Neutral Citation: [2014] IEHC 296

THE HIGH COURT

[2006 No. 5400 P]

BETWEEN

MARY JO MOLONEY

PLAINTIFFS

AND

SAMY MALHAS AND ADVANCED COSMETIC SURGERY LIMITED

DEFENDANT

THE HIGH COURT

[2008 No. 2482 P]

BETWEEN

DEIRDRE SHORTT

PLAINTIFF

AND

SAMY MALHAS AND COSMEDICO CLINIC DUBLIN LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered on the day 4th day of June, 2014

1. These two cases, which raise very similar, if not quite identical issues, have been heard together and it seems sensible to deliver one judgment covering both cases. For convenience, I propose to refer to Mary Jo *Moloney v. Advanced Cosmetic Surgery Limited and Samy Malhas* [2006 No. 5400 P] as the *Moloney* case/the *Moloney* proceedings, and *Deirdre Shortt v. Samy Malhas and Cosmedico Limited [*2008 No. 2482 P] as the *Shortt* case/the *Shortt* proceedings. In each case, the matter before the Court involves an application by Arthur Cox & Co. Solicitors to come off record on behalf of Samy Malhas, having previously been on record on behalf of Mr. Malhas at the behest of the Medical Defence Union (MDU), and an application on behalf of the plaintiff in each case pursuant to O. 15, r. 37 appointing a representative of the Estate of the late Samy Malhas for the purpose of defending the case and/or for the purpose of requesting the assistance of the MDU in respect of claims brought against Mr. Malhas.

2. It is convenient to refer to the background to these two cases which have given rise to the four motions now before the court. So far as the *Moloney* proceedings are concerned, the position is that on 11th November, 2003, the plaintiff underwent a mastopexy (breast uplift) at the premises of Advanced Cosmetic Surgery Limited in Mount Merrion. The surgery was performed by Mr. Malhas. The plaintiff was quite dissatisfied with the outcome of surgery. The basis of the dissatisfaction is set out in considerable detail in the personal injuries summons, but the complaints include the fact that post surgery the breast wounds became very inflamed and that she was left with long term problems involving scarring, asymmetry, nipple mal-positioning, nipple hypersensitivity, lumpiness and distortion of the shape of the breast.

3. On 10th November, 2006, a personal injuries summons was issued. It is of some note that the proceedings raise issues as to the validity of the consent obtained.

4. Following a notice for particulars and reply thereto, a defence was delivered on behalf of the second named defendant on 15th November, 2012. The defence is a full one and involves denials that the second named defendant, Mr. Malhas, failed to inform the plaintiff of the risks associated with surgery.

5. On 19th November, 2013, a notice of intention to proceed was filed. It is of some significance that the first named defendant is now in liquidation, a liquidator having been appointed on 5th March, 2013, and that no insurance cover was in place in respect of that defendant when the plaintiff underwent surgery.

6. So far as the *Shortt* case is concerned, the position is that the plaintiff, on 3rd August, 2007, underwent a rhinoplasty procedure at the premises of Cosmedico. The surgery was performed by the first named defendant in these proceedings, Mr. Malhas. Again, the plaintiff is unhappy with the outcome. In that regard, she has been described as "a nasal cripple". A defence was delivered on 12th January, 2010, and on 20th November, 2012, a notice of intention to proceed was filed. The defence of Mr. Malhas involves certain admissions, accepting that the plaintiff developed a small depression or dent on the left side of the nose due to excessive removal of vestibular skin in the nasal valve area, and to that extent, and only to that extent, that the procedure was suboptimum. Save for those limited admissions the particulars of negligence, breach of contract, assault/battery are denied. There is, in addition, a plea that the plaintiff was guilty of negligence/contributory negligence in failing to allow the nose to heal. In contrast to the situation in *Moloney*, Cosmedico Clinic Dublin Limited is not in liquidation and there is insurance in place, albeit subject to a not insignificant policy excess.

