

**THE HIGH COURT**

[2020] IEHC 640

[Record No. 2015/9917 P.]

**BETWEEN**

**JANIS BRIEDIS**

**PLAINTIFF**

**AND**

**RYAN INVESTMENTS TRADING AS HERTZ RENT A CAR**

**AND**

**MARTIN PUCE**

**RESPONDENT**

**EX TEMPORE JUDGMENT delivered by Mr. Justice Heslin delivered on Monday, 30th day of November, 2020**

1. At the outset let me say that I am very grateful to Mr. Sugrue and to Mr. Punch for their detailed, skilled and helpful submissions in relation to a matter. I took the opportunity, over the weekend, to read the papers in their entirety and I am grateful for the fact that papers were lodged in time so I had that opportunity.
2. The underlying matter in this case concerns an accident which occurred on 1 December, 2013. The plaintiff alleges that he was a front-seat passenger in a car which drove into the back of another vehicle as a consequence of which the plaintiff alleges that he suffered personal injuries. In the context of today's motion to remit the matter to the Circuit Court, a detailed affidavit was sworn in reply by Mr. Michael Brennan, solicitor for the first named defendant, and that is an affidavit sworn on 10 June, 2020. It is appropriate to observe that no replying affidavit was sworn which controverted, in any way, any of the facts averred to in that affidavit.
3. The first defendant, as averred by Mr. Brennan, was the owner of the vehicle involved in the accident and the second defendant was the driver of the vehicle in which the plaintiff was travelling. It is not in dispute that a High Court personal injury summons issued on 27 November, 2015 nor is it in dispute that a full defence was filed by the first named defendant who alleges that the accident was caused by the deliberate act of the second named defendant and that it was part of a fraudulent enterprise.
4. The plaintiff was involved in a second road traffic accident and it is not in dispute that this occurred on 13 May, 2015 and that it gave rise to a second set of legal proceedings in which the plaintiff also pleaded personal injuries. I note that in the replies to particulars, which are dated 5 June, 2017, in respect of proceedings concerning the second accident, the plaintiff pleaded that he had "*fully recovered from the injuries*" sustained in the first accident prior to the second accident occurring and the plaintiff also pleaded that the second accident exacerbated the injuries which he sustained in the first accident. The foregoing is clear from the contents of the Reply to Notice Requiring Further Information in the matter of *Janice Briedis v. Mary O'Shea, Circuit Court proceedings under Record No. 2017 0043*, which Mr. Brennan has exhibited in the context of his replying affidavit in the present proceedings.

5. I note, in particular, the reference at para. 3 of those replies to the first accident being described as: "1 December, 2013 at Dooradoyle, Limerick" and, as to injuries: "Pain over anterior chest wall, left shoulder, low back lumbar area, right leg area, bruise over right knee" and, as to treatment: "the A&E Department at the Regional Hospital Dooradoyle, Limerick", with reference then being made to clinicians who are listed at para. 3(d) and that para. 3(e) in the replies, it is stated as follows "The Plaintiff has recovered from the injuries sustained in the prior accident", whereas at reply 25 it stated "The injuries that were suffered by the Plaintiff in the prior accident disclosed at reply to number 3 above were exacerbated by this accident".
6. It is not in dispute that the plaintiff has settled the proceedings in relation to the second accident. It is also common case that, in the present claim, the plaintiff initially pleaded a loss of earnings claim.
7. As regards the plaintiff's loss of earnings claim and a loss of opportunity claim, it is averred by Mr. Brennan that discovery was ordered and that Mr. Justice Cross made an order for discovery on 6 February, 2017. It is also averred that it was necessary for the first named defendant to issue a motion seeking to strike out the plaintiff's claim for failure to comply with the discovery order. It is averred that that motion was before the court on a number of occasions and that the plaintiff swore four affidavits of discovery, between 31 August 2017 and 26 October 2018, exhibiting, *inter alia*, bank statements, records touching on his employment and vocational history and social welfare records.
8. A notice of trial issued on 5 February 2018 and, on 21 March 2018, the plaintiff, in correspondence, withdrew his claim for past and future loss of earnings. The case was, by that point, set down for hearing at the High Court sittings in Limerick.
9. It is also not in dispute that in response to 21 March, 2018 letter the solicitors for the first defendant wrote on 30 April, 2018 indicating, *inter alia*, an intention to proceed with an application pursuant to s.26 of the Civil Liability and Courts Act of 2004 at the hearing of the action.
10. In para.16 of his affidavit Mr. Brennan avers that, based on the relevant medical reports the overlapping nature of the injuries sustained in the second accident and first accident and the plaintiff's acknowledgement that the second accident was responsible for exacerbating and prolonging the injuries sustained in the first accident, the plaintiff's claim should have been instituted in the Circuit Court. Mr. Brennan goes on to refer to a medical report by Mr. Carr consultant neurosurgeon namely, his report of 19 October, 2015. That report is plainly after, indeed five months after, the second accident yet it is fair to say, as Mr. Brennan avers, it makes no reference to 13 May 2015 accident, notwithstanding the overlapping nature of same and that report is exhibited.
11. Mr. Brennan also avers at para. 18 of his affidavit that the notice of trial in this matter, which is dated 5 February, 2018 was after the plaintiff had acknowledged that his injuries had fully recovered in respect of the accident which is the subject of these proceedings.

