

THE HIGH COURT

1986 No. 855 p

BETWEEN

ALEX KANE

PLAINTIFF

AND

THOMAS MICHAEL MCGOVERN

DEFENDANT

Judgment delivered by O'Hanlon J., the 12th February, 1988.

A dispute has arisen between the Plaintiff and the Defendant concerning the terms of settlement of an action for damages for negligence which the Defendant in the present proceedings brought against the Plaintiff. The title of those proceedings was as follows: "The High Court, 1982 No. 10205 P: Between Thomas Michael McGovern, Plaintiff, and Alex Kane, t/a Kane's Garage, Defendant, and Cornelius Briody, Third Party." The proceedings were commenced by Plenary Summons in the year 1982. At a later stage, application was made for judgment in default of Defence, and an extension of time for filing the Defence was granted, the Defendant to pay the costs of the Motion for Judgment. This Order was dated the 25th April, 1983. The action was listed for hearing on the 16th April, 1985, but the Defendant, (Alex Kane) being unable to proceed that day, an adjournment was granted, the Defendant being ordered to pay the Costs and Expenses incurred by reason of the

postponement of the hearing of the Action.

The case came on for hearing again on the 9th July, 1985, and when it had been at hearing for some time negotiations took place between Senior Counsel representing the Plaintiff and Senior Counsel representing the Defendant in those proceedings, as a result of which the case was settled on the basis that the Defendant would pay the Plaintiff an all-in sum of £30,000, inclusive of costs.

The settlement moneys were to be paid within two weeks, and the case was put back for mention to enable the settlement to be implemented. The agreed figure was paid within the stipulated period, and thereupon the Action was struck out on the application of Counsel for the Defendant, with no Order as to costs. This occurred, apparently, on 23rd July, 1985.

Steps however, had previously been taken to have the costs awarded in favour of the Plaintiff by the Order of the 16th April, 1985, submitted for taxation, and the matter was listed to appear before the Taxing Master on the 23rd July, 1985. By letter dated the 10th July, 1985 the Solicitors for the Defendant in those proceedings, (Alex Kane) notified the Cost Drawers for the Plaintiff of the settlement which had been negotiated and asked them to arrange to have the taxation withdrawn or struck out. On the 17th July, 1985 they sent to the Plaintiff's Solicitors a Bank Draft for the agreed sum of £30,000, with a form of discharge to be signed by the Plaintiff, acknowledging receipt of the said sum "in full and final settlement and in discharge of any and all claims that I have, including claims to costs, relative to a traffic accident, which occurred on the 16th day of April, 1982 ..."

The Bank Draft was duly lodged and cashed, but as no further communication was received from the Plaintiff's Solicitors, the Defendant's Solicitors wrote again on the 2nd August, 1985, requesting return of the Discharge Form, duly completed. On the 26th August, 1985, the Plaintiff's Solicitors wrote to say that the settlement of the 9th July, 1985, made no reference to the two existing orders for costs which had previously been made in favour of the Plaintiff and claimed payment of the said costs.

After further correspondence, the Plaintiff's Solicitors went ahead with the taxation of the costs on foot of the Order of the 16th April, 1985, and the same were taxed at a sum of £2,607.51. The Defendant responded by bringing the present proceedings, initiated by Plenary Summons dated the 29th January, 1986, seeking a Declaration that his payment of the Settlement Moneys of £30,000 discharged him from all liability in respect of the Plaintiff's claims in those proceedings including all costs arising in the course of same.

Evidence as to the negotiations preceding the settlement was given by Mr. Diarmuid O'Donovan, Senior Counsel for Mr. Kane; his instructing Solicitor, Mr. John Quinn, and Mr. O'Carroll of the firm of George .v. Maloney & Co., Solicitors for Thomas Michael McGovern.

It emerged that Mr. Kane's claim to be indemnified by his insurers in respect of the action brought by Mr. McGovern was disputed by the insurance company, and that dispute having gone to arbitration, was eventually decided in a manner unfavourable to Mr. Kane. News of this decision only came through during the actual hearing of the proceedings for

damages brought by Mr. McGovern and seems to have precipitated the opening of negotiations for settlement. It appears that an offer of £25,000 "all-in" was made on behalf of Mr. Kane and rejected by Mr. McGovern's representatives, who countered with an offer to settle for payment of £25,000 and costs, with a figure of £12,500 being suggested as the appropriate figure for costs. This in turn was rejected by Mr. Kane, and a final offer made on his behalf of £30,000 "all-in" was accepted on behalf of Mr. McGovern.