7. Mr. Malhas was a member of the Medical Defence Union (the MDU) at the time he performed both procedures. He sought assistance from the MDU in dealing with the plaintiffs' claims. The provision of such assistance is discretionary. In fact, in both cases the MDU agreed to offer assistance and instructed Arthur Cox & Co. to come on record on his behalf.

8. On 9th January, 2013, Mr. Malhas died in Germany. Enquiries there established that at the time of his death he was operating as a sole practitioner in a clinic. Further inquires at another clinic where he had previously practised established that he had been declared a bankrupt before his death. Contact with his bankruptcy administrator established that his survivors had disclaimed any inheritance. Ms. Orla Kane, solicitor, in a grounding affidavit, summarised the position as being that there was no estate from which she could take instructions.

9. The MDU was informed of what had emerged. A decision was taken that further assistance would not be provided and that Arthur Cox & Co. would not receive further instructions and should come off record. The motions to come off record followed in both cases issuing on 26th November, 2013.

10. The applications to come off record have been opposed by the plaintiffs in both cases. Furthermore, in the *Shortt* case the position adopted by the plaintiff was supported by counsel on behalf of the second named defendant, Cosmedico Clinic Dublin Limited.

11. I think it is fair to say that the objection of the plaintiffs and, indeed of Cosmedico, is not so much to Arthur Cox & Co. coming off record as such. If the application was being made in circumstances where there had been some disagreement between Arthur Cox & Co. and the MDU and there was another solicitors' firm poised to come on record, the application would have been entirely non-controversial, but rather the real objection is to the fact that the MDU is withdrawing assistance and ceasing to be involved. The effect of this is that the plaintiffs' position is made very difficult. In the Moloney case, there is no defendant from whom the plaintiff can realistically hope to recover, the first named defendant Advanced Cosmetic Surgery Limited being in liquidation and uninsured. The position is not quite as bleak for the plaintiff in the *Shortt* case, in that the first named defendant remains in existence and has a form of insurance cover. Nonetheless, the fact that the MDU is not going to meet any award that might be made against Mr. Malhas does mean that the plaintiff's position becomes more difficult. The proposed departure from the scene of the MDU also presents difficulties for Cosmedico as it finds that it will not be possible to obtain a contribution or indemnity from the surgeon who performed the rhinoplasty.

12. The immediate and obvious difficulty for the plaintiffs is that the authorities are clear that in dealing with an application to come off record, it is not the function of the Court to decide whether an insurer was or was not entitled to repudiate liability. In that regard, in the context of an application by solicitors instructed by the MDU to come off record, Lavan J. in *Corroon (A Minor) v. Pillay's General Hospital Ltd.* (Unreported, High Court, Lavan J., 31st July, 2008,) commented:

> "All of the authorities cited to the Court are unanimously of the view that if a firm of solicitors wish - where insurers discontinue providing indemnity - to come off record, they should be entitled to do so".

He also accepted that "in deciding an application to come off record in the insurance cases, it is no function of the Court to decide whether the insurer was or was not entitled to repudiate liability". The principle which applied to insurance companies, he concluded, also applied to the MDU. Since the decision in *O'Fearail v. McManus* [1994] 2 I.L.R.M. 81, the courts have set their faces against what has come to be referred to as "enforced forms of liaison". In that case, O'Flaherty J. observed at p. 83:

> "The present situation, as it has unfolded before us, is that the insurance company, rightly or wrongly, has repudiated. It says that it does not want Mr. O'Brien to act any longer and I think, in those circumstances, it would be a forced form of liaison to say to Mr. O'Brien that he should continue to act for this defendant and I would, in the circumstances, allow him to come off record, and to that extent, I would reverse the order of the learned High Court judge."

That the principles applicable to insurance companies apply also in the case of the MDU is clear from cases such as *Corroon (A Minor) v. Pillay's General Hospital Ltd.* (Unreported, High Court, Lavan J., 31st July, 2008,) to which I have already referred, *Finn and Dunlea v. Pillay's General Hospital Ltd. (*Unreported, High Court, Gilligan J., 5th March, 2008), a decision of Gilligan J., and *Sweetman v. Tarpey* (Unreported, High Court, White J., 6th February, 2006).