12. Given that the relevant replies in the proceedings by the plaintiff against Ms. O'Shea were dated 5 June 2017, it cannot be disputed that eight months elapsed between then and the notice of trial which was served in the present High Court proceedings on 5 February 2018 and it is not in dispute that during that eight-month period the plaintiff did not make any application to remit the present proceedings to the Circuit Court.
13. It also seems clear that it was the first named defendant's solicitors who first raised the topic of an application to remit the proceedings to the Circuit Court and did so in their letter of 12 April 2019. In a response which is dated 9 May 2019, the plaintiff indicated their intention to make an application to remit, but neither specified a date for such an application nor, it is fair to say, made one in the days, weeks or months which elapsed thereafter.
14. On 24 July, 2019 the plaintiff sought a further adjournment of the case which was listed in the callover for the Michaelmas sittings of the High Court in Limerick. By that point, as averred by Mr. Brennan at para.18 of his affidavit, seven related cases arising from the accident, the subject of these proceedings, had been finalised at Limerick Circuit Court on 21 May, 2019. It also seems clear that the plaintiff had, by this stage, settled his proceedings in relation to the second accident, a notice of trial having been served in those proceedings on 20 June 2018 for a trial date in Kerry Circuit Court for 26 June 2018.
15. It is not in dispute that the plaintiff still made no application in these proceedings to remit that matter to the Circuit Court and, at the callover of the Hilary sittings in respect of Limerick, Ms. Justice O'Hanlon refused the plaintiff's request for an adjournment and the case was listed as No. 69 for hearing in the High Court sitting in Limerick. This is averred by Mr. Brennan who also avers that he sent out full briefs at that point to Senior Counsel and to Junior Counsel and that he notified witnesses and served the requisite witness summons.
16. At this juncture, it is appropriate to observe three things. Firstly, there is no evidence whatsoever averred to by Mr. Cousin of any *impediment* which prevented the plaintiff from making an application to remit this matter as of, say, June 2017 or soon thereafter - June 2017 being when the plaintiff confirmed in the second proceedings that his injuries relating to the first accident had fully resolved prior to the second accident.
17. A second observation which is fair to make is that there is nothing before this Court to *explain* the plaintiff's failure to bring such an application in June 2017 or reasonably soon thereafter or which explains the plaintiff's failure to do so then, and his *continued* failure to do so, despite the solicitors for the first named defendant raising that specific issue in mid-April 2019.
18. A third observation that it seems to me to be fair to make, is that significant legal costs undoubtedly arose in the proceedings *after* June 2017. Indeed, Mr. Brennan avers, at para.15 of his 10 June 2020 affidavit, that the first named defendant's motion to strike out the plaintiff's claim for failure to comply with the High Court's discovery order was in

the High Court on the 25 July 2017, 31 October 2017, 5 February 2018 and 30 April 2018. All of those appearances in the High Court post-date the plaintiff's replies to particulars in the second set of proceedings.

