Neutral Citation [2013] IEHC 209

THE HIGH COURT

Record Number: 2002 No. 15244P

Between:

Paul Smyth

Plaintiff

And

The Commissioner of An Garda Síochana, The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General

Defendants

THE HIGH COURT

Record Number: 2003 No. 15671P

Between:

Brenda Flood and Philip Smyth

Plaintiffs

And

Colm Church, Raymond Murray, The Commissioner of An Garda Síochana, The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General

Judgment of Mr Justice Michael Peart delivered on the 16th day of May 2013:

The events giving rise to these two sets of proceedings occurred about 20 years ago even though the proceedings themselves were commenced in 2002. For present purposes it is unnecessary to set out the extensive background to the proceedings and the present application.

I have already decided that in the very unusual circumstances of these cases that delay was not sufficient to lead to the dismissal of the proceedings on the grounds of delay.

What is before the Court now for decision is an application by the defendants that a preliminary issue be directed on a point of law, namely that regardless of what facts may be established in relation to the allegations contained in the Statements of Claim regarding how an investigation of the plaintiffs' complaints the subject of the proceedings was carried out, or not carried out, by members of An Garda Siochana, as a matter of Irish law no duty of care under the law of tort and in particular the law of negligence is owed to the plaintiffs, or members of the public generally, by members of An Garda Siochana in relation to how those investigations are carried out.

The defendants submit therefore that it is desirable in terms of a saving in costs and in the proper use of court time, that this issue be determined now, and that it should not have to await the full hearing of the case. They submit that the plaintiffs' cases are purely speculative, and for success would require an impermissible extension of the law of negligence against a substantial body of existing authority to the effect that no such duty of care to the plaintiffs is owed under Irish law regardless of what facts may be established at trial.

Two other preliminary issues are sought, one being that the proceedings are statute barred, and the other that certain matters are already *res judicata* having been decided in other proceedings in which Mr Paul Smyth was a plaintiff. I can dispose of those applications quickly. The Statute point is closely linked to the delay issue which I have already decided and I do not think this is a case where that issue can be decided discretely and it would have to await oral evidence in the rather exceptional facts of this case. As for the *res judicata* issue, it is accepted by the defendants that those proceedings did not involve Mr Philip Smyth. In those circumstances there is nothing to be gained for these proceedings in now having that matter determined either. So I refuse the defendants' application in that regard.

But, to return to the issue under consideration, in so far as some of the case-law relevant to whether or not such an issue on a point of law should be directed states that it is undesirable for such an issue to be directed where facts are in dispute between the parties, the defendants have stated that for the purpose of having this preliminary issue determined they will accept the truth of the allegations of fact pleaded in the each plaintiffs Statement of Claim, and that submit therefore, for that purpose alone, that there are no facts in dispute.

The plaintiffs on the other hand urge that the Court should direct a preliminary issue only where that determination, whichever way it is decided, will bring an end to the proceedings. In that regard they point to the rather obvious fact that only if the issue is determined in favour of the defendants will the proceedings be at an end.

The trial of a preliminary issue is dealt with under three different rules in the Rules of the Superior Courts.

Order 25, rule 1 RSC provides:

> *"Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial. "*

Order 34, rule 2 RSC provides:

> *"If it appears to the Court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed'. [emphasis added]*

Order 36, rules 7 and 9 provide respectively:
"(7) The Court may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which, without the 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.

(9) Subject to provisions of the preceding rules, the Court may in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others and in all cases may order that one or more issues of fact be tried before any other or others."

In relation to Order 36, Michael Collins SC for the plaintiffs has submitted that it does not apply to the present case, but rather refers to what he termed 'a modular trial' rather than the determination of what is essentially a point of law in the present case. But he stresses in any event that the point of law in question on this application will in any event be dependent upon many factual issues all of which are put in issue in the defendants' Defences, and that there would be no savings in terns of court time and costs. He points also to the fact that in the case of Paul Smyth, there is a claim based on contract in addition to the claims in negligence, as Paul Smyth at the time of the events in question was a serving member of An Garda Siochana. He urges that the determination of the duty of care issue in favour of the defendants will not put an end to Paul Smyth's proceedings in their entirety. But Paul Anthony McDermott BL for the defendants submits that any claim put forward on the basis of any such contract is itself dependent upon a breach of a duty of care, and submits that no distinction therefore arises.