13. Of note is that in *Finn and Dunlea v. Pillay's General Hospital Ltd.* (Unreported, High Court, Gilligan J., 5th March, 2008), Gilligan J. commented:

> "I do not have to enquire into the proprietary of the MDU decision to discontinue providing assistance to Dr. Pillay. I am satisfied that the MDU is not, as such an insurance company and that it provides assistance and/or indemnity to its members on a discretionary basis, and that such, when granted, can be withdrawn pursuant to its Memorandum and Articles of Association."

14. These observations of Gilligan J. remain very much in point.

15. While the disappointment experienced by the plaintiffs at the turn events have taken is understandable, it must be said that forcing Arthur Cox & Co. to remain on record, contrary to its wishes, and contrary to the wishes of the MDU, which had previously provided instructions, would not alter or improve the plaintiffs' position in any way.

16. No case has been cited to me where leave to come off record has been refused. Even if I was prepared to break with all precedent and refuse leave to come off record, that would be a pointless exercise which would not assist the plaintiffs, or indeed, Cosmedico in any way. The real question, therefore, is whether any conditions should be imposed as a condition of that being allowed happen. In that regard, it must be said that the real issue in almost all of the reported cases in the area has been determining what, if any, conditions should be imposed. An examination of the cases shows that there have been very considerable divergences in approach in considering whether to impose conditions, and specifically, how to deal with the vexed question of costs. Three broad streams can be identified. There are cases where there has been no order as to costs, and each side has been left to bear its own. *Corroon (A Minor) v. Pillay's General Hospital Ltd.* (Unreported, High Court, Lavan J., 31st July, 2008,) is such a case. Lavan J., while directing that in the particular circumstances of the case with which he was concerned, each side should bear its own costs, took as his starting position that the general rule was that parties opposing an application to come off record should be entitled to the costs of the motion. The moving party on the current application has urged that the approach of Lavan J. should be followed by me. Right at the other end of the spectrum, is *Byrne v. John S. O'Connor & Co.* [2006] 3 I.R. 379, a case where the Supreme Court dismissed an appeal by Admiral Underwriters Agents (Ireland) Ltd. (Admiral) against a decision of O'Donovan J. which had permitted Giles J. Kennedy & Co. Solicitors to come off record for the defendant, but only on the basis that Admiral, the underwriters, was joined as a notice party to the proceedings and directed to pay the costs incurred by the plaintiff to date and also costs in relation to an application brought by the executor of the late Patrick J. O'Connor, former Principal of the defendant firm of solicitors. As this is a case which is central to the arguments advanced by the plaintiffs, it is appropriate to consider the background to that case and the facts of the case, which it must be said immediately, were highly unusual.

17. The factual background to the decision can be summarised as follows. The plaintiff was allegedly the victim of an assault in a public house perpetrated by employees of that premises. He instructed the defendant firm of solicitors to act on his behalf. The person in the defendant firm with whom he was dealing was not legally qualified and caused the plaintiff to believe, incorrectly, that legal proceedings had been initiated and a judgment obtained following a settlement meeting. In fact, no such proceedings had been issued and no settlement obtained. A solicitor in the firm and a son of the Principal of the firm notified the possibility of a claim from Mr. Byrne to Admiral, the insurers of the firm. A firm of solicitors, Orpen Franks, were in contact to say that they had been nominated to act. Proceedings issued and a defence was delivered by Orpen Franks on behalf of the solicitors' firm. Subsequent to that, the insurers changed solicitors and appointed Giles J. Kennedy & Co.. Mr. Kennedy, of that firm, wrote to Mr. Michael O'Connor, the solicitor who had first notified Admiral of the possibility of a claim, raising a number of issues and suggesting that there had been non-disclosure in relation to the possibility of a claim. Giles Kennedy & Co. then gave notice of repudiation to the firm of solicitors representing the estate of the late Principal. Then, Mr. Kennedy advised the plaintiff's solicitor that his firm proposed to come off record and had requested the solicitors representing the estate of the late Principal to file a notice of change of solicitors.