19. Mention is also made by Mr. Brennan in his affidavit of no less than four affidavits of discovery sworn by the plaintiff and, again, all four post-date the plaintiff's replies to particulars in the second set of proceedings, being dated 31 of August 2017, 4 September 2017, 13 October 2017 and 26 October 2018, according to Mr. Brennan in para.15 of his affidavit.
20. It has not been explained, in any averment before the court in the context of today's motion, why the plaintiff did not promptly bring an application to remit the case and it seems incontrovertible that High Court costs were incurred, and continued to be incurred, cumulating in Senior and Junior counsel being briefed on behalf of the first named defendant in relation to proceedings in respect of which, not only had a notice of trial been served, but which had been set down for trial and were listed for hearing. Nor is it in dispute that a judge of this Court refused an adjournment of those proceedings which set down for trial in Limerick.
21. In para. 18 Mr. Brennan avers that the plaintiff informed him that a motion to remit was returnable for the first day of the sittings in Limerick which is 17 February 2020. Reference is made to an exchange of correspondence of 10 and 17 February 2020, the first named defendant's position then being that, if the Circuit Court was prepared to accede to a remittal application, an application would be made for a differential costs order.
22. It has not been explained why the plaintiff did not move any application to remit the case in February of this year, but it is not in dispute that the plaintiff did not move an application to remit and Mr. Brennan avers that no such application was served on him and this is not in dispute.
23. It is not in dispute either that the case was not in fact reached in the Hilary sittings and it was not until April 2020 that the plaintiff first issued a motion and they did so pursuant to O.63, r.1(33) of the Rules of the Superior Courts, seeking to transfer these proceedings to the South Western Circuit in Limerick. That motion's initial return date was 6 July 2020, which is three years after the plaintiff confirmed, in replies in the second set of proceedings, that all his injuries in the first accident, which is the subject of these proceedings, had resolved prior to the second accident which of course occurred on 13 May, 2015.
24. A further observation can be made, namely, if the plaintiff's injuries sustained in the first accident had in fact resolved prior to the second accident, the plaintiff has known this since 13 May 2015 at the latest. In other words, his application to remit these proceedings comes five years after relevant knowledge on the part of the plaintiff.

25. I have very carefully considered the grounding affidavit sworn by Mr. Cussen in the context of the application which is before this Court, and it is fair to say, that the grounding affidavit to remit the case is a brief one, comprising just eight paragraphs. I have, as I say, carefully considered its contents.
26. In para. 1, Mr. Cussen identifies himself as the plaintiff's solicitor and confirms that the affidavit is sworn with the plaintiff's authority. In para. 2, references are made to the accident, the subject of these proceedings, with para. 3 referring to the pleadings themselves. In para. 4, it is averred that the pleadings are not closed and that no monies are in court and that no appearance has been entered by the second named defendant, with Mr. Cussen averring that it will be necessary for an application for judgment in default of appearance to be brought.
27. Two observations can fairly be made in relation to that averment. Firstly, the pleadings in respect of the plaintiff's claim against the first named defendant have long since closed. Secondly, it is over five years since the proceedings were issued and, given that the first named defendant filed an appearance in January 2016, it is not explained how, if the plaintiff had any intention of issuing a motion for judgment in default of appearance against the second named defendant, how such a motion has not been issued before now during the very considerably more than four years which have elapsed since the first named defendant's appearance was entered.
28. In para. 5 of Mr. Cussen's affidavit, it is averred that there is agreement between Mr. Cussen and counsel that, having regard to the available medical evidence, it could not reasonably be said that the case would attract damages in excess of the Circuit Court's jurisdiction. It is not, however, averred when those discussions took place. Given the fact that, by the time of the second accident, in May 2015, the plaintiff had fully recovered from the injuries sustained in the first accident, the subject of these proceedings, it is not explained in Mr. Cussen's affidavit why the present application was not brought during the intervening almost five-year period, as opposed to being an application which is brought now. Indeed, a period of four years from May 2015 to May 2019 is not referred to at all in Mr. Cussen's affidavit in the context of the present application.
29. In para. 6, reference is made to correspondence in May 2019 when the plaintiff indicated an intention to apply to have the case remitted to Limerick Circuit Court with the first named defendant consenting at that point in time. It is also averred that the plaintiff did not, in fact, bring the application but it is fair to say that no explanation is offered as to why that was so.
30. Correspondence from January and February of this year is also referred to and exhibited by Mr. Cussen but no explanation is given for why no application to remit was brought at that stage, in February of this year, and it is appropriate to quote as follows from certain correspondence sent in February on behalf of the first named defendant, beginning with the letter of 4 February 2020 to Mr. Cussen's office which refers to a letter of the 4th inst. and goes on to state: -

