THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 216

Finlay Geoghegan J.
Peart J.
Hogan J.

Appeal Numbers 400, 401, 402, 403 & 404/2016

High Court Record Numbers [1999 No. 1257 P, 2005 No. 797 P, 2003 No. 13968 P, 2000 No. 12607 P & 2001 No. 9812 P]

BETWEEN

PAUL JOSEPH MURRAY, RICHARD LEONARD, JOHN ALLEN, GERARD PATRICK REGAN AND EUGENE HEAPHY
PLAINTIFFS/APPELLANTS

-AND-

THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND AND THE ATTORNEY GENERAL AND OTHERS

DEFENDANTS/RESPONDENTS

JUDGMENT delivered by Ms. Justice Finlay Geoghegan on the 21st day of July 2017

1. The questions raised by these appeals are whether the High Court has an inherent jurisdiction to set aside or permit a plaintiff to withdraw a notice of discontinuance filed pursuant to O. 26 of the Rules of the Superior Courts and, if it does, should it have exercised such jurisdiction in favour of each of the five plaintiffs in the proceedings.

2. Applications to set aside or permit each plaintiff to withdraw a notice of discontinuance which had been served were refused by the High Court (Barrett J.) for reasons set out in a judgment delivered on 26th May, 2016. By reason of the underlying facts alleged in these proceedings the trial judge concluded:

> "The Court, with every respect and no little regret, is therefore coerced as a matter of law into declining to grant the relief now sought of it by the plaintiffs."

3. The issue on appeal is whether the High Court judge was correct in so concluding.

Background facts and proceedings

4. Each of the plaintiffs is an adult male who was once a pupil in a national school run by the Christian Brothers. Each alleges that whilst a pupil he was sexually abused, sexually assaulted and, in some instances, also physically assaulted by a Christian Brother. Each plaintiff has instituted separate personal injury proceedings naming as defendants, in some instances, the alleged perpetrator of the abuse; in all instances a person nominated by the Christian Brothers Order and, again, in all instances, the Minister for Education & Science, Ireland and the Attorney General. I propose to describe these defendants as the "State defendants". Certain of the proceedings also name as defendants the board of management of the relevant school or an individual member of the board of management. The claims relate to matters alleged to have occurred in the 1950s, 1960s and 1970s. As appears from the record numbers of the proceedings they were instituted between 1999 and 2005. Statements of claim have been delivered in each of the proceedings in years between 1999 and 2008. Whilst there are certain differences in the manner in which the claims are pleaded, they include claims against the State defendants in negligence, for alleged breaches of constitutional rights and in vicarious liability for the actions of the alleged perpetrators.

5. Defences were filed, *inter alia*, on behalf of the State defendants.

6. A chronology has been submitted in relation to each of the proceedings. It is clear that there was an element of stop – start in certain of the proceedings. This was in part explained by decisions given in the High Court in other similar proceedings including:

- *Martin Delahunty v. South Eastern Health Board & Ors.* [2003] 4 IR 361
- *Louise O'Keeffe v. Leo Hickey & Ors.* [2006] IEHC 13, (Unreported, High Court, De Valera J., 20th January, 2006)
- *Thomas Murphy v. John Hannon & Ors.* [2006] IEHC 261, (Unreported, High Court, Johnson J., 18th July, 2006)
- *D.O'C. v. A.M.McD. the Minister for Education & Science Ireland and the Attorney General* and *M.O.S. v Minister for Education & Science Ireland and the Attorney General & Ors.* [2006] IEHC 299, (Unreported, High Court, O'Donovan J., 6th October, 2006)

7. Each of the above plaintiffs failed in the High Court against the State defendants, but in some instances succeeded against non-State defendants. Of these decisions, the most important is that of *O'Keeffe v. Hickey*, if for no other reason than Ms. O'Keeffe appealed her adverse decision to the Supreme Court. In certain of the current proceedings there was correspondence between the solicitors for the plaintiffs and the solicitors for the State defendants in relation to the potential impact of the decision in the *O'Keeffe* appeal for these proceedings. On 19th December, 2008 the Supreme Court delivered judgment in the *O'Keeffe* appeal: *O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 IR 302.

