

THE HIGH COURT

JUDICIAL REVIEW

[2017 2319 P]

BETWEEN

NOEL STANTON

PLAINTIFF

AND

**FIONA FOLEY, VALENTINE TURNBULL AND CAROLINE O'DRISCOLL PRACTISING UNDER THE STYLE AND TITLE OF FOLEY
TURNBULL SOLICITORS AND CHRISTINA STANTON**

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 26th day of November, 2018

1. This application is brought by the first, second and third named defendants for an order dismissing the plaintiff's claim on the ground that no reasonable cause of action has been disclosed or alternatively on the grounds of delay.

Background Facts

2. The plaintiff was born on the 10th December, 1961. On the 6th July, 1971, when the plaintiff was nine and a half years of age, he was involved in a road traffic accident while cycling on the public highway in Cork when he was struck by a lorry owned by Cork Corporation.

3. It would appear that the plaintiff's mother, the fourth named defendant in these proceedings, instructed a firm of solicitors in Cork, Messrs. Barry Turnbull & Co., to institute proceedings on behalf of the plaintiff against Cork Corporation claiming damages. The fourth defendant acted as the plaintiff's next friend in those proceedings.

4. It is common case that those proceedings were instituted and ultimately compromised for the sum of IR£1250. The matter was ruled before the High Court (Finlay J.) sitting in Cork on the 27th January, 1973 when the sum of IR£1250 was lodged in court with a sum of IR£45 paid out for presumably special damages and the balance of IR£1205 invested to the credit of the infant plaintiff.

5. The plaintiff attained his majority, then 21 years, on the 10th December, 1982. Less than a month thereafter, on the 7th January, 1983 an application was made to the High Court for payment out of the funds then standing to the credit of the plaintiff being at that time IR£3,092.92. The application for payment out was made on foot of an affidavit ostensibly sworn by the plaintiff and filed by Barry Turnbull & Co. The plaintiff alleges that he did not swear this affidavit, his signature thereon is a forgery and he knew nothing of the matter until many years later. The plaintiff alleges that he never received any of the money paid out of court.

6. The plaintiff's evidence is that he became estranged from his mother when he left home at thirteen years of age and knew nothing of the case or the money in court until the day of his father's funeral on the 30th December, 2014. The plaintiff's case is that at the funeral, his uncle asked him if he had ever got the money from the accident and the plaintiff did not know what he was talking about. His uncle told him that Barry Turnbull & Co. solicitors had acted in the matter and as a result, he subsequently contacted that firm.

7. This application is grounded upon an affidavit sworn by the second defendant, Valentine Turnbull ("Mr Turnbull"). Mr. Turnbull's late father, Austin Turnbull ("Mr. Turnbull Senior") was a solicitor and the principle of Barry Turnbull & Co. Mr. Turnbull Senior qualified as a solicitor in 1964 and practised until 1994 when he had a stroke and retired from practice. He died on the 28th February, 1999. Mr. Turnbull was apprenticed to his father and qualified in 1976 when he too commenced employment as a solicitor in Barry Turnbull & Co. In 1982 Mr. Turnbull became a partner in the firm and then became sole principle in 1990 when Mr. Turnbull Senior transferred his share in the practice to his son. Mr. Turnbull Senior continued to practice as a consultant in the firm until his ill health in 1994.

8. Mr. Turnbull continued to practice as a sole practitioner until the 30th November, 2015 when he merged the practice with another firm, Fiona Foley & Co. and the new firm, Foley Turnbull Solicitors commenced practice on the 1st December, 2015.

9. On the 8th April, 2015, the plaintiff telephoned Barry Turnbull & Co. and spoke to an assistant solicitor working with Mr. Turnbull, Mortimer Kelleher. The plaintiff alleged to Mr. Kelleher that the firm had brought a claim on his behalf but he never received any money. Mr. Turnbull met the plaintiff for the first time in May 2015 and made a number of subsequent enquiries in relation to the matter to the Accountant's office of the High Court. Eventually it was ascertained that money was paid out to the credit of the plaintiff on the 24th January, 1983.

10. The within proceedings were commenced by the plaintiff as a litigant in person on the 13th March, 2017. The statement of claim was delivered on the 6th June, 2018. In it, the plaintiff alleges that he had no involvement in the payment out application which was arranged by Barry Turnbull & Co. He alleges that a pay order in the sum of IR£3,092.92, payable to the plaintiff, was sent to Barry Turnbull & and cashed by them. He alleges that he received none of these funds.

11. He alleges that his signature was forged on the affidavit sworn before a Commissioner for Oaths. He alleges that he never instructed Barry Turnbull & Co. to act on his behalf. Under the heading "Particulars of Fraud and Deceit" the plaintiff pleads as follows at para. 22:

"The conduct of the defendants in bringing an application to the court purportedly on behalf of the plaintiff constitutes fraud and deceit on both the plaintiff and this honourable court. The plaintiff did not authorise the application for the payable order. He did not give any instructions in relation to it. He was not aware of the application. He did not receive any of the money paid out in the payable order."

12. The plaintiff goes on in his statement of claim to allege that the defendants were guilty of fraudulent conduct in inducing the High Court to make a payment out of the plaintiff's money when they knew they had no authority from the plaintiff to make such application. It need hardly be stated that it is difficult to conceive of more serious allegations of professional misconduct and indeed criminal wrongdoing on the part of a solicitor.