*"You will note that your application to have the matter adjourned was refused at the call-over of the list. I gather that the court in refusing your application suggested that you can inform the court when the matter is called on for hearing as to your current views in relation to the monetary jurisdiction of the case.*

*The matter is now listed and will proceed.*

*On that basis, I am instructed to decline your request to have the case remitted, in circumstances whereby the court has directed that the case proceed at the forthcoming High Court session in Limerick, but should you proceed with your application please let me know as to when you intend bringing your application for leave to issue your motion so my counsel can be present in order to oppose same. Finally, and without prejudice to the fact that the case is listed for hearing at the forthcoming session of the High Court in Limerick, should you proceed with your application, and should your application be granted, I am instructed to seek an order of the High Court in favour of my client for the difference between, (a) defending the proceedings to date in the High Court, and (b) amount of defence costs on the basis of Circuit Court costs to date all such costs to be taxed in default of agreement together with High Court costs in relation to my defence of your client's loss of earnings claim which has now been abandoned."*

A similar attitude was taken in a letter from the first named defendant to Mr. Cussen's office, which is dated 11 February 2020, which states as follows:

*"Your fax of even date refers.*

*You previously have maintained that you are proceeding with a motion to remit your case which you are aware that I am instructed to oppose. You are also aware that you are obliged to seek leave to bring your motion and I have asked that I be notified as to when your application will be brought so I can have counsel present to oppose same.*

*Please revert in this regard as a matter of urgency.*

*Finally, I respectfully suggest that any arguments in relation to the issue of remitting the case and the consequences that arise therefrom can be deferred to the date of your application for leave to remit/application to remit."*

31. In para. 7 of Mr. Cussen's affidavit, it is averred that the Limerick Circuit Court is a more suitable and convenient forum given that the accident occurred in Limerick and, at para. 8, the relief in the motion was sought.
32. Order 63, r.1(33) which is referenced in para. 1 of the plaintiff's motion, and is the relevant order in respect of which relief is sought, refers to an order for transfer of proceedings to the Circuit Court on consent of the parties. It is clear from the averments made by Mr. Brennan that the first named defendant is not consenting simpliciter. As Mr. Punch makes clear in very skilled and helpful submissions, the first named defendant's

position is more nuanced than a simple consent. Under normal circumstances where a simple consent is furnished, an order under O.63 r.1(33) would be not at all uncommon, with costs simply being reserved, but a much more sophisticated position is adopted by the first named defendant saying in short that, if the court is prepared to remit the case, it should only be remitted on the basis that a number of orders for costs are made in favour of the first named defendant.