8. In the *O'Keeffe* case, it appears from the judgment of De Valera J. in the High Court that the plaintiff's claim against the State defendants was originally pursued in negligence, in vicarious liability and in respect of an action for damages for breaches of constitutional rights. The claim in negligence was stated by De Valera J. to be "arising out of the State's purported failure to put in place appropriate measures and procedures to detect and prevent sexual abuse by the first defendant." He granted a direction non-suiting the plaintiff in respect of this claim, as he concluded the Minister had no case to answer. It appears that no evidence was adduced by the plaintiff in support of the alleged negligence of the State. Ms. O'Keeffe's claim against the State upon the grounds that the State defendants were vicariously liable for the sexual assaults perpetrated on her by the first defendant and for breach of

constitutional rights was dismissed in the High Court for the reasons set out in the written judgment: [2006] IEHC 13.

9. In the Supreme Court, Ms. O'Keeffe's appeal was only pursued against the dismissal of the vicarious liability claim. She did not appeal against the dismissal of her claims against the State defendants in negligence and for breaches of constitutional rights. A majority of the Supreme Court dismissed the appeal: *O'Keeffe v. Hickey* [2009] 2 IR 302.

10. In the wake of the delivery of the Supreme Court judgments, the Chief State Solicitor wrote to the solicitors for each of the plaintiffs on various dates between January and March, 2009 in substantially similar terms. The correspondence included the following paragraphs:

> "We would draw your attention to the Supreme Court decision in the case of *Louise O'Keeffe –v – Leo Hickey, the Minister for Education & Science, Ireland and the Attorney General*, which was delivered on 19th December 2008. You will be aware that in dismissing the plaintiff's appeal, the Supreme Court held that the State defendants were not vicariously liable for the abusive actions of a teacher (or other party) as there was no employer/employee relationship between the abuser and the State defendants. The judgements of the Supreme Court may be found at www.courts.ie/Judgments.nsf/Webpages/HomePage.
>
> It appears to us that your client's case has the same legal issues as the above case, and therefore, cannot now succeed as against our clients, having regard to the jurisprudence as established in the Supreme Court.
>
> We wish to advise that, on our client's instructions, we are in a position to propose, at this time, that the State will not seek its costs on the conditions that, firstly, your client does not seek costs from the State and secondly, a Notice of Discontinuance is filed on behalf of your client by 31st March 2009.
>
> We wish to specifically state, at this time, that this offer to go back-to-back on costs stands strictly subject to the filing of a Notice of Discontinuance by 31st March 2009. In the event that a Notice of Discontinuance is not served by that date then our instructions are to seek our costs in the event that your client's claim is not successful against our clients."

11. In certain of the proceedings a further letter or letters were written extending the time for filing a notice of discontinuance and making a threat to bring a motion to strike out the plaintiff's claim.

12. Each of the plaintiffs had, in 2009 and in subsequent years, the benefit of legal advice and representation. Each of the plaintiffs served notices of discontinuance against the State defendants on the following dates:

- Paul Joseph Murray 2nd October, 2009
- Richard Leonard 20th February, 2009
- John Allen 2nd June, 2010
- Gerard Patrick Regan 16th March, 2009
- Eugene Heaphy 12th September, 2011

13. On 16th June, 2009 Ms. O'Keeffe lodged an application against Ireland with the European Court of Human Rights under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The primary complaint made was an alleged breach of Article 3 of the Convention in that the system of primary education in Ireland failed to protect her from sexual abuse by a teacher in 1973 and under Article 13 that she did not have an effective domestic remedy in that respect.

14. On 28th January, 2014 the Grand Chamber gave judgment *O'Keefe v Ireland* [GC] no.35810/09.ECHR 2014 (extracts) A majority of the Court held in favour of the applicant that there had been a violation by Ireland of Article 3 of the Convention in failing to fulfil its positive obligation to protect her from the sexual abuse to which she was subjected in 1973 whilst a pupil. The majority also determined that there had been a violation of Article 13 of the Convention as it had not been demonstrated by Ireland that the applicant had an effective domestic remedy available to her as regards her complaints of a breach of Article 3 of the Convention.

15. In 2016 the notices of motion were brought in each of the proceedings seeking to set aside or to be granted leave to withdraw the notices of discontinuance served in respect of the claims against the State defendants. Prior to the issue of the notices of motion letters had been written requesting consent to the setting aside of the notices of discontinuance. All five motions were heard together by the High Court and a single judgment given.