18. A motion to come off record issued which was linked to the main action, both of which came on before O'Donovan J. on 8th October, 1999. O'Donovan J. put the matter back for a week, indicating that he wished to have a representative from the insurance company present on the adjourned day. He then indicated that he found the situation very unsatisfactory, but permitted Giles J. Kennedy & Co. to come off record on terms which included joining Admiral as a party to the proceedings and making an order for costs.

19. During the course of the hearing of the appeal to the Supreme Court by Admiral, it emerged that arbitration proceedings in relation to the insurance policy were in being and had been so for a number of years. The court accepted the assurance of counsel for Admiral that he had no knowledge of this and had not been told of this. The Supreme Court concluded that O'Donovan J. did indeed have jurisdiction to make the order under appeal, adding that, to the extent that the order was a discretionary one, it was satisfied that the discretion was reasonably exercised. In dismissing the appeal, the court stated that it was also having regard to the undisclosed arbitration proceedings as a matter which goes to the exercise of discretion.

20. It will be seen, therefore, that there were a number of unusual features, not least the undisclosed arbitration proceedings and the fact that the motion to come off record came on for hearing on the same day as the main action.

21. Another case where the costs awarded went beyond costs of the motion to come off record was the case of *McTiernan and Anor v. Quin-Con Developments (Waterford) Ltd and Ors* [2007] IEHC 142. There, Laffoy J. concluded that there was undoubtedly excessive delay on the part of the insurer in unequivocally extricating itself. In these circumstances, as a condition of allowing the applicant's solicitors come off record, liability was imposed on the insurer for costs incurred, subject to certain excepted items which did not involve the insurers, between March 2004, when, at the latest, according to Laffoy J., the plaintiffs should have been told of the decision to repudiate, and July 2006, when the motion issued.

22. The majority of cases fall into the third stream, the middle stream. The case of *O'Fearail v. McManus* [1994] 2 I.L.R.M. 81, the leading case on coming off record applications, would appear to be such a case. Counsel for the plaintiff and counsel for the moving party though, are not in agreement as to what the Supreme Court decided in relation to costs. O'Flaherty J., who delivered the only judgment, dealt with the question of costs in these terms at p. 83:

> "I would do so, however, on condition that the costs, both in the High Court and of this hearing will be paid, not by Mr. O'Brien [the solicitor seeking to come off record], but by the insurance company concerned and I would look for Mr. Comyn's undertaking in this regard that the insurance company will discharge the costs of all parties."

23. Counsel for the moving party has interpreted this as meaning that the costs of all parties on the motion in both the High Court and Supreme Court were to be paid. Insofar as there has been reference to this decision in later cases, it is clear that this is how it has been interpreted. So, for example, the transcript in *Sweetman v. Tarpey (*Unreported, High Court, White J., 6th February, 2006) records White J. as addressing counsel for the applicant solicitors and saying to him "I can only give the costs of the motion".

24. The cases where costs of the motion were awarded, though not more extensive costs, included *Finn and Dunlea v. Pillay's General Hospital Ltd.* (Unreported, High Court, Gilligan J., 5th March, 2008), where Gilligan J. declined an application for a wider costs order, in the process distinguishing *McTiernan v. Quin-Con Developments (Waterford) Ltd and Ors* [2007] IEHC 142.

25. In this case, I am in no doubt that it is proper to require an undertaking that the costs of the motions will be paid to both plaintiffs and also to Cosmedico. The question is whether it is appropriate to go further. I do not see any factors present in the *Shortt* case that would justify going beyond what I regard as the established norm, either as far as the plaintiff or Cosmedico is concerned. Even if the plaintiff had been aware of the issues in relation to Mr. Malhas, it is quite likely that proceedings would have issued against Cosmedico. Accordingly, I will permit Arthur Cox & Co. to come off record in this case, subject to receiving an undertaking to pay the costs of the motion of the plaintiff and second named defendant.

