Neutral Citation Number: [2008] IEHC 49

THE HIGH COURT

2002 No. 16309 P

BETWEEN

THOMAS Ó TUAMA, JOHN V. O'SULLIVAN, MICHAEL CAREY, PADRAIG O'SHEA, JOHN FINN AND PATRICK McCARTHY

PLAINTIFFS

AND

GREG CASEY AND MAIREAD CASEY T/A CASEY & COMPANY SOLICITORS

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 28th day of February, 2008.

1. Introduction

1.1 The plaintiffs in these proceedings are customs officials who claim to have been defamed in newspaper articles in the latter part of 1995 and the earlier part of 1996. It is common case that the plaintiffs retained the defendant firm of solicitors ("Casey & Co.") for the purposes of advising and, if appropriate, maintaining proceedings in respect of the alleged defamation. It would appear that proceedings were issued some three years later which was well within the time limit prescribed by the Statute of Limitations, 1957. However, those proceedings were not served on the intended defendants.

1.2 The plaintiffs state that they became ultimately dissatisfied with the lack of progress in maintaining their claim, discharged Casey & Co., and instructed alternative solicitors to prosecute their claim. Those events occurred in 2003 which was, of course, after the limitation period had expired. It is then said that those new solicitors discovered the existence of the proceedings as issued and the fact that the summons had not been served. It would appear that those solicitors wrote to Casey & Co. inviting Casey & Co. to inform them of any reason that might be given for the fact that the proceedings had not been served. It is said that such information was necessary, by virtue of the fact that quite some period of time had elapsed from the issue of the proceedings during which the proceedings remained unserved so that any application to renew the summons would have required a significant explanation in order to satisfy the court that it was appropriate to make the renewal sought. It was, of course, the case that by that time it was too late to issue fresh proceedings as any such proceedings would have been statute barred. The plenary summons had been issued in late 1998, some three years after the alleged defamation. The requests for explanations as to why the summons had not been served were maintained throughout 2003. It is clear, therefore, that if the summons was to have been renewed in 2003, it would have required the court to be satisfied that it was appropriate to renew the summons, notwithstanding the fact that some four or five years had elapsed from its issue without it being served and that, in that period, the time limit provided for by the Statue of Limitations had expired.

1.3 Against the background of the failure of Casey & Co. to serve the relevant proceedings and/or to afford any explanation to the plaintiffs' new solicitors which might have led to a successful application to renew the summons in 2003, these proceedings for negligence as against Casey & Co. are maintained.

1.4 The plaintiffs obtained judgment in default of appearance on 20th December, 2004. As it happens, I made the relevant order in circumstances where no appearance had been entered to the proceedings and where there was no appearance on behalf of Casey & Co. at the motion for judgment. My order of that date provided that the damages to which the plaintiffs might be entitled were to be assessed by a judge sitting alone. On foot of that order the plaintiffs proceeded to set down the issue of the assessment of their damages for trial. Subsequent to the case being listed for hearing, it was intimated on behalf of Casey & Co. that it was wished to bring an application to set aside the judgment obtained in default. In those circumstances the proceedings for assessment of damages were unable to go ahead and a motion was made returnable for last October, seeking the setting aside of the order for judgment in default of appearance. This judgment is concerned with that application.

1.5 The hearing has, for reasons which will become apparent, proceeded in two parts. I had earlier made a ruling on one aspect of the matter, which ruling was delivered *ex tempore*. In order to properly understand the issue which I now have to decide I should briefly refer to that ruling.

2. The previous ruling

2.1 When the motion originally came before the court there was an issue between the parties as to whether the judgment could be properly said to have been obtained either regularly or irregularly. The jurisprudence of the courts in this regard is clear. See for example *Irwin & Co v. Austin & Sons* [1907] 41 ILTR 190, *Maher v. Dixon* [1995] 1 ILRM 218 and Delaney & McGrath on *Civil Procedure in the Superior Courts* (2nd Edition) at paragraphs 4-33 to 4-47. Thus, where judgment is obtained irregularly, the court will normally set aside the judgment without enquiring into the merits of the proposed defence. The logic of this position is that the judgment should not have been obtained in the first place and a plaintiff who has obtained judgment irregularly should not have any benefit by reason of having obtained judgment in that fashion. On the other hand, where judgment is obtained regularly, the court may, nonetheless, be persuaded to set aside the judgment so as to permit the defendant to defend the proceedings but will only do so after considering the possible merits of the defence which the defendant would wish to put forward. I will turn to the precise test by reference to which a defendant's potential defence is to be assessed in due course.

