



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 34
Appeal No. 14/685
[Article 64 Transfer]

**Peart J.
Hogan J
Mahon J.**

Laurence Flynn

Plaintiff/Applicant

- and -

Finbarr Desmond

Defendant/Respondent

Judgment of Mr. Justice Alan Mahon delivered on 26th February 2015

General

1. On 21st November 2012 the High Court (Birmingham, J) made an order that these proceedings had been compromised by an agreement made between the Plaintiff and the Defendant on 12th November 2009, wherein it was agreed that a sum of €5,000 (subsequently increased by agreement to €5,500) was to be paid to the Plaintiff in settlement of his personal injury claim. No order was made in relation to costs. The Plaintiff has appealed the High Court Order of 21st November 2012 on a number of grounds.

The compromise of the High Court proceedings

2. The Plaintiff instituted proceedings in the High Court by plenary summons dated 17th December 2007. He claimed damages for personal injury and loss arising from an incident which occurred in September or October 2004 when he sustained an injury to his right index finger while employed by the Defendant as a fisherman on a fishing vessel, "Bonne Chance", off the coast of Kinsale, Co. Cork.

3. On 12th October 2009 the Defendant filed a Notice of Motion seeking an order that the Plaintiff's claim was statute barred by operation of s. 46(2) of the Civil Liability Act 1961, a provision which applies a two year limitation period to a claim for personal injury arising from a maritime accident.

4. At or about this time, a settlement meeting was arranged between the parties. The Plaintiff was not legally represented, nor indeed had he been at any time in the course of these proceedings. The settlement meeting took place on 12th November 2009. The Defendant was represented by his solicitor, on the instructions of an insurance company. The opportunity to obtain legal advice was declined by the Plaintiff. At this meeting a settlement of the action was agreed, submitted to writing, and signed by the Plaintiff. The written agreement provided as follows:-

I, Laurence Flynn of 4 Upper Convent Road, Blackrock, in the County of Cork, being eighteen years and upwards, hereby do confirm that I have entered into a settlement agreement in the above entitled proceedings on the following terms:

- 1. Acknowledge full and final settlement in the entirety of these proceedings in the sum of €5,000 to include general damages, special damages and any outlays incurred.*
- 2. I hereby undertake as a term of settlement that I will file and lodge, in the Central Office of the Four Courts, and serve on Conways Solicitors, 35 South Terrace, Cork, a Notice of Discontinuance within fourteen days of the receipt of the cheque.*
- 3. I hereby enter into this settlement agreement in full knowledge that no admission of liability has been made.*
- 4. I hereby confirm that I will agree to this agreement being entered into in the strictest terms of confidentiality and that I will not discuss this claim and its subsequent settlement with anyone.*

I sign this agreement in the full knowledge and understanding that I have been invited to consult with an independent legal advisor prior to signing this document but I have waived this right and I am happy to do so with the full knowledge as to the consequence and import of this agreement.

Signed: Laurence Flynn

Dated the 12th November 2009

5. On 15th November 2009, some three days after the agreement, the Plaintiff wrote to, and emailed, the Defendant's solicitor informing him that he was unhappy with the settlement because the agreed compensation figure represented a minor injury, whereas his injury was serious and was likely to get worse with the passage of time. It would appear that in the weeks that followed, the Plaintiff reconsidered his position again and, undoubtedly prompted by a commitment on the part of the Defendant to pay an additional €500 making the total compensation figure €5,500, the Plaintiff confirmed in writing the settlement of the action in a communication with the Defendant's solicitor on 23rd December 2009. A Notice of Discontinuance, signed by the Plaintiff, was filed in the Central Office of the High Court on 23rd December 2009.

6. Approximately twenty four hours later on 24th December 2009, the Plaintiff again wrote to the Defendant's solicitor advising him that he had again changed his mind and, effectively, rejected the settlement. On this occasion he complained that he had not been given sufficient time to obtain legal advice, and that he had been pressured into a settlement under threat of future legal action against him. He returned the cheques totalling €5,500.