Discussion

13. The first point to note is that the first and third defendants, who were partners in Fiona Foley & Co. Solicitors before the merger above referred to in 2015, could have no conceivable involvement of any description in the events complained of by the plaintiff. They ought never have been joined as defendants in these proceedings and the plaintiff's counsel conceded as much at the hearing of this application. Not only were these allegations made against the first and third defendants in the statement of claim but in the affidavit sworn by the plaintiff in opposition to this motion, far from resiling from these allegations, the plaintiff says at para. 15:

"I believe that I have been the victim of a fraud, negligence and breach of duty by the solicitors involved and by my mother and I issued the proceedings herein on the 13th March, 2017."

14. Accordingly, it is with considerable regret that I note that the plaintiff has sought to perpetuate allegations of the most serious kind against the first and third defendants, solicitors and officers of the court, which are patently without foundation and could never have had any valid basis, right up to the hearing of this application.

15. Insofar as the second defendant is concerned, it is again common case that Mr. Turnbull was entirely unaware of anything to do with this matter prior to being contacted by the plaintiff in 2015. The only basis upon which this claim could be maintained against him is that he has a potential liability as a partner in the firm of Barry Turnbull & Co. at the time of the events complained of. Mr. Turnbull's uncontradicted evidence is that all files of the practice prior to the year 2000 have long since been destroyed.

16. Similarly, enquiries made through the firm's bank, Bank of Ireland, disclose that it no longer retains any records relating to the accounts of Barry Turnbull & Co. back as far as the 1980s as these have long since been destroyed. There is therefore no documentary evidence available to the second defendant which would assist in the defence of this claim. More fundamentally, the only witness who could respond to the extremely serious allegations made against him by the plaintiff, namely Mr. Turnbull Senior, died over eighteen years prior to commencement of these proceedings which themselves relate to events that occurred over 34 years prior to such commencement.

Legal Principles

17. It is accepted by the defendants that I must deal with the evidence in this case, contentious as it is, on the basis of taking the plaintiff's case at its height. Taken as such, it seems to me that if the allegations alleged against the second defendant were made out at trial, there is at least a theoretical basis for a claim. Thus I do not think this is a case where the court would be justified in reaching the conclusion that the pleadings on their face disclose no reasonable cause of action such as would justify the application of O.19 r.28.

18. That being so I turn to the alternative basis for this application being delay by the plaintiff and consequent prejudice to the second defendant.

19. Applications of the kind arising in these proceedings are by now so common and the subject of so many decisions of the Superior Courts that it can safely be said that the jurisprudence is now well settled. In summary, there are two lines of authority stemming from the seminal decisions of the Supreme Court first in *O'Domhnaill v. Merrick* [1984] I.R. 151 and second in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. In summary, *O'Domhnaill* suggests that where the passage of time is such that it is no longer possible for the defendant to have a fair trial, irrespective of any blameworthy delay on the part of the plaintiff, the court may dismiss the proceedings.

20. Under *Primor*, where it is shown that a plaintiff has been guilty of both inordinate and inexcusable delay, the court may then go on to consider where the balance of justice lies in order to determine whether the case should be permitted to proceed. A defendant is entitled to rely on either or both lines of authority in pursuing a strike out application. The onus of proof on a defendant who places reliance on *O'Domhnaill* is higher than where *Primor* is invoked. Under *O'Domhnaill*, the defendant must establish prejudice likely to lead to a real risk of an unfair trial. Lower onus applies in *Primor* where once a defendant establishes that the plaintiff has been guilty of both inordinate and inexcusable delay, proof of moderate prejudice may suffice even if that does not necessarily establish a real risk of an unfair trial.

21. Although there is a significant conflict of evidence on the affidavits before the court regarding the plaintiff's culpability in relation to the delay in commencing proceedings, as I have said I am obliged to take the plaintiff's case at its height. That means that I must accept for the purposes of this application that the plaintiff knew nothing of the events complained of until the 30th December, 2014 and the consequent delay in instituting proceedings, while manifestly inordinate, must be regarded as excusable.

22. The focus then shifts to the *O'Domhnaill* test. In recent times this test has been applied in a number of historic sex abuse cases. In *Whelan v. Lawn* [2014] IESC 75, the Supreme Court considered the issue of prejudice arising from the fact of the alleged abuser's death. In that regard, Hardiman J. noted (at para. 12 of his judgment):

"the grossest imaginable prejudice is the death of the defendant himself in a case where the basic facts are disputed by one person's word against another's."

23. This was applied by the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74. The plaintiff instituted proceedings for abuse which was alleged to have occurred 32 years previously. The abuser was by then believed to have been deceased. Delivering the judgment of the court, Irvine J. referred to the dicta of Hardiman J. above said (at para. 52):

"In this regard I am satisfied that it would be hard for a defendant to demonstrate greater prejudice than that which arises for the defendant in this case, by reason of the fact that PD is believed to be dead."

24. As I have already pointed out, the allegations made in this case against Mr. Turnbull Senior, long since deceased, could hardly be more serious. Nobody but Mr. Turnbull Senior could dispute what the plaintiff now alleges. Even in the absence of Mr. Turnbull Senior himself, his files may have shed some light on the matter but they have long since been destroyed as have any financial records from the firm's bank which might have shown to whom the proceeds of the claim were paid back in 1983.

25. In short, the passage of time in this case has led to the situation where the second defendant cannot defend himself. It is simply impossible for him to obtain a fair trial in the circumstances.

26. In my view therefore, the application of the *O'Domhnaill* test must result in the dismissal of the plaintiff's claim herein.

27. It is agreed that the claim against the first and third named defendants must be dismissed. I will also strike out the claim against

the second named defendants for the reasons I have identified.