2.2 In any event, there was a dispute between the parties as to whether the judgment had, in fact, been obtained regularly or irregularly. The first named defendant, who dealt with this aspect of the motion personally, indicated that he had assumed that the judgment was obtained irregularly for reasons to which I will advert in early course. On that basis it was said that the affidavit evidence upon which the motion was moved did not go into the merits or otherwise of the defence. In those circumstances, I indicated that I would determine whether it could properly be said that the judgment had been obtained irregularly or regularly and if I was satisfied that the judgment had been obtained regularly, I indicated that I would afford Mr. Casey the opportunity to put in further evidence concerning the defence.

2.3 For reasons which I set out in the *ex tempore* judgment to which I have referred, I indicated that I was satisfied that the judgment should be regarded as having been obtained regularly. The only doubt concerning that fact stemmed from certain events which occurred on the morning when the motion for judgment was actually moved before me. There is no dispute but that Casey & Co. had not filed an appearance within the time limit provided for by the Rules of the Superior Courts. There is no doubt but that Casey & Co. were, therefore, in default of appearance. Neither is there any doubt but that the motion for judgment in default of appearance was properly served on Casey & Co. and that that firm were aware that the motion was on for hearing, notwithstanding the fact that it had been adjourned from the original return date.

2.4 On the morning of the adjourned date for hearing of the motion for judgment a faxed copy of a purported notice of appearance was, it would appear, sent by Casey & Co. to the plaintiffs' solicitors. However, it is also clear that no appearance was, in fact, entered in the Central Officer, nor could it have been without an extension of time agreed by the plaintiffs or ordered by the court. No person appeared in court on behalf of Casey & Co. when the motion was moved. I am satisfied on the affidavit evidence that what occurred was that, while the faxed copy notice of appearance had arrived by fax in the plaintiffs' solicitors' office prior to the beginning of the list in which the motion for judgment was due to be heard, the receipt of the document did not come to the attention of the solicitor involved until after he had instructed counsel that there had been no communication from Casey & Co. By the time the fact that the document had been faxed to him came to his attention and he had contacted counsel, the motion had been moved in the absence of Casey & Co. and judgment obtained.

2.5 While the circumstances were, therefore, somewhat unusual, I ruled that they were much more analogous to a regular than an irregular situation. I did so on the basis that Casey & Co. were well aware that the motion was before the court. They must also have been well aware that without the agreement of the plaintiffs it could not be assumed that an extension of time for the filing of an appearance would be allowed. Casey & Co. must also have been well aware that the mere faxing of what, in substance, was a form of appearance that might, with the consent of the plaintiffs or by order of the court, be filed in the Central Office, could not, of itself, change the situation. In substance, the height of the case that could be made was that the faxing of that document amounted to a request for an extension of time. In the absence of any reply, Casey & Co. were not entitled to assume that any such request had been acceded to.

2.6 I did note that, where a plaintiff is aware of contact from a defendant against whom a motion for judgment is moved, it may well be incumbent upon such plaintiff to bring the nature of such contact to the attention of the court so that the court can place whatever weight might be considered appropriate on that contact. However, even that obligation has to be seen against the background of circumstances where the contact in this case occurred at such a late stage that it should have been known to Casey & Co. that there was every risk that counsel instructed would not actually have the fact of the contact brought to his attention.

2.7 On that basis I ruled that the circumstances in which judgment was obtained in this case were much closer to the regular than the irregular end of the spectrum and that, in all the circumstances of the case, it would be inappropriate to set aside the judgment without considering the basis on which it was suggested that Casey & Co. might have a defence. I therefore afforded Casey & Co. an opportunity to put whatever defence they might seek to assert on affidavit so that I could give further consideration to the matter in the light of the asserted defence. A subsequent hearing occurred after affidavit evidence had been filed concerning the contended for defence and this judgment is directed to that hearing.

2.8 Before going on to consider the issues raised, I should also note that, in the course of the original hearing, the first named defendant suggested that among the matters that might well be raised by way of defence concerned difficulties which, it was said, the plaintiffs might have encountered in successfully pursuing their claim for defamation had the proceedings been maintained in an orderly fashion. I pointed out at that time that difficulties which a plaintiff might have encountered in successfully bringing proceedings which are not, in fact, prosecuted by virtue of the negligence of a solicitor instructed to prosecute such proceedings, do not necessarily afford a defence to a negligence action grounded upon the failure to properly prosecute the proceedings contemplated. Clearly, if a plaintiff is advised that he has no cause of action and appears to accept that advice, then that is one thing, subject to the possibility that the advice itself may be said to have been negligent. Equally, where a plaintiff is advised not to bring proceedings because of the risks inherent in the proceedings which are contemplated and where the plaintiff appears to accept that advice, there may well be no claim in negligence in failing to pursue the proceedings unless the advice itself may, again, be said to have been negligent.