7. On 5th March 2012, the Plaintiff served a Notice of Intention to Proceed on the Defendant's solicitors.

8. By Notice of Motion dated 31st May 2012, the Defendant applied to the High Court for, *inter alia*, "an order declaring that the

within action has been compromised by agreement made between the Plaintiff and the Defendant and the payment of the agreed sum by the Defendant to the Plaintiff which was received and accepted by the Plaintiff in satisfaction and discharge of the Plaintiff's claim." Two affidavits were filed in relation to the Motion which was heard on 21st November 2012. One affidavit was sworn by Mr. Dermot Conway, the Defendants solicitor. It provided a brief summary of the Plaintiff's claim and its agreed settlement following a meeting between the Plaintiff and himself on 12th November 2009, and it exhibited, *inter alia*, a copy of a written settlement agreement ("the agreement") signed by the Plaintiff, and in which it was stated that he, the Plaintiff, accepted €5,000 in settlement of his action (this figure was later increased to €5,500). The second affidavit was that of the Plaintiff. In his affidavit the Plaintiff made a number of averments, including the following:-

- That his injury was causing him constant pain, and was more serious than initially believed.
- That the 12th November 2009 agreement had been entered into between the Defendant and himself.
- That he had abandoned the agreement because it was unfair to him.
- That he had not had an opportunity to avail of legal advice at the time he entered into the agreement. The Plaintiff's affidavit exhibited a number of medical reports and communications with medical practitioners, and extracts from medical journals.

The Appeal

9. The Plaintiff's Notice of Appeal lists a number of grounds of appeal relating to the judgment of the learned High Court judge. These can be usefully summarised as follows:

- The agreement was rescinded by him within three days.
- He did not fully comprehend the nature of the agreement he had entered into.
- The confidentiality clause in the agreement was "*near impossible*" to fulfil.
- The injury was more serious than originally believed, and this aspect of the case had not been afforded sufficient weight by the learned High Court judge.
- That in the circumstances, Article 40.3.1 of the Constitution permitted him to change his mind in relation to the agreement

10. The Plaintiff also brought a Motion to this Court for leave to introduce additional evidence, namely the results of a MRI scan carried out on his right hand and elbow on 25th August 2012. More recently, (and subsequent to the hearing of this appeal), a communication from the Plaintiff to the Defendant's solicitors dated 13th February 2015 was forwarded by the Defendant's solicitors to this Court. That communication refers to a childhood injury suffered by the Plaintiff and was provided to the Defendant's solicitors out of a concern on the Plaintiff's part that its non-disclosure would be considered inappropriate. In any event the information disclosed in that communication is not relevant to the subject matter of this appeal.

11. Essentially, the Plaintiff's Appeal is focussed on his contention that the learned High Court judge failed to recognise and accept that the written agreement of 12th November 2009 had been entered into by him in circumstances where, having regard to all the facts, it amounted to an unconscionable or improvident bargain, and that he was not afforded a reasonable opportunity to obtain legal advice. In support of this contention, the Plaintiff points to, as he sees it, the seriousness of the injury and the devastating consequences of that injury in relation to his inability to work. The medical reports, coupled with the explanation of the difficulty the Plaintiff now has in relation to his right arm and hand certainly indicate the existence of a significant disability, and a disability such as would be expected to negatively impact on his ability to work.

12. In the course of his judgment the learned High Court judge observed:-

"The combination of a live Statue issue and the distinct lack of backing from medical advisors meant that the Plaintiff's position was not an easy one. On 13th October 2009 the Defendants issued a Motion seeking to have the Plaintiff's claim deemed Statute barred. That Motion was returnable for 23rd November 2009."

13. It is clear that the learned High Court judge identified two separate and distinct potential difficulties with the Plaintiff's case, both of which created a significant uncertainty for the outcome of the case for him, namely the possibility that the action was statute barred, and the lack of medical evidence sufficient to link, as a matter of probability the Plaintiff's current and ongoing right arm disability to the original right index finger injury. Had he contested his claim in court he may well have lost his case, or if successful, would have been awarded relatively small damages. Contesting the case would also have carried with it the risk of an award of costs being made against the Plaintiff. At the time of the agreement on 12th November 2009, the Plaintiff was very immediately facing the prospect that his claim would be declared statute barred as a Notice of Motion was by then returnable to the High Court on 23rd November 2009, some two weeks later, seeking to terminate the proceedings on that very point. Although the Plaintiff did not have the benefit of legal advice at the time the agreement was signed by him he was nevertheless aware of issues in his case that rendered its outcome uncertain, at that time, and indeed, for some time previously.