High Court judgment

16. The trial judge carefully analysed the Supreme Court decision in *Smyth v Tunney* [2009] 3 IR 322 which concerned an application to set aside a notice of discontinuance in the context of the submissions made to him and the facts of these applications and ultimately determined, as a matter of law and in particular having regard to the decision in *Smyth v. Tunney* which was binding on him, that he was coerced to decline to grant the applications of the plaintiffs.

Appeal

17. The core submission on behalf of the appellants is that the High Court judge erred in holding that he was compelled by the decision of the Supreme Court in *Smyth v. Tunney* to dismiss the applications. The appellants submit that the High Court, or this Court on appeal, has an inherent jurisdiction to set aside a notice of discontinuance and that the circumstances of these cases warrant the exercise of that jurisdiction. The appellants submitted, as they did in the High Court, that the judgment of the European Court of Human Rights (ECtHR) in *O'Keeffe v. Ireland* created a change in the "legal landscape" which warrants the setting aside of the notices of discontinuance. However, at the hearing of this appeal, counsel on their behalf also relied upon the fact that the ECtHR judgment referred to and relied upon parts of reports produced by a number of commissions of inquiry in the State commencing with the Carrigan Report in 1931 and concluding with developments which followed the publication of the Ryan Report in May 2009. These references, she submitted, indicate the availability of evidence to the plaintiffs herein which had not been available to them when they discontinued the proceedings in 2009 and 2010.

The law

18. Order 26, rule 1 of the Superior Court Rules permits a plaintiff by notice in writing to "wholly discontinue his action against all or any of the defendants …" The rule expressly provides that such discontinuance shall not be a defence to any subsequent action.

Whilst there are certain times within which it can be done, without leave of the court or consent of the other parties, no issue has arisen on this appeal in relation to the validity of the notices of discontinuance served by each of the plaintiffs. They were clearly filed and served with the consent of the State defendants by reason of the prior correspondence.

19. Order 26 does not provide for the withdrawal of a notice of discontinuance nor does it expressly grant to the Court a power to set aside or permit the withdrawal of a notice of discontinuance. It is accepted on behalf of the plaintiffs that there is nothing in O. 26 which would permit such an interpretation of the rule.

20. The first question, therefore, is whether the court as part of its inherent jurisdiction may permit a notice of discontinuance to be set aside or withdrawn. There is no distinction between setting aside and withdrawing. It is accepted that in either instance it would have to be pursuant to an order made by the court pursuant to its inherent jurisdiction.

21. The issue was considered by the Supreme Court in *Smyth v. Tunney*. The trial judge correctly observed that that judgment was binding on him, as it is on this Court. The single judgment was given by Finnegan J. (with whom Kearns J. and Macken J. concurred). In that case the plaintiff had served a notice of discontinuance against the third defendant only. Subsequent to service of the notice, the Supreme Court gave a decision in a separate action between different (but possibly related) parties which the plaintiff in *Smyth v. Tunney* considered could assist him in his discontinued claim against the third defendant. The High Court granted liberty to withdraw the notice of discontinuance and the defendant appealed.

22. The judgment of Finnegan J. refers to and considers a number of the judgments to which this Court was again referred on this appeal. In relation to the existence of an inherent jurisdiction, he considered the judgment of Esson J.A. in the British Colombia Court of Appeal in *Adam v. Insurance Corporation of British Colombia* [1985] 66 BCLR 164 which in turn considered a judgment of a Master in the Canadian case of *Cusack v. Garden City Press Limited* [1978] 22 O.R. (2d)126. In *Cusack* the Master had stated:

> "I feel that it must always be open to the court in proper circumstances to relieve against an act done either by way of inadvertence or misapprehension and that this should be particularly so where no real prejudice to the other side is demonstrated."