2.9 Where, however, a plaintiff is left in a position where he believes that proceedings will be pursued, but where they are either not commenced or, as here, commenced but not served in time so as to have placed a continuance of the proceedings at risk, then a claim in negligence will *prima facie* arise. The calculation of the damages to which the plaintiff may be entitled will, of course, have regard to the extent to which the proceedings might have been likely to have been successful and the value of any relief that might have been obtained had they been successful. What the plaintiff will have lost due to the negligence of a solicitor in those circumstances is his chance of succeeding in the proceedings.

2.10 As is clear from the Supreme Court decision in *Philip v. Ryan* [2004] IESC 204, the damages to be awarded in such circumstances has to have regard to the extent to which the court becomes satisfied that the plaintiff would have had a high or low chance of success in those proceedings. If the proceedings were virtually certain of success, then his damages in a negligence action against his solicitor will be close to or at the full value of the case which he was precluded from maintaining by virtue of that solicitor's negligence. If the case had only a small chance of success then any damages to be awarded against the solicitor will have to take full account of that fact. However, it is important to note, therefore, that, subject to the case being unstateable and the plaintiff being told that, or the proceedings being unwise by virtue of the risks involved and the plaintiff accepting that, questions concerning the strength or otherwise of the plaintiff's original case are really matter which may go to the quantum of the damages to which he may be entitled in an action for negligence against his solicitor, rather than providing a defence as such.

2.11 In fairness, counsel who was ultimately instructed for the second phase of the hearing on behalf of Casey & Co., accepted that analysis and confined himself, in arguing that there was a defence which ought persuade the court to set aside the judgment, for other propositions to which I will shortly turn. However, it is firstly appropriate to address the test by reference to which I should assess the defence contended for.

3. The law

3.1 In *Martin O'Callaghan Limited v. Patrick O'Donovan & Anor.* (Unreported, Supreme Court, Lynch J., 13th May, 1997) the Supreme Court had to consider a motion to set aside judgment, where it was accepted that the judgment had been regularly obtained and where it was, therefore, necessary to consider the defence which the defendant would wish to put forward in the event that the judgment was set aside. Speaking for the Supreme Court, Lynch J. adopted the test stated in *The Saudi Eagle* [1986] LLR 2, at p. 223. In the passage quoted with approval by Lynch J. a test of "an arguable case" which had been proposed by the defendant in that case was rejected. Rather, it was stated that "a defendant who is asking the court to exercise its discretion in its favour should show that he has a defence which has a real prospect of success".

3.2 The test which I should apply is, therefore, clear. It is not sufficient that I be satisfied that Casey & Co. has an arguable defence to these proceedings. It is necessary that I be satisfied that Casey & Co. has a defence which has, in the words of *The Saudi Eagle*, a real prospect of success. I, therefore, propose to apply that test to assess the contended for defence.

4. Application to Facts of this Case

4.1 It is clear that the Senior Counsel instructed on behalf of the plaintiffs by Casey & Co. in relation to the defamation proceedings

did express certain concerns relating to the question of whether it could be established that the plaintiffs were identified in the articles which allegedly were defamatory of them. In that context it was clear that there were at least some difficulties in relation to the plaintiffs' proceedings. As a result it would appear that the question of the plaintiffs being afforded an indemnity by the State (they being customs officers and the alleged defamation relating to them in their capacity as such) was raised. There seems to be some factual dispute as to the precise instructions which may have been given to Mr. Casey at material times. It would appear that an indemnity was ultimately offered on behalf of the State but only on the basis that any damages which might be recovered would be given to the State. There is little doubt but that the indemnity offered was considered by the plaintiffs to be unsatisfactory. However, there is a dispute between the parties as to whether, ultimately, the plaintiffs (as they assert) gave instructions that the proceedings were to go ahead notwithstanding the unsatisfactory nature of the indemnity if that was the best that could be obtained or, as Mr. Casey asserts, that the plaintiffs were unwilling to proceed on the basis of the offered indemnity.

4.2 Counsel for the plaintiffs draws attention to the contents of certain correspondence and memoranda of meetings from which it is asserted that I should infer that it is likely that the plaintiffs' account will be accepted in relation to that dispute of fact. There is certainly some substance to counsel's argument. However, I am mindful of the oft noted strictures set out in many judgments of both this Court and the Supreme Court which warn of the dangers of reaching any significant conclusions at an interlocutory stage and on the basis of affidavit evidence in relation to disputed factual matters. At the end of the day if the Court were ultimately to decide as a matter of fact that the plaintiffs were unwilling to proceed without a better form of indemnity from the State authorities than was forthcoming, then that would, of course, afford a full defence to these proceedings. As the underlying issue of fact which would determine that issue is likely to require to be heard by this Court in the near future, I should refrain from expressing any view on the merits or otherwise of the competing arguments save such as is necessary to determine the application before me. I, therefore, confine myself to indicating that I am satisfied that Casey & Co. have met the relevant test in relation to establishing a possible defence on that ground.