Mr. O'Donovan and Mr. Quinn said that in view of the fact that Mr. Kane was not to be indemnified by his insurance company, it was most important for him to know the exact amount of his liability before he could agree to any terms of settlement and that it was never their intention to leave "in the air" an outstanding liability of an undefined amount in respect of the earlier costs awarded against him. Neither side mentioned the earlier orders for costs which have given rise to the present litigation, although the Solicitors on both sides should have been conscious of their significance in view of the fact that Messrs. Maloney & Co., had set matters in train for taxation to take place on the 23rd July, 1985, and notice of the date for taxation had issued from the Taxing Master's Office to Messrs. Quinn & Co., on the 1st July, 1985. Furthermore, the magnitude of the claim which could be made under the Order for costs of the day, dated the 16th April, 1985, was made apparent in a letter of the 20th May, 1985, from Messrs. Maloney & Co., giving details of the amount claimed and nominating a sum of £2,765.17p.

Mr. O'Carroll said that when the settlement was being

negotiated there was no mention of the previous Orders for costs. "I knew they were there; they were not issues before the Court on that occasion. I explained the settlement to (Mr. Kane). I told him of the question regarding the costs from 1983, 1985, I would be seeking to recover on his behalf. The Order of the 16th April, 1985 was still an issue I considered remaining to be resolved and I would be seeking to recover those costs.. I would try to collect those costs... There was no insurance. I felt they might be hard to recover.. I felt that might be all he would get out of it and the money might not be there to pay the additional costs."

In cross-examination he appeared to agree that in offering to settle for £25,000 and £12,500 costs, it was intended to cover all costs payable to Mr. McGovern in the figure of £12,500.

The Plaintiff in the present proceedings says that an "all-in" settlement of an action for damages, "inclusive of costs" discharges all liability of a Defendant to a Plaintiff in respect of the costs of those proceedings from the inception of the proceedings until their culmination, unless a special term is incorporated in the settlement imposing an additional liability on the Defendant in respect of some particular costs which may have been incurred in the earlier stages of the proceedings. The Defendant says that a settlement on the day of the case, "inclusive of costs" only covers the liability of a Defendant for costs which are then in issue between the parties, and is exclusive of any costs which may have already been awarded in favour of the Plaintiff against the Defendant at earlier stages in the proceedings.

Mr. O'Carroll did not actually participate in the negotiations for settlement - he said that he "hung back" and was given a "feed back" by Counsel whom he had briefed, as to *the* progress of the negotiations.

I take the view that a settlement of an action for damages by payment of an agreed sum on an "all-in" basis, "inclusive of costs" should be regarded as a settlement intended to discharge the Defendant in the proceedings from all further liability in respect of the Plaintiff's claim for damages in respect of the matters alleged in those proceedings, and also from all further liability in respect of the costs of those proceedings from the commencement of the proceedings until the proceedings have been finally disposed of by implementing the terms of settlement. If the Plaintiff in such proceedings wishes to retain an enforceable claim for costs already awarded in his favour at earlier stages in the proceedings, in addition to claiming payment of the settlement moneys, then he should, in my opinion, expressly stipulate that the term "inclusive of costs" is not all-embracing but is merely intended to refer to such part of the costs of the proceedings as has not already been dealt with by previous Orders of the Court.

Neither of the Senior Counsel who represented the Plaintiff in the action for damages gave evidence to dispute the correctness of the interpretation which Mr. O'Donovan, acting for the Defendant, put on the terms of settlement as understood by him, and Mr. O'Carroll appeared to me to confirm that the initial offer of settlement emanating from his side sought payment of a measured sum for costs which included the

costs arising under the earlier Orders made by the Court.

In these circumstances I propose to grant a declaratory order as sought by the present Plaintiff, Mr. Alex Kane, in the terms referred to in Paragraph 14a of the Statement of Claim, reserving the Plaintiff's right to apply, if it should become necessary to do so, for any of the other forms of relief referred to in the pleadings.



R.J. O'Hanlon

12th February, 1988

Counsel for the Plaintiff:-

Hugh Geoghegan, SC  
Edward S. Walsh, BL  
(inst~~ru~~cted by J. J.  
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Counsel for the Defendant:-

Patrick Keane SC  
John R. Finlay SC  
(inst~~ru~~cted by George V.  
Maloney & Co.,  
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Cases and Materials referred to:-

Mespil Ltd. .v. Capaldi, (Supreme Court, 11th February, 1986)

Irish Life Assurance Co. Ltd. and Dublin Land Securities Ltd,  
(High Court Keane J., 2nd May, 1986)

Reen .v. Bank of Ireland Finance Ltd. & Anor. (1983) ILRM 507.