33. The first of those urged on the court is an order in favour of the first named defendant in respect of the costs of what might be called the abandoned loss of earnings claim.
34. A second order is also urged, namely a differential costs type order, namely, an order as against the plaintiff in respect of its costs to date, other than in relation to the loss of earnings claim covered by the first order, and being equal to the difference between the party and party costs incurred to date by the first named defendant versus the costs on a party and party basis on the Circuit Court scale which would have been incurred had the proceedings been brought to date in that jurisdiction with execution stayed until the final determination of the proceedings.
35. A third order urged on the court, being an order reserving to the Circuit Court the costs to date, other than as above namely other than as covered in orders one and two, limited to costs on the Circuit Court scale to be adjudicated by the County Registrar in default of agreement.
36. A fourth order is urged on the court, namely, an order in favour of the first named defendant in respect of today's motion to remit, with a stay in respect of those costs.
37. Mr. Punch's submissions echo what Mr. Brennan has averred at para. 19 of his affidavit in response to the motion. In other words, far from being a situation where the first named defendant is simply consenting to the application to remit, a range of costs orders are urged on the court *if* this Court is prepared to remit the matter.
38. It is uncontroversial to say that in the present case, the plaintiff made a choice to commence this claim in the High Court regarding the accident which occurred in December 2013. As of 13 May 2015, when they were involved in a second accident, by which time their injuries sustained in the first accident had resolved fully, the plaintiff also made a choice, a choice not to apply to remit this claim to the Circuit Court at that juncture. That was a choice the plaintiff continued to make in the months, and indeed years, which followed. As of June 2017, when the plaintiff furnished their replies to particulars in the second set of proceedings, the plaintiff also made a choice to have these proceedings continue in the High Court and the plaintiff chose not to apply to remit the claim to the Circuit Court, notwithstanding the contents of the replies to particulars in the second set of proceedings which I have referred to.
39. The plaintiff, it can fairly be said, chose not to make an application to remit the case to the Circuit Court throughout 2017 and throughout 2018, by which time it cannot be disputed High Court costs continued to be incurred, right up to and including Senior and

Junior counsel being briefed for a trial in respect of High Court proceedings which had been set down.

40. The plaintiff also chose not to apply to remit either at the Michaelmas sittings in 2018 or at the Hilary sittings in Limerick in 2019. It was only in the summer of this year that the plaintiff's application to remit was listed for the first time, by which all pleadings had closed in respect of the claim against the first defendant, discovery had been made, and I have referred to what can be fairly be said to be an extensive history in respect of discovery, indeed a motion had issued and that motion had been in the High Court on multiple occasions.
41. In short, from the evidence before this Court, the entirety of the costs incurred by the first named defendant right up to and including the setting down and listing for hearing of a trial were incurred and were incurred in the High Court because of the choices which the plaintiff made.
42. On the evidence before this Court it does not seem to me that the plaintiff is entitled, as of right, to the relief sought at para.1 of the plaintiff's notice of motion. If the first named defendant was consenting, without reservation or condition, to a remittal to the Circuit Court, things might be otherwise but for very understandable reasons the first named defendant is not simply saying "*I consent*". On the contrary, the first named defendant's attitude is that, if this Court is minded to remit the case, it should only do so if four costs orders are made and that submission or attitude is plainly taken conscious that, if the lower court deals with the matter as the lowest court, the Circuit Court would not be in a position to grant, for example, a differential costs order at the conclusion.
43. I agree with Mr. Punch's submissions that it would be wholly unfair to the first named defendant for this Court to simply remit the matter and reserve the costs, something which, it is fair to say, is urged skilfully by Mr. Sugrue on behalf of the plaintiff, but there seems to me to be an alternative other than the two contended for with such skill by Mr. Sugrue and Mr. Punch and that is the option which seems to me to create the least risk of injustice, namely, to ensure that the entire question of costs is dealt with at the conclusion of the trial by a trial judge who has the benefit of all witness evidence and access to all discovery documentation and expert's reports and who has made his or her decision as to issues in the case, most obviously, decisions as to liability and, flowing from that, decisions as to quantum.
44. It seems to me that it will be when the case has an outcome in the form of a plenary hearing which results in findings that the court will have the optimum opportunity and, in my view, the appropriate opportunity, to make such costs orders as meet the requirements of justice. The judge hearing the case, being a judge of this Court, will have full powers including as regards any differential costs orders if appropriate. In my view, this guarantees fairness both to the first named defendant and indeed the plaintiff.
45. There is no case to my knowledge, and counsel very helpfully confirmed this, where at an application to remit, the court has made what could fairly be called final orders as to costs



including of a differential costs order type and I do not believe that this is something this Court should do now. Doing so in my view, even if this Court has such jurisdiction - and reference was made to s.168(1) of the Legal Services Regulation Act - doing so even as I say if this Court has such jurisdiction would, in my view, be far inferior to a trial judge at the conclusion of the trial making appropriate costs orders.