4.3 I should, however, indicate that a second ground of possible defence relied upon in argument before me does not, in my view, have a real prospect of success. It was said that the plaintiffs' new solicitors could, nonetheless, have gone ahead with an application to renew the summons some four and a half years after it had been issued and some three and a half years after it had expired and that the plaintiffs new solicitors should have made such an application based on the file and without a reply from Casey & Co as to the reasons why the summons had not been served. On that basis it is said, also, that Casey & Co. has a real prospect of success in defending these proceedings. I am afraid I cannot agree. On what basis were the plaintiffs' new solicitors to urge upon the Court that a summons should be renewed in circumstances where no real or full explanation could be tendered as to why the summons had not been served at the relevant time or any time like it. I am satisfied that the plaintiffs' new solicitors were in a wholly impossible situation in the absence of obtaining any assistance from Casey & Co. in that regard. I am not, therefore, satisfied that any independent ground of defence exists under that hearing which meets the "real prospect of success" threshold.

4.4 I am, therefore, satisfied that the only ground of defence which has been made out as meeting the appropriate threshold is the factual contention that it is alleged that the plaintiffs instructed Casey & Co. not to proceed with the litigation in the absence of a more beneficial indemnity from the State. I, therefore, propose setting aside the judgment and extending the time for Casey & Co. to file a defence by a period of one week from today's date. I should emphasise, however, that this order is on strict terms.

4.5 Firstly, the only defence which I will permit to be raised so far as liability is concerned is the defence which I have just identified. While Casey & Co. are free to raise whatever issues as to quantum that they consider appropriate, the defence so far as liability is concerned must be confined in that way.

4.6 Secondly, I am satisfied that the plaintiffs have suffered enough delay in getting a resolution of these proceedings. The case is already assigned to be heard in the Cork list. The next Cork list is scheduled to take place in early June and these proceedings will have to ready within that time frame. In that regard I have also had to take into account the fact that there was an unconscionable delay on the part of Casey & Co. in bringing this application to set aside the default judgment before the Court. I appreciate that there was evidence which suggests reasons why the first named defendant may not have been able to attend to matters for relatively significant portions of the period between the time when judgment was obtained and when the application to set aside the judgment was originally brought. However, those circumstances only provide a partial explanation. In addition no explanation whatsoever has been given as to why the second named defendant could not have dealt with these matters in circumstances where the first named defendant was unable so to do. I am, quite frankly, not satisfied that any adequate explanation has been given for the delay. On balance I came to the view that I should not regard that failure of explanation as a sufficient factor to prevent Casey & Co. being permitted to defend theses proceedings on their merits. However, that delay places an even greater obligation upon Casey & Co. to act in a manner which ensures that these proceedings are ready for hearing at the next session.

4.7 If, therefore, the plaintiffs wish to seek discovery (and it is not clear that this will be necessary having regard to the fact that Casey & Co's files would appear to have been handed over to their new solicitors) then any request seeking voluntary discovery should be replied to within ten days of the receipt of a letter seeking same. In addition Casey & Co. must raise any requests which they may have for discovery within ten days of the filing of their defence. Any material failure to comply with those time limits will be treated as a breach of a condition on which I have been prepared to set the judgment aside and will result in the defence being struck out and the case reverting to be one which will be an assessment only during the next Cork sessions. I should emphasise that these strictures apply only to Casey & Co. Should it transpire that the plaintiffs are placed in any difficulty concerning a tight time frame then they are at liberty to have these proceedings operate at a slower pace. Casey & Co. could not be heard to complain in those circumstances.

4.8 It also seems to me that all of the factors which I have earlier identified lead only to the conclusion that the justice of the case requires that this significant leeway be granted to Casey & Co. only on condition of a significant penalty as to costs. This judgment is, therefore, conditional upon the entire costs of the proceedings to date (including the costs of the application to which this judgment is directed) being paid by Casey & Co. to the plaintiffs. I will, however, stay any action directed towards the enforcement of that order until such time as the proceedings as a whole have been completed.

5. Conclusion

5.1 In summary, therefore, I am prepared to set aside the judgment but on the following conditions:-

> (a) That the only defence as to liability which is permitted is one in which it is contended that the plaintiffs gave instructions that the proceedings were not to be progressed in the absence of a form of indemnity from the State which was not forthcoming;
>
> (b) That the time limits to which I have earlier referred will be strictly complied with by Casey & Co.;

and

(c) That Casey & Co. are liable for all of the costs of these proceedings to date.