Even in relation to Mr Collins's arguments on Order 25 and Order 34, heavy emphasis is put on the existence of disputed facts in the case, and on certain cases which have decided that in such circumstances no preliminary issue ought to be directed.

As far as Order 25 and Order 34 RSC are concerned, there is not much relevant distinction in my view. Each rule enables a Court to direct the disposal of a point of law. Order 25 would appear to enable a party to make an application for the hearing of a preliminary issue on a point of law, while Order 34 appears to empower the Court, perhaps of its own motion, to so direct. The case law to which I have been referred would appear to have equal application to either rule.

The question of there being disputed facts is a central question in the cases referred to. For instance, in *Kilty v. Hayden* [1969] IR 261, O'Dalaigh CJ stated at p. 266:

> *"I am satisfied that the procedure laid down under Order 25, r. I corresponds to the old hearing on a demurrer, and may not be availed of where the facts giving rise to the point of law are in dispute between the parties. For the reasons stated I would allow the appeal".*

A similar view has been expressed subsequently by McMenamin J. in *Murray v. Fitzgerald* [2009] IEHC 101 where at paragraph 27 of his judgment where he refused to direct a preliminary issue to be tried, he stated:

> "27. *In the instant case I find that there are facts in dispute, and further that there is no agreement on facts*." [emphasis added]

In similar vein, Dunne J reviewed the case law on this point in her judgment in *Tritton Development Fund Limited v. Markin A.G.* [2007] IEHC 21, and set forth a number of key principles. Firstly, the purpose of directing such an issue to be tried is to achieve a saving in court time and costs. Secondly, that this should be done only in exceptional cases, particularly where there are mixed issues of law and fact involved in the preliminary issue. Thirdly, she expressed the view that the authorities seemed to indicate that a preliminary issue should be directed only when whichever way it is decided it is conclusive of the whole matter. In that case, she went on to state that while the issue was a very important aspect of the cases between the parties and at the heart of the case> she went on to state:

> *"It may be fair to say that it would be conclusive of the case if determined in favour of the defendant, but given that it forms such a central part of the case between them it does not appear to me to be a suitable issue to be dealt with in the manner suggested. "*

In *Nyembo v. Refugee Appeals Tribunal* [2007] IESC 25, Denham J. (as she then was) stated:

> *"In this case there are contested facts which are relevant to the issues of law. There is no agreement on the facts. Nor are the facts conceded for the purpose of the preliminary issues. In such circumstances it is not appropriate, practical or convenient to have preliminary issues of law determined. It is well settled in law that where there are disputed facts an application for the hearing of a preliminary issue cannot succeed. In all the circumstances, also, I would merely reflect that, as Lord Evershed MR. pointed out, the attempted short cut turns out to be the longest way. I would allow the appeal. " [emphasis added]*

Mr Collins in his written submissions has referred to much older authority also, namely the judgment of Jessel MR in the Court of Appeal in *Emma Silver Mining Company Limited v. Grant* [1879] 11 Ch D 918 where he stated as follows:

> *"In a cause of this kind my opinion is that the judge must have some evidence which will make it at least probable that the issue will put an end to the action. The plaintiff is not to be harassed at the instance of the defendant by a series of*

trials, each trial taking issue on every link of the plaintiff's case. That is not the meaning of the rule as I understand it, but it may properly be applied in such a case as that I have stated, where the Judge has serious reason to believe that the trial of the issue will put an end to the action. "

Finally, I would refer to a passage from the judgment of O'Higgins CJ in *Tara Exploration and Development Limited v. Minister for Industry and Commerce* [1975] IR 242 where dealing with an application under Order 34, r. 2 RSC he stated:

"The infrequent use of this procedure may be explained by the restricted field in which it can operate. First of all, there must be a question of law which can be identified amongst the issues in the action. Further this question of law must be such that it can be decided before any evidence is given. If special facts have to be proved or if facts are in dispute the rules do not apply. In addition, it must appear to the court to be convenient to try such question of law before any evidence is given. This will involve consideration of the effect on the other issues in the case and whether its resolution will reduce these significantly or shorten the hearing. Convenience in this respect must also be considered in the light of what appears fair, proper and just in the circumstances. "

It seems to me in the present case that there is certainly an identifiable question of law, namely whether there is any duty of care owed to a member of the public such as the plaintiffs in relation to the investigating of a complaint, and if not, whether, the fact that Paul Smyth was himself a member of An Garda Siochana, makes any difference. It seems also that it is purely a question of law which can be tried before any evidence is given, especially in the light of the concession by the defendant for the purpose of the issue of the facts pleaded by the plaintiffs in support of their claims. I have no doubt given the nature of the claims, that there will be a significant saving in terms of costs and court time to have those questions determined in advance of any full hearing on the facts. Were it not for that concession by the defendants this would not be a suitable case, as facts are in dispute.

I am particularly persuaded by the extract from the judgement of Denham J. (as she then was) in Nyembo where it is clear a concession of facts for the purpose of the issue will get over the difficulty presented by disputed facts. The rules themselves are silent as to the effect of disputed facts on the success of an application. Nevertheless it makes perfect sense that as a matter of practicality it is not appropriate that an issue be directed where facts are in dispute, as often the legal issue will be dependent on a resolution of at least some of those facts and evidence would have to be heard. In such circumstances it is hard to see how any great savings in terns of time and costs would be achieved.

As to whether it is necessary before an issue is directed that the issue should be one which, whatever way it is decided, will bring an end to the proceedings, it is worth noting again that in Order 34, rule 2 RSC the Court may order an issue to be tried and also that "*all such further proceedings as the decision of such question of law* ***may render unnecessary*** *may thereupon be stayed*" [emphasis added]. That suggests that the aim of it bringing of the proceedings to an end is not an absolute one. Clearly, from the authorities above, it is highly desirable that there be a reasonable possibility that the entire proceedings would be brought to an end. But it would be a rare case indeed in my view that a point of law, whichever way it is decided, would end the proceedings. The most usual point of law which is tried as a preliminary issue is where a defendant pleads the Statute of Limitations in a personal injury action. Unless it is a state of knowledge type case, the issue is relatively simple, but it could not be said that whatever way it is decided the proceedings will be at an end. Clearly it will be at an end only if the defendant is successful.

In the present case, the proceedings will be at end in the event that the defendant succeeds on the point of law, as in that case there will be no cause of action known to the law arising on the pleadings. Mr McDermott has opened a considerable body of case-law which would be in favour of the defendant's case on the issue in question. In fact, Mr Collins has referred to no case where such a duty of care in negligence has been found to exist on the part of An Garda Siochana, or in any other jurisdiction. That is not to say that the plaintiffs may not seek to break new ground, and that will be their task. I think even they would accept that the mountain they must ascend is a steep one. In such circumstances I feel it is reasonable to conclude that the issue in question has at least a possibility of ending these proceedings, and I would go so far as to say a probability. I apply these comments as much to the case of Paul Smyth as to that of Philip Smyth. Nevertheless, the Court remains open to persuasion in due course. But it is an exceptional case, made easier by the fact that the defendants have made the essential concession for the purpose of the trial of the issue that they will accept the facts as pleaded by the plaintiffs in their Statement of Claim, thereby allowing the Court to take the plaintiffs case at its highest when determining whether there is any legitimate cause of action at all on those facts.

I will therefore make an appropriate order for the trial of those issues identified in relation to the absence of a duty of care, and if necessary hear Counsel in order to agree the precise terms of the order.