discontinuance is headed 'The High Court' to my mind is of no significance having regard to the preceding correspondence and having regard to the way in which it is worded. It is a complete discontinuance of proceedings against the defendant.

11. In my view, that brought this appeal to an end. It was discontinued in accordance with terms which were offered by Mr. Waliszewski's solicitors on 1st July which were accepted on 2nd July and which were implemented on 3rd July by the service and filing of that notice of discontinuance.

12. Consequently, in my view there is no matter now which can proceed to appeal. Mr. Waliszewski says that he has been busy in compiling evidence which will demonstrate that his injuries were somewhat different to the injuries which were dealt with by the judge. But that is of no assistance on this application because this application deals with the question of whether there is a valid appeal before the court at all.

13. In my view, having regard to what has passed between the solicitors advising Mr. Waliszewski and the solicitors who were on record for the defendant and the service of the notice of discontinuance, there was accord and satisfaction which brought this appeal to an end. Consequently, for my part, I would grant the relief which is sought in the motion and dismiss this appeal.

Irvine J.

14. It is indeed regrettable that Mr. Waliszewski now today before this court has indicated that he wishes to pursue his appeal against the order of Mr. Justice Barton made in February of this year. But unfortunately it is the position from a legal perspective that he did not adopt that same position back on the 1st, 2nd and 3rd July of this year when it is clear from correspondence that he instructed his solicitors to enter into an agreement with the defendant's solicitors whereby he would discontinue his action if the defendant did not pursue the order for costs which it obtained back in February 2015. He himself entered into that agreement fully and acknowledged his agreement by signing the notice of discontinuance on 3rd July 2015.

15. Unfortunately, the correspondence between the 1st July and 3rd July is incapable of any other construction than a binding agreement whereby Mr. Waliszewski must be deemed to have abandoned his appeal. For those reasons I too would allow the relief sought.

Hogan J.

16. I also agree with the judgment of Mr. Justice Kelly and Ms. Justice Irvine. Again, it is unfortunate from Mr. Waliszewski's perspective that he entered into this agreement if he wanted to pursue the appeal. But in the course of litigation decisions have to be made sometimes at short notice, sometimes very difficult decisions. But the courts have to respect agreements made between the parties, save perhaps in truly exceptional circumstances. Here, such an agreement was made and this Court cannot, I fear, look behind it.

17. As my colleagues have pointed out the correspondence admits of only one interpretation. Specifically the notice of discontinuance of 3rd July was executed in this case and therefore there is no appeal properly before the court at this stage by reason of the execution of that notice of discontinuance.

18. For those reasons, I fear, that I must hold that the court lacks jurisdiction and any purported appeal must be dismissed.