Neutral Citation Number: [2007] IEHC 192

THE HIGH COURT

[1992 No. 313 P]

BETWEEN

W.J. PRENDERGAST & SON LIMITED

PLAINTIFF

AND

CARLOW COUNTY COUNCIL

AND

REDVERS SKELTON PRACTISING UNDER THE STYLE AND TITLE OF REDVERS SKELTON AND COMPANY

DEFENDANTS

Judgment of Mr. Brian McGovern delivered on the 15th June, 2007

1. This matter comes before the court by way of a motion brought by the second named defendant to dismiss the proceedings on the grounds that they disclose no reasonable cause of action against the second named defendant. The basis for the application is that the matters complained of in the proceedings arise out of evidence given by the applicant (the second named defendant) in Circuit Court proceedings and subsequently in the High Court on appeal. It is alleged that the applicant gave false and misleading evidence in the proceedings and in particular in the High Court and that he interfered with the analysis of samples for a wrongful purpose.

2. Background.

The applicant is and was at all material times a Fire Investigator. On the 29th January, 1986 a fire occurred in the plaintiff's factory premises at Leighlinbridge, Co. Carlow resulting in the destruction of the premises. A malicious injury application was brought in the Circuit Court by the plaintiff in these proceedings. The application was successful in the Circuit Court and Carlow County Council, who were the respondents in that matter, appealed the decision. I have been informed by counsel that expert evidence was called on behalf of both the applicant and the respondent in both the Circuit Court and the High Court. Dr. McDaid a Fire Consultant was brought in by the plaintiff to examine the scene of the fire and gave evidence on behalf of the plaintiff in the Circuit Court and High Court proceedings. The applicant visited the scene of the fire the day after the incident and he gave evidence in both the Circuit Court and the High Court. While Dr. McDaid's said he found no traces of accelerants having been used to start the fire the applicant stated that he found evidence which suggested to him that kerosene vapours were present in at least three locations within the building, one area being the office at the front of the building where Mr. Christopher Prendergast had been sitting for half an hour or more awaiting the arrival of his father William. Christopher Prendergast had gone to check out the factory after he was told by his mother that the alarm had gone off there. His father made contact with him and went to the factory to meet his son and inspect the premises.

3. Although the plaintiff company (as applicants in the malicious injury proceedings) succeeded in the Circuit Court the County Council lodged an appeal and were successful in their appeal before O'Hanlon J. who gave his judgment on the 3rd June, 1988. In the course of his judgement he made reference to a number of facts including the evidence of the applicant on this motion, Mr. Skelton. At page 9 of his judgment he stated:

> "Mr. Skelton, the Fire Consultant who gave evidence on behalf of the Respondent, gave as his opinion that a fire set by an arsonist, or occurring accidentally in the knitting room, would have quickly become a conflagration, or else would have smouldered and died out completely within a comparatively short time. He further said that if smouldering in a room stacked with acrylic-type materials, it would have given off pungent fumes which would have percolated rapidly to every part of the factory and should have been apparent in the office where Christopher Prendergast sat reading for a considerable time while awaiting the arrival of his father. I find this evidence quite convincing".

He went on to state that he found the evidence in support of the applicant's claim so unsatisfactory and so unconvincing that he was unable to decide as a matter of probability that the fire was caused by the malicious act of a third party in circumstances giving rise to a claim for compensation under the Malicious Injury Code. He therefore found against the plaintiff who was the applicant in the Malicious Injury application.

4. In support of the application to dismiss these proceedings affidavits have been filed by the applicant (second named defendant) and by Mr. Maurice G. Lyons the plaintiff's solicitor. The applicant claim immunity from suit as an expert witness in the malicious injury proceedings and on that basis the motion has been brought by him to dismiss the plaintiff's claim. The affidavit of Mr. Maurice Lyons refers to a copy of a report obtained by the plaintiff from Dr. Brian G. O'Rourke a Consultant Chemist. The date of this report is the 17th October, 2006. I have been informed by counsel for the plaintiff that the report was commissioned a few months earlier. In summary the report from Dr. O'Rourke contends that the analysis of the samples by the applicant in the malicious injury application was fundamentally flawed, that the scientific methodology used by him was incorrect and that samples provided for analysis were almost certainly contaminated with kerosene. He also alleges that the applicant made erroneous and false statements both in report form and in direct evidence to the court and that he mislead the court. Counsel for the plaintiff informed the court that this report was commissioned a few weeks prior to the date on which it was issued that is to say sometime in the autumn of 2006. It seems to me that the claim being made in these proceedings by the plaintiff against the applicant is largely based on what is in that report yet the report was only commissioned many years after the proceedings were commenced. This is quite unsatisfactory. These proceedings make the most serious allegations against the applicant and it would appear that they were commenced some fourteen and a half years before the report of Dr. O'Rourke was commissioned and obtained.

