THE HIGH COURT

[2023] IEHC 758

Record No. 2016/11145P

CATHERINE MCGOOHAN

Plaintiff

AND

THE DEPARTMENT OF TRANSPORT, SPORTS AND TOURISM, THE MINISTER FOR TRANSPORT, SPORTS AND TOURISM, NATIONAL SPORTS CAMPUS DEVELOPMENT AUTHORITY, NSCDA (OPERATIONS) LIMITED and THE NATIONAL AQUATIC CENTRE

Defendants

Ex-tempore judgment of Ms. Justice Nuala Jackson on the 28th November 2023:

1. The Plaintiff herein seeks to reinstate the within proceedings in the following circumstances:

2. The Personal Injuries Summons herein was issued on the 15th December 2016. This Summons was issued in accordance with the provisions of Order 1A of the Rules of Superior Courts ('RSC') and, in particular, Form 1 in Appendix CC thereof. The reliefs sought therein include, *inter alia*, (under the Particulars of Special Damage)

"(f) Other expenses to include home help: STG£ 1900 to date."

The action in question relates to an event alleged to have occurred on or about the 18th April 2014. The address for the Plaintiff's solicitors in the Personal Injuries Summons is Suite 331, The Capel Building, St. Mary's Abbey, Dublin 7. There is no consent in the said Summons to service of documents by electronic mail as provided for in the template form aforementioned.

3. An Appearance was entered on behalf of the 3rd – 5th named Defendants on the 28th March 2017. The same solicitors entered an Appearance on behalf of the 1st and 2nd Named Defendants on the 19th May 2017. The address for the Plaintiff's solicitors in these Appearances is the Dublin address aforementioned.

4. A Notice for Particulars was served on behalf of the 3rd – 5th Named Defendants by letter dated the 7th April 2017. The letter in which such Particulars were sought is addressed to the Dublin address aforementioned.

5. Replies to Particulars were furnished by the Plaintiff's solicitors dated the 19th June 2017. Again, the address on this document is the Dublin address aforementioned.

6. A Defence on behalf of all of the Defendants was delivered on the 14th November 2017. This Defence is addressed to the Plaintiff's solicitors at an address at Port Road,

Letterkenny, County Donegal. It would appear that the Plaintiff's solicitors have an address in Donegal and an address in Dublin. The internal organisational structure of the Plaintiff's solicitors is not known to me, and I do not know why the Defence was delivered to an address other than the address which had previously been used by all concerned. In any event, it was not contended by the Plaintiff herein that this Defence was not received.

7. The concatenation of events pertinent to the application currently before me commenced in or about December 2020. A motion issued on behalf of the Defendants seeking three reliefs:

1. Directions in relation to the Plaintiff's default of her obligations pursuant to Order 39 Rule 46 RSC;

2. An Order directing the Plaintiff's compliance with her obligations pursuant to Order 39 Rule 46 of the RSC "to exchange" with the Defendants her schedule of Witnesses intended to be called at the hearing of the action, Statement of Special Damages together with vouchers and Schedule of Expert Reports to be relied upon at the hearing of the action – a seven day period for this was sought;

3. An Order striking out the Plaintiff's claim for failing to comply with Order 39 rule 46 of the RSC.

8. There are two points to be noted in respect of this motion:

a. The return date set out in the motion is incorrectly stated to be 22nd March 2020 – this should have been 2021;

b. The relief pursuant to Order 39 Rule 46 sought an "exchange" of documents as recited in the motion.

9. At this point it should be noted that Order 39 Rule 46 does require an exchange of certain documentation and a time scheduled provision of others. Sub-rules (1) and (2) are different in this regard:

> *46. (1) The plaintiff in an action shall furnish to the other party or parties or their respective solicitors (as the case may be) a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in respect of the action or within such further time as may be agreed by the parties or permitted by the Court.*
>
> *Within seven days of receipt of the plaintiff's schedule, the defendant or any other party or parties shall furnish to the plaintiff or any other party or parties a schedule listing all reports from expert witnesses intended to be called. Within seven days of the receipt of the schedule of the defendant or other party or parties, the parties shall exchange copies of the reports listed in the relevant schedule.*
>
> *(2) The parties in an action shall exchange with the other party or parties or their respective solicitors (as the case may be) the information and statements referred to in section 45(1)(a)(iii), (iv) and (v) within one month of the service of the notice of trial or within such further time as may be agreed by the parties or permitted by the Court.*
>
> *(3) In any case where a party or his solicitor certifies in writing that no report exists which requires to be exchanged pursuant to subrule 1, any other party shall, on the*

expiry of the time fixed, agreed or permitted (as the case may be) deliver any report within the meaning of the section to all other parties to the proceedings." (Underlining added)