14. Undoubtedly there were good reasons for the Plaintiff to settle his claim; albeit for relatively small compensation. His agreement to settle could not be said to be imprudent or unwise. While it is certainly possible that the engagement of a solicitor by the Plaintiff might have resulted in a better outcome for him, it could certainly not be said that such would have been probable. A solicitor engaged by the Plaintiff would have identified the potential difficulties in the litigation and may well have advised the Plaintiff to settle the claim, if possible. It is certainly possible that a solicitor acting for the Plaintiff, and acting in his interests, would have advised him to accept an offer in the region of €5,000, and it could not be said that such advice was anything other than good advice.

15. In this case the Plaintiff chose to institute his proceedings and to process his litigation for a period of approximately five years before entering into the agreement to settle, and it is apparent that the Plaintiff, without legal training, did so with considerable competence. It is also apparent (and which is acknowledged by him) that the Plaintiff had an awareness, at least, of the very real possibility that in the event that he was to fully contest his claim it might fail, or would result in a reward of relatively small damages. It was in this frame of mind that he attended the settlement meeting on 12th November 2009, and at that meeting agreed to settle his claim for €5,000, and that furthermore, approximately one month later, and having had some doubt about the fairness of the agreement, proceeded to confirm the agreement, subject to an additional €500 being paid.

16. The absence of legal advice will not usually prove fatal to a contract, but may do so in certain circumstances. In *Lloyds Bank v. Bundy* [1974] Q.B.326 at 339, Lord Denning M.R., stated the following:

"...English law gives relief to one who, without independent advice, entered into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."

17. A litigant is entitled to process, manage and conclude his litigation in the absence of legal advice or representation, and many choose to do so. There is, of course, a very considerable public interest in upholding the finality of settlements and courts have been traditionally wary of permitting any litigant to undo any such settlement.

18. It is true, of course, that the plaintiff is a litigant in person. But this in itself cannot be a reason for allowing the settlement to be undone, for if it were so, it would mean, in effect, that no settlement with a litigant in person would ever be final. It must also be recalled, moreover, that the plaintiff accepts that he was advised that he should seek independent advice prior to concluding the settlement.

19. A court will usually go to considerable lengths to assist lay litigants and will allow considerable latitude to them in stating their case. In doing so, however, a party with legal representation should not be unfairly penalised because his opponent does not have legal representation: see *RB v. AS* [2002] 2 I.R. 428 In *McGill v. Ulster Independent Clinic and Others* [2010] NICA33 Girvan LJ, commented as follows:

"While courts are conscious of the difficulties faced by a personal litigant representing herself and will strive to enable that person to present her case as well as they can, the dictates of objective fairness and justice preclude the court from in any way distorting the rules or the requirements of due process because one party is unrepresented."

Conclusion

20. It is evident that the Plaintiff has a significant disability in his right arm and hand, and that his ability to work has been adversely affected. It is also the case that his claim for compensation, which is the subject matter of these proceedings, carried with it a risk that the claim was statute barred, or, if successful, would, if the matter was to have proceeded to a full hearing, attract relatively small damages because of the difficulty in establishing that the medical difficulties that now afflict the Plaintiff in relation to the use of his right arm and hand were caused, either directly or indirectly, by his accident in September or October 2004.

21. These potential difficulties with the claim were identified by the learned High Court judge in his judgment of 21st November 2012. There were also known to the Plaintiff at the time he signed the agreement to settle the litigation on 12th November 2009, and again when he reaffirmed his agreement to settle towards the end of December 2009. It cannot be said that the Plaintiff's agreement to settle his claim for a figure of (in total) €5,500 was unwise. I am also satisfied that the absence of legal advice to the Plaintiff at the time of his agreement to compromise these proceedings does not, in the circumstances of this case, undermine that agreement. Therefore, these proceedings have been compromised and have concluded.

22. The Plaintiff's appeal is therefore dismissed, and the Order of the High Court affirmed.