23. Finnegan J. at p. 328 refers to the holding by Esson J.A. that:

> "the court must have an inherent jurisdiction over its own process and there must be a discretionary power to relief against the consequences of discontinuance without attempting to catalogue the circumstances which would justify the exercise of that power. He held that the circumstances must be very special and may not go beyond the kind of inadvertence, mistake or misapprehension which existed in *Cusack v. Garden City Press Ltd.*"

Of this decision, Finnegan J. then stated at p. 328 :

> "This decision does not appear to me to advance the plaintiff's case. There was no question of inadvertence or mistake but rather a deliberate decision not to proceed against the third defendant with a view to minimising the risk as to costs. The present case falls outside the very limited sphere in which the inherent jurisdiction envisaged by Esson J.A. would operate."

24. At this point in the judgment Finnegan J. neither expressly agreed or disagreed that such an inherent jurisdiction exists in Ireland.

25. He then noted the similarity between the rules in England and Wales, up to the introduction of the civil procedure rules in 1998, and O. 26 in this jurisdiction and observed that, accordingly, the decisions of the courts of England on this point are persuasive. He then turned to the law in this jurisdiction, stating at p. 329:

> "A starting point as to the law in this jurisdiction is Wylie on the *Judicature Acts* (1st ed., 1906). At p. 437 he states that O. 26, r. 1 forms a complete code as to the discontinuance of an action or the withdrawal of a defence or counterclaim and cites as authority *Fox v. Star Newspaper Company* [1898] 1 Q.B. 636, a judgment of the Court of Appeal. That judgment was upheld by the House of Lords, reported at [1900] A.C. 19. The rule in issue in that case is identical to that in the Rules of 1905. Chitty L.J. in the Court of Appeal said at p. 639:-
>
> > "It seems to me that Order XXVI. is intended to form a complete code applicable to the whole subject of discontinuing an action."
>
> This view of O. 26, r. 1, persisted in England and Wales - service of a notice of discontinuance put an end to the action but without prejudice to the right of the plaintiff to institute fresh proceedings on the same grounds, but subject to an exception where service of a notice of discontinuance was an abuse of the court's process when the discontinuance could be set aside on application by the other party to the cause."

26. He then considered two English cases: *Castanho v. Browne & Root* [1981] A.C. 557 and *Ernst & Young v. Butte Mining plc* [1996] 1 W.L.R. 1605. Each of those judgments concerned applications by a defendant to set aside a notice of discontinuance served by a plaintiff upon the grounds that its service was an abuse of process. In Castanho the plaintiff, a resident in Portugal, commenced personal injury proceedings for an accident on an American ship which was lying in port in England. Two interim payments were made on consent and the defendant admitted liability. The plaintiff then commenced an action in Texas and discontinued the English proceedings by reason of the probability of higher damages in Texas. Ultimately the House of Lords agreed with a dissenting judgment of Lord Denning M.R. in the Court of Appeal that it is possible to treat a notice of discontinuance which complies with the Rules of Court as an abuse of process, and that in such circumstances the court has jurisdiction to strike it out. As observed by Finnegan J., the House of Lords thus established an exception to the general rule that O. 26, r.1 was a complete code and that as the rule did not provide for the striking out of a notice of discontinuance, the court had no power to do so.

27. In *Ernst & Young v. Butte Mining plc*. a similar jurisdiction was exercised to strike out a notice of discontinuance which was served to prevent the service of a counterclaim in circumstances where the defendant had intimated intention to counterclaim but had agreed to set aside a summary judgment.

28. Finnegan J. at p. 331 of his judgment in *Smyth v Tunney* having referred to the decision in *Ernst & Young* stated:

> "While the issue was determined on the basis of abuse of process the circumstances come closer to those in which equity would grant relief, that is, fraud, accident or mistake. However, no case has been cited in this or in the neighbouring

> jurisdiction where a notice of discontinuance has been struck out on such a basis. Abuse of process is narrower in scope than the equitable principles in that it concerns the inherent power of the court to prevent misuse of its procedure in a way which although not inconsistent with the literal application of its procedural rules would nevertheless be manifestly unfair to a party to the litigation or would otherwise bring the administration of justice into disrepute."

29. Finnegan J. referred to other English cases to similar effect and then stated:

> "The cases consistently recognise that the rule does not provide for the withdrawal of a notice of discontinuance by the party who has served the same. The court has not been referred to any case in this jurisdiction or in England and Wales where this has been permitted. There is no report of such case in either jurisdiction recognising an inherent jurisdiction to do so. Even if such jurisdiction should exist this is not a case in which it should be exercised. The decision to serve the notice of discontinuance was a conscious and advised one. The withdrawal of the notice of discontinuance at this stage would likely deprive the third defendant of a defence of the Statute of Limitations."