26. So far as the *Moloney* case is concerned, the position is somewhat different. The first named defendant is in liquidation and was never covered by insurance. Had the plaintiff been aware that there was no prospect of recovering from Mr. Malhas, the plaintiff might well have hesitated before issuing proceedings.

27. In considering whether to go beyond a costs of the motion order, factors that I take into account are that Mr. Malhas died on 9th January, 2013, but that the motion to come off record was only made returnable for 14th January, 2014. Some of the early correspondence from the solicitors for Mr. Malhas/the MDU might have led the plaintiff's advisers to believe that the absence of an identifiable estate and a source of instructions was the problem and they may have drawn some comfort from this, seeing this as a difficulty capable of being overcome.

28. Contrary to what has been asserted on behalf of the plaintiff, I do not accept that the reasons for deciding not to assist further, and accordingly that there should be an application for the solicitors to come off record, have changed fundamentally, though I do accept that the language in which those reasons have been stated has evolved somewhat.

29. On the other side of the coin, the surgery in this case was performed on 11th November, 2003, and yet the matter had not been brought to trial when Mr. Malhas died in January 2013, more than ten years later. I do accept that the plaintiff is not a person of means and that her difficulty in funding the litigation may have contributed to its slow pace. Nonetheless, one is struck by the fact that had the case come on with reasonable expedition, it would have been decided long before the death of Mr. Malhas. I do not find present here the sort of extraordinary circumstances that were a feature of *Byrne v. O'Connor* [2006] 3 I.R. 379. However, it does seem to me that to leave the plaintiff responsible for all the outlay that had been expended by and on her behalf, when proceedings

might very well never have been launched had the MDU not indicated that it was providing assistance to Mr. Mahlas, would be harsh.

30. I realise, of course, that, as Kearns J. (as he then was) pointed out in *Byrne v. John S. O'Connor & Co.* [2006] 3 I.R. 379, a plaintiff will always be on the hazard that an insurer, even after exercising its right of subrogation, may become aware of matters which would entitle it to void its policy, and thus terminate its involvement in the dispute or litigation between the original parties. The observations of Kearns J., dealing with insurers, apply with even greater force to an entity such as the MDU, where the provision of assistance is discretionary. Nonetheless, it seems to me that it would be a harsh result that allowed the MDU take advantage of the death of its former member as a bankrupt and leave the plaintiff standing alone facing major bills. It seems to me that a degree of balance would see the applicant paying, not just the costs of the motion, but also reimbursing the plaintiff in respect of outlay incurred. Accordingly, as a condition of allowing the solicitor to come off record in the *Moloney* case, I will require an undertaking to that effect. If I do not receive such an undertaking, the application will stand refused.

31. So far as the motions issued pursuant to O. 15, r. 37 are concerned, the question is what would be achieved by making the orders sought? It may well be that the motions were prompted by a belief that what was required was to find a way around or a way over the technical difficulties that had emerged in terms of obtaining instructions in order to facilitate the continued involvement of the MDU.

32. However, it is now clear that the approach of the MDU arises from a settled determination not to be further involved and not to provide further assistance. In these circumstances, nothing would be achieved.

33. Order 15, r. 37 offers a court the option, where a deceased person was a party, to proceed in the absence of any person representing the estate of the deceased person or the option of appointing a person to represent the estate of the deceased person. In this case, as I have indicated, I do not believe anything would be achieved by nominating a person to represent the estate. On the other hand, I cannot see any reason why the actions should not proceed in the absence of any person representing the estate if that was regarded as desirable. My decision is not to make an appointment to represent the estate at this time. In the event of a change of circumstances, which is unlikely, but cannot be totally excluded, the issue can be revisited. At this stage, though, I will simply strike out the motions brought pursuant to O. 15, r. 37 of the Rules of Superior Courts, making no order as to costs. In summary, then, the moving party will, subject to undertakings in the form to which I have referred being forthcoming, be permitted to come off record.