5. In the malicious injury application both in the Circuit Court and High Court each party had an expert fire investigation witness and both witnesses were available for cross-examination. I have been informed by counsel that each party to the malicious injury application was represented by experienced senior counsel. I have also been informed that the applicant's conclusions were fully canvassed by him before the Circuit Court Judge and the High Court Judge. If his evidence or credibility was to be challenged that was the time to do so. The plaintiff had, at the time, the benefit of its own expert and of solicitor and counsel.

6. The Law.

The law on immunity of witnesses has been set out in *Looney v. the Governor and the Company of Bank of Ireland and Morey* (Unreported, Supreme Court, 9th May, 1997). In the judgment of the court O'Flaherty J. referred to:

> "…the need to give witnesses (and also indeed, the judge) in Court, a privilege in respect of oral testimony and also with regard to affidavits and documents produced in the course of a hearing. Such persons, either witnesses or those swearing affidavits, are given an immunity from suit. Otherwise, no judge could go out on the bench and feel that he or she could render a judgment or say anything without risk of suit. Similarly witnesses would be inhibited in the way that they could give evidence. The price that has to be paid is that civil actions cannot be brought against witnesses even in a very

> blatant case, which of course this case is not, but even in a case of perjury - which would be such a case – the law says that an action cannot lie".

7. He went on to compare the law in England with that in America. He said that the rule in England is that immunity is absolute whereas in America immunity will extend as long as the particular statement is in some way relevant or pertinent to the issue to be determined. In *Re Haughey* [1971] I.R. 217 at 264 O'Dalaigh C.J. said:

> "It is salutary to bear in mind that even in the High Court, if a witness were to take advantage of his position to offer something defamatory having no reference to the cause of matter of inquiry but introduced maliciously for his own purpose, no privilege or immunity will attach and he might find himself sued in an action for defamation".

8. O'Flaherty J. in the *Looney* case said that he would concur in setting that kind of boundary to the immunity so that if somebody for a malicious purpose or in order to abuse a position of immunity which he enjoyed in court simply used the situation to make defamatory or malicious statements against others in a manner that had nothing to do with the particular proceedings then the witness would probably be answerable in an action for deformation or malicious falsehood.

9. In *Ennis v. Butterly* [1996] I.R. 426 Kelly J. held that in an application of this nature the Judge must assume that every fact pleaded by the plaintiff in the statement of claim is correct and can be proved at the trial and that every fact asserted by the plaintiff on affidavit is likewise correct and can be proved at trial.

10. Application of the Law to this case.
This is not a case involving new evidence in the sense that evidence is now available which could not have been available at the trial of the malicious injury application in either the Circuit Court or the High Court. It is true that the report of Dr. O'Rourke has only been furnished in 2006. But at the malicious injury application and appeal the plaintiff (who was the applicant in that matter) had an expert witness for the purpose of dealing with the cause of the fire. There is nothing to show that the "new evidence" of Dr. O'Rourke would be admitted at this stage under the rules relating to the admission of fresh evidence. But if one accepts the assertion made by the plaintiff that the applicant's evidence was false or misleading or seriously flawed this is a matter which was capable of being tested in the malicious injury proceedings. Applying the principles in the *Looney* case there is no doubt that the evidence given by the applicant was "…relevant or pertinent to the issue to be determined". But even if I assume that the evidence was seriously flawed or false or misleading for the purpose of disposing of this application this is something which should have been dealt with in the malicious injury proceedings. As O'Flaherty J. stated in the *Looney* case:

> "The price that has to be paid is that civil actions cannot be brought against witnesses even in a very blatant case…even in a case of perjury".

He says that quite simply even in such a case the law says an action cannot lie against a witness. When one looks at the boundary to the immunity it is clear that the evidence of the applicant which is complained of was given in a manner which was pertinent to the malicious injury proceedings. If there was some new evidence which could not have been used at the malicious injury hearing then it might be permissible for the court to allow that evidence to be introduced subject to the argument of inordinate and inexcusable delay. But in this case all the matters complained of in the statement of claim could have been put to the applicant in the malicious injury application including the fact that he "interfered with the analysis of the said samples for the wrongful purpose of showing where he alleged that the fire had started", as alleged in the Statement of Claim in this Action.

11. The parties have agreed that the issue of inexcusable or inordinate delay should be left aside until I determine the issue of the applicant's immunity from suit as a witness in the malicious injury application. It has been agreed that the delay point will only arise if the application fails on the immunity issue.

12. I am quite satisfied that in the circumstances of this case the applicant is entitled to an order dismissing these proceedings on the grounds that they disclose no reasonable cause of action against him on the basis that he has immunity from suit in respect of his evidence given in the malicious injury application.

13. In the circumstances I will make an order dismissing the proceedings against the applicant who is the second named defendant in these proceedings.