30. It appears to me that the Supreme Court *per* Finnegan J. in *Smyth v. Tunney* tacitly recognised that the Irish courts have an inherent jurisdiction to set aside a notice of discontinuance. Such a conclusion appears to follow from his reference to the similarity of O.26 r.1 with the English Rules prior to 1998, and the citation with apparent approval of the English persuasive authorities in which notices were struck out on the application of a defendant as an abuse of process. The position in relation to the jurisdiction of the court where the application to strike out is by the party who served the notice of discontinuance is, perhaps, less clear.

31. As a matter of logic, however, once it is determined that the court has an inherent jurisdiction to strike out a notice of discontinuance then the question becomes the circumstances in which it may or should exercise such inherent jurisdiction.

32. I do not understand the judgment in *Smyth v Tunney* to preclude the court setting aside a notice of discontinuance on the application of the person who served same. The citation of the Canadian cases which recognise an inherent jurisdiction to set aside a notice of discontinuance on an application of a person who served same where it was served or filed by way of inadvertence, misapprehension or mistake without disagreement appears to leave it open. The fact that Finnegan J. recorded that the Court had not been referred to any case in this jurisdiction or in England and Wales where an application to withdraw by the party who served same has been allowed - whilst not excluding such a possibility – does, however, indicate the potential exceptional nature of any such successful application.

33. What is very clear is that on the facts of *Smyth v Tunney* Finnegan J. determined that it was not a case in which such an inherent jurisdiction should have been exercised. He cited two reasons for this; (1) the notice of discontinuance was a conscious and advised one and (2) the withdrawal of the notice of discontinuance would likely deprive the third defendant of a defence under the Statute of Limitations.

34. On the facts of these appeals it is not in dispute that each plaintiff served the notice of discontinuance with the benefit of legal advice and did so deliberately following the correspondence and offer in relation to costs. The service of the notice was, therefore, in the sense used in *Smyth v. Tunney*, a conscious and advised one. It is furthermore not in dispute that if the Court were now to set aside the notice it would as a matter of probability deprive the State defendants of a defence under the Statute of Limitations (as amended).

35. The submissions of the plaintiffs seek in part to bring themselves within the situation of the Canadian cases, namely, where a notice of discontinuance was served through mistake, misapprehension or inadvertence. They also in part seek to rely upon the law according to which the Court will set aside a contract or a consent order in proceedings where it was founded upon a mutual mistake of law or fact. The notices of discontinuance cannot be said to have been served by reason of inadvertence. There is no need to distinguish on the facts herein between misapprehension and mistake.

36. The submissions made on behalf of the plaintiffs, when viewed in their different guises, all fail for a central reason. That reason is that the ECtHR judgment in *O'Keeffe v. Ireland* did not change the domestic law or potential causes of action available to the plaintiffs in these proceedings against the State defendants. As already stated, Ireland was found to be in breach of its positive obligations to Ms. O'Keeffe under Articles 3 and 13 of the Convention. The Convention is an international treaty and in accordance with Article 29.6 of the Constitution, it is only part of the domestic law of the State to such extent as may be determined by the Oireachtas. That was done by the European Convention on Human Rights Act 2003. That Act does not have retrospective effect: see *Dublin City Council v. Fennell* [2005] IESC 33, [2005] 1 I.R. 604.

37. The incidents giving rise to these proceedings took place long before the coming into effect of the 2003 Act. Accordingly there is no cause of action maintainable against the State defendants pursuant to the 2003 Act in relation to any obligation imposed on any of the State defendants in domestic law pursuant to the Convention arising out of the incidents the subject matter of the proceedings. There is no cause of action now available to the plaintiffs against the State defendants by reason of the ECtHR judgment in *O'Keeffe v. Ireland* which was not also available to the plaintiffs prior to that decision. When asked by members of the Court to identify any such additional cause of action, counsel for the plaintiffs was understandably unable to do so. The plaintiffs' claims in these proceedings against the State defendants were in negligence, vicarious liability and for breach of constitutional rights or duties. The domestic law relating to those causes of action has not been altered by the decision in *O'Keeffe v. Ireland*.