46. It is not in dispute that the Circuit Court, if hearing the case as the lowest court, could not deal with the differential issue, but on the evidence, and guided by the interests of justice, I am satisfied this Court should not attempt, no matter how well-intentioned, it should not attempt now to make what could be fairly called final orders as to costs. This is because there is an evidential deficit, as I see, it in relation to making the orders contended for by the first named defendant but, as I say, contended for in the context of those orders being sought if, and only if, the court is prepared to remit the case.
47. I am also satisfied that as well as being inappropriate to grant the reliefs sought in para.1, it would not be appropriate or in the interests of justice to make any alternative order. I would also express the view that even in practical terms this case is ready for trial. It has been set down for trial and, but for the vagaries of availability of court resources, it would already have proceeded to trial and, that being so, it is very difficult for me to see much, if any, scope for a saving of costs going forward. By that I mean this case, if it were remitted to the Circuit Court, would have to proceed in an identical manner, with the same involvement of witnesses, the same examination and cross-examination by counsel in front of a single judge. Be they a judge of the Circuit Court or High Court, it seems to me that a similar demand would be made on both sides, in terms of time and a similar demand would be made on the resources of the court system, regardless of what forum it were to proceed to trial in. In other words, I am making the obvious point that this is not a situation where, let us imagine by the end of 2015, or even 2017, an application to remit had been made which offered a very real prospect of saving in terms of High Court costs. That prospect has long since evaporated as a result of the choices the plaintiff made.
48. It is appropriate to point to that O.49, r.7 permits an application, normally prior to a notice of trial being served, for a case to be remitted from the High Court to the Circuit Court or indeed the District Court, but even when the court is satisfied that the case is not a matter fit to be prosecuted in the High Court, it is clear that this Court retains a discretion as to whether to remit a case, or not. The words used in O.49, r.7 are "*may remit or transfer*" and the mandatory term "*shall*" is nowhere used in O.49, r.7 in the context of a remittal application.
49. It also seems to me that it is not unreasonable that the position adopted by the first named defendant over a year and a half ago, namely, in Mr. Brennan's 10 May 2019 email, has shifted. Then, it seemed to be that the first named defendant was prepared to consent simpliciter to the plaintiff's application to remit, but it is not in dispute that the plaintiff did not bring an application to remit at that juncture. If the plaintiff had brought an application then it seems entirely likely that an order would have been appropriate

under O.63, r.1(33). In other words, with straightforward consent without condition being forthcoming from the first named defendant, the court could, and in all likelihood it seems to me would, have made a straightforward remittal order reserving the costs but that as we know is not the position. The plaintiff did not bring its application then and in my view, the first named defendant cannot fairly be criticised for now taking the stance that it is not simply consenting, without more, to the plaintiff's application.

50. In conclusion and for these reasons, I am satisfied that the interests of justice require a refusal of the relief sought in the motion. To my mind, doing so meets concerns including Mr. Sugrue's contention that the loss of earnings claim was never a substantial one; and that a review of the plaintiff's injuries, as of 10 September 2015, justified the continued jurisdiction of the High Court insofar as the plaintiff saw it. It also meets the concerns raised by Mr. Punch, including submissions to the contrary. So, notwithstanding the very skilled and helpful submissions by Mr. Sugrue, I am refusing today's application, entirely satisfied that this will create the least risk of injustice and ensure that the appropriate orders for costs can be made by a court which has the full benefit of all relevant evidence.