

APPROVED

[2022] IEHC 661



THE HIGH COURT

[2016 8438 P]

BETWEEN

ELIZABETH O'NEILL

PLAINTIFF

AND

DUBLIN CITY COUNCIL AND DUGGAN BROTHERS (CONTRACTORS) LIMITED

DEFENDANT

Judgment delivered 14 October 2022 by Mr. Justice Tony O'Connor

1. Before the Court is a notice of motion issued on 2 June 2022 for the plaintiff seeking an order pursuant to O. 63(1)(33) and/or O. 49(7) of the Rules of the Superior Courts (“RSC”) remitting these proceedings to the Dublin Circuit Court for hearing. The issue

between the plaintiff and the second named defendant concerns the delay and expense incurred and to be incurred if the order is granted at this stage.

Background

2. The most efficient way to outline the background is to set out a chronology of relevant events:

17/11/2015 - the plaintiff allegedly tripped and fell;

27/07/2016 - the authorisation from the Personal Injuries Assessment Board (“**PIAB**”) to bring these proceedings against the first named defendant (“**DCC**”) was issued;

21/09/2016 - the personal injuries summons naming DCC as defendant was issued;

16/01/2017 - a defence was delivered for DCC;

Sept 2019 - according to the grounding affidavit of the plaintiff’s solicitor sworn on 30 May 2022 the plaintiff had experienced pain radiating down her left leg. Following referral, it was concluded by an orthopaedic surgeon in September 2019 that the plaintiff did not require surgery even though she had developed chronic pain in her lower back.

09/04/2020 - the authorisation from PIAB to bring proceedings against the second named defendant, Duggan Brothers, issued.

09/07/2020 - an order was made with the consent of DCC directing that the second named defendant be joined as a co – defendant.

15/07/2020 - the amended personal injury summons was issued which alleged that one or other of the defendants were occupiers of the locus and carried out works which allegedly cause the plaintiff to fall.

27/11/2020 - the defence for Duggan Brothers was delivered with pleas inter alia that the plaintiff's claim against Duggan Brothers was statute barred and that the plaintiff was guilty of inordinate and inexcusable delay in prosecuting the proceedings.

15/02/2021 - the plaintiff's reply to the defence of Duggan Brothers was delivered. It included a plea inter alia that the plaintiff only had knowledge of the alleged causative link by reason of a letter from DCC of 28 February 2020 advising the plaintiff's solicitors of the part played by Duggan Brothers in the works relevant to the plaintiff's claim.

29/03/2021 - the solicitors for Duggan Brothers set these proceedings down for hearing and subsequently on 25 March 2022, the trial date of 20 October 2022 was assigned for the plenary hearing in advance of the issue being raised in the notice of motion before this Court. It was subsequently agreed and mentioned to the Court that the proceedings would now only be mentioned on the 20 October 2022 in order to get a further date.

11/08/2022 - the plaintiff's solicitors for the first-time requested consent to the remittal of the proceedings to the Circuit Court which was declined for reasons which were summarised by counsel for Duggan Brothers, at the hearing of this motion last Monday and today.

Position of DCC

3. DCC does not object to the remittal of the proceedings and were not represented at the hearing of this motion.

The law

4. Order 63(1)(33) of the RSC only applies where there is a consent application. The relevant order relied upon for this application is O. 49(7) of the RSC which reads as follows:

“7(1)Where any action or proceeding is pending in the High Court which might have been commenced in the Circuit Court or the District Court, any party to such action or proceeding may apply to the High Court that the action be remitted or transferred to the Circuit Court or the District Court (as the case may be), and if the High Court should not consider the action or proceeding fit to be prosecuted in the High Court it may (emphasis added by this Court) remit or transfer such action or proceeding to the Circuit Court or the District Court (as the case may be) to be prosecuted before the Judge to such Circuit or (as the case may require) the justice assigned to such District as may appear to the Court suitable and convenient, upon such terms and subject to such conditions as to costs or otherwise as may appear just”.

5. I paraphrase O. 49(7)(2) of the RSC, and more particularly subpara. (b) by stating that an application can be made in a personal injury action at any time before the commencement of the trial.

Submissions

6. Included in the oral submissions of counsel for the plaintiff were the following:
 - (i) There will be a saving in costs following a remittal. He instances that senior counsel need not or will not be briefed and that there is a greater potential for agreeing medical reports in the Circuit Court.
 - (ii) Duggan Brothers have had High Court orders made in their favour in motions issued previously in these proceedings and have not given specific figures for the other costs incurred from July 2020 when the amended personal injuries summons was served to October 2022 when this motion was heard.
 - (iii) There can be no dispute that scale fees for proceedings in the Circuit Court are less than those in the High Court.

- (iv) The statement of Peart J. at para. 26 in *Moin v. Sicika and O'Malley v. McEvoy* [2018] IECA 240 (Unreported, IECA, 24 July 2018) which reads:

“The ongoing progress of a plaintiff and medical reports that are received from time to time until the case is listed for hearing will usually clarify the level of general damages that the injuries sustained by the plaintiff can reasonably be expected to attract at trial. Where the level of damages that can be expected are professionally considered to be within the level of the Circuit Court jurisdiction, whatever the plaintiff himself/herself may think should be awarded, serious consideration must be given to an application to remit to the lower court, or else face the risk of a differential costs order. That is the clear legislative intention of the Oireachtas”.