38. Insofar as counsel for the plaintiffs sought to rely on the identification by the ECtHR in its judgment in *O'Keeffe v. Ireland* of the existence of relevant evidence from reports of commissions of inquiry which both predated and post dated service of the notices of discontinuance as a ground to set aside the notices of discontinuance, it does not appear to me that this could be regarded as a basis upon which the Court could set aside the notices of discontinuance. Even if the notices are to be regarded as served pursuant to a compromise agreement and there is now new relevant evidence of which the plaintiffs and their legal advisors were not aware at the time of the service of the notices of discontinuance, such circumstances on the facts of these proceedings could not constitute a basis to set aside either the compromise agreement or the notice of discontinuance. In relation to any agreement insofar as the lack of awareness of such potential evidence may be considered to be a mistake of fact, there is no evidence that it was a shared mistake of fact and, more particularly, it is not one which would render impossible the performance of the compromise agreement entered into between the plaintiffs and the State defendants. Those agreements were that the plaintiffs would serve notices of discontinuance and the State parties would not seek their costs against the plaintiffs. The entitlement to seek the costs would of course otherwise arise following a service of a notice of discontinuance in accordance with O. 26, r. 1.

39. Furthermore, where, as was done here, a party makes a conscious advised decision to serve a notice of discontinuance, the subsequent discovery of potentially relevant evidence which might enhance the plaintiff's chance of success in the discontinued claim is not a basis upon which the Court could set aside the notice. It would be contrary to the principles in relation to the finality of

litigation and the effect of the service of a notice of discontinuance and indeed the Supreme Court decision in *Smyth v Tunney.*

40. Finally, the plaintiffs rely upon their undoubtedly vulnerable positions but incorrectly submit that the correspondence from the Chief State Solicitor following the Supreme Court decision in *O'Keeffe v. Hickey* is such that they acted under duress in serving the notices of discontinuance.

41. The substantive terms of the letters sent are set out above. They do clearly indicate the State's view that the plaintiffs' claims in these proceedings involved the same legal issue upon which Ms. O'Keeffe was unsuccessful against the State defendants in the Supreme Court. In that context they made the offer not to seek costs on condition of the service of a notice of discontinuance.

42. However, it remained a matter for each plaintiff with the benefit of advice from his own lawyers as to whether he should then discontinue and avoid the risk of orders for costs if unsuccessful in his proceedings against the State defendants. It was a matter for each plaintiff with the benefit of legal advice to decide whether or not the issues in his proceedings had been disposed of by the Supreme Court in *O'Keeffe v. Hickey* or whether he had claims which might be pursued which had not been excluded by the Supreme Court decision in that case. The only claim determined in that judgment was the claim in vicarious liability. There had also been other unsuccessful claims against State defendants decided in the High Court as referred to above, but it is important to state that there had been no decision at appellate level in respect of a claim either in negligence or for breach of constitutional right or duty. There were, however, obvious risks in costs in continuing to pursue such claims having regard to the adverse High Court decisions. It was a matter for each plaintiffs to decide whether or not he wished to take such a risk or to accept the State offer which obviated the risk which each did in making the decision to discontinue. Having done so and served the notice of discontinuance there is no basis upon the law and facts in these proceedings the Court may now permit the plaintiffs to change their minds.

43. I have concluded for those reasons that the trial judge was correct in deciding that he was coerced by the law as set out in the Supreme Court judgment in *Smyth v. Tunney* to dismiss the plaintiffs' applications to set aside or withdraw the notices of discontinuance served. Whilst acknowledging, as did the trial judge, the undoubted suffering of the plaintiffs if the facts alleged in the statements of claim happened, this Court must nevertheless apply the law and, accordingly, it must dismiss the appeals.

Conclusions

44. The High Court does have an inherent jurisdiction to set aside or permit a plaintiff to withdraw a notice of discontinuance filed pursuant to O. 26 of the Rules of the Superior Courts.

45. The trial judge was, however, correct in determining that in accordance with the law as set out by the Supreme Court in *Smyth v. Tunney* [2009] 3 I.R. 322 the notices of discontinuance served by the plaintiffs in each of the above entitled proceedings should not be set aside.

46. Accordingly the appeals will be dismissed.