10. Section 45(1)(a) of the Courts and Court Officers Act, 1995 states:

"45. – (1) Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings (or in connection with the obtaining or giving of legal advice) are in certain circumstances privileged from disclosure, the Superior Courts Rules Committee, or the Circuit Court Rules Committee as the case may be, may, with the concurrence of the Minister, make rules—

(a) requiring any party to a High Court or Circuit Court personal injuries action, to disclose to the other party or parties, without the necessity of any application to court by either party to allow such disclosure, by such time or date as may be specified in the rules, the following information, namely—

(i) any report or statement from any expert intended to be called to give evidence of medical or para-medical opinion in relation to an issue in the case;

(ii) any report or statement from any other expert of the evidence intended to be given by that expert in relation to an issue in the case;

(iii) the names and addresses of all witnesses intended to be called to give evidence as to facts in the case;

(iv) a full statement of all items of special damage together with appropriate vouchers, or statements from witnesses by whose evidence such loss would be proved in the action;

(v) a written statement from the Department of Social Welfare showing all payments made to a plaintiff subsequent to an accident or an authorisation from the plaintiff to the defendant to apply for such information; and

(vi) such other relevant information or documentation (as may be provided for by rules of court) so as to facilitate the trial of such personal injuries actions."

(Underlining added)

11. It is clear that what was being sought in the motion which issued by the Defendants in this instance did not relate to expert reports only but rather related also to a Schedule of Witnesses and a Statement of Special Damages with vouchers, the last mentioned obviously relevant only to the Plaintiff. Order 38, rule 46 deals with these categories differently. Expert reports are dealt with in Order 38, rule 46(1) while the other matters (Schedule of Witnesses, Statement of Special Damages with vouchers) are dealt with in Order 38, rule 46(2). The latter provides for exchange while the former provides that the Plaintiff give a Schedule of Reports first, followed within seven days by the Defendant.

12. The matters at issue here appear to relate to the matters to be exchanged under sub-rule (2) and also to a staged handover under sub-rule (1).

13. The matter was dealt with by consent on the 22nd March 2021 before Heslin J. The Order (in keeping with the terms of the Motion), allowed the Plaintiff four weeks to exchange the

documentation referred to. It must further be noted that prior to this Motion being dealt with by way of Consent Order, certain documents had been provided by the Plaintiff. On or about the 5th day of February 2021, the Plaintiff provided to the Defendant with a Schedule pursuant to SI 391/1998 (which statutory instrument introduced the amendments to Order 39 of the RSC which are pertinent herein). However, it is clear that there was no vouching provided, indeed all that was provided was the Schedule without any accompanying documentation. It is clear from this Schedule that the Special Damages figure in respect of home help (to date and future) had very significantly increased. The Plaintiff has urged upon me that what remained to be done was the exchange of vouching materials. The Defendant would not appear to greatly demur from this. Whatever remained to be done, the Order of Heslin J. was made on consent.

14. From the information available to me, it would appear that there was no compliance by either party with the exchange order of the 22nd March 2021.

15. In June 2021, the Defendants issued two motions – the first sought to compel replies to particulars and had a return date of the 1st November 2021. This motion was dealt with by Consent, the replies were provided prior to the return date but subsequent to the issuing of the motion and the motion was in consequence struck out with costs to the Defendants. The second motion was returnable to the 11th[1] November 2021 and sought a strike out of the Plaintiff's proceedings for failure to comply with the Order of Heslin J. of the 22nd

[1] Documentation provided and submissions made indicate that the second November motion was returnable to the 11th November 2021, however, the Order made in respect of such motion is dated the 15th November 2021.

March 2021. The Order made in consequence of the said Motion recites that Counsel for the Plaintiff was present at the hearing of the motion. It would appear to be accepted by both parties that Counsel for the Plaintiff was not present at this hearing. This Motion resulted in an 'unless' order being granted by Egan J. on the 15th November 2021. Four extra weeks were provided for compliance with the Order of Heslin J., failing which the Plaintiff's case would be struck out. The issue of costs was also dealt with.

16. The address for the Plaintiff's solicitors:

(i) The March 2021 motion references the Letterkenny address;

(ii) The Notice of Trial of the 17th July 2020 references the Letterkenny address;

(iii) The Schedule pursuant to SI 391/1998 of the 5th February 2021, most confusingly, is signed with the Dublin address but the cover page attaching has the Letterkenny address (this is also the position in relation to the Schedule provided on the 29th March 