- (v) Counsel for the plaintiff submits that the legislature intends the court to accede to remittal applications in order to minimise costs to be incurred by the parties.

7. Counsel for Duggan Brothers made the following submissions which may be summarised as follows:

- (i) The plaintiff has unreasonably delayed in bringing this application and particularly when it is grounded upon the views of the orthopaedic surgeon expressed as long ago as September 2019 (over 3 years ago now). Since then, Duggan Brothers have been joined and have prepared for a High Court trial which was scheduled for hearing later this month by consent. The plaintiff does not offer any excuse for that delay.
- (ii) Although Duggan Brothers may have obtained orders for costs in High Court interlocutory applications to date, Duggan Brothers will still have a liability for fees of senior counsel and the difference for solicitors' fees between July

2020 and June 2022 which may never be awarded in the Circuit Court because s. 17(5) of the Courts Act 1981 (as substituted by s. 14 of the Courts Act 1991) only concerns an order for damages which could be awarded in a lower court.

- (iii) The ex-tempore judgment of Heslin J. *Briedis v Ryan Investments Trading as Hertz Rent a Car and Puce* [2020] IEHC 640 (Unreported, High Court, 30 November 2020) concerns facts which are in counsel's words "on all fours" with the facts before this court. Essentially the Court should take account of the absence of any explanation [see para 20 of that judgment] to apply for a remittal. There the first named defendant had actually raised the issue of remittal in April 2019. Paragraphs 14 and 15 of that judgment referred to seven related cases which had been concluded in Limerick Circuit Court on 21 May 2019 and the Plaintiff's proceedings for another claim had been set down for Kerry Circuit Court on 26 June 2018.
- (iv) Despite the opportunity given by this Court last Monday, 10 October 2022, when the motion was partly heard, the plaintiff solicitors in their letter of 12 October 2022 have not addressed the inability of the Circuit Court to award differential costs for the period from July 2020 (when Duggan Brothers were served with an amended personal injury summons) and June 2022 when this motion was issued.
- (v) Counsel also summarises the points made in the reply dated 13 October 2022 for the plaintiff's solicitors concerning the fact that senior counsel had already furnished an advice on proofs which prompted the remittal application and that reports from experts can equally be agreed in the High Court
- (vi) Counsel also referred the Court to the delay which will occur if the proceedings are remitted. Her solicitors in their letter of 13 October 2022 gave

examples of 12 to 18 months delay from the date of issue of a Notice of Trial to an allocated date for hearing in the Dublin Circuit Court

Conclusion

8. The unexplained and unjustified delay from September 2019 when it was known that the plaintiff would not require surgery which is a significant fact prompting the application for remittal, is unfortunate. Duggan Brothers since that time have engaged solicitors and counsel on the basis that it is facing a High Court plenary trial. Despite the opportunity given last Monday for the plaintiff to consider the effect of the binding authorities in the Court of Appeal on this Court concerning costs orders (*Moin v. Sicika and O'Malley v. McEvoy* [2018] IECA 240 (Unreported, Court of Appeal, 24 July 2018) and *Emma McKeown v Alan Crosby and Mary Vocella* [2021] IECA 139 (Unreported, Court of Appeal, 11 May 2021)) and the inability of the Circuit Court by reason of the statutory provisions, to exercise its discretion to make an order for the difference between costs in the High Court and those in the Circuit Court from July 2020 to June 2022, no accommodation has been offered on behalf of the plaintiff to Duggan Brothers.

9. I understand that the parties and the Court do not have figures for the potential differential, but it is indeed common knowledge that the costs of proceeding with or defending High Court proceedings can be different from those relating to Circuit Court proceedings. There is a certain reluctance on the part of this Court to refuse remittal particularly as one defendant does not object. However, I have not been satisfied that the reasoning of Heslin J. in *Briedis v Ryan Investments Trading as Hertz Rent a Car* [2020] IEHC 640 can be distinguished from the facts presented in this application.

10. The comment of Peart J. in *Moin v. Sicika* relied upon by counsel for the plaintiff would incline me to grant the application to remit save that it is also the intention of the Oireachtas, the Superior Courts and Article 6 of the European Convention on Human Rights

(right to a fair and public hearing within a reasonable time) for proceedings to be determined without delay. In other words, in exercising the discretion under O. 49 (7) of the RSC, I am taking account of the delay in obtaining a date for the trial in the Circuit Court.

11. The parties had a date later this month for the trial in the High Court but the trial was adjourned pending the determination of this application. The parties will now be able to apply on 20 October 2022 for a new trial date.

12. I also conclude that the trial judge in the High Court may be able to take account of the plaintiff's application to remit without objection from DCC (albeit delayed) in considering and exercising discretion in any future application for a differential costs order following the conclusion of these proceedings.

Solicitors for the plaintiff: O'Hanrahan Lally D'alton LLP

Solicitors for the second defendant: Tormey Solicitors LLP

Counsel for the plaintiff: Seamus Collins BL

Counsel for the second defendant: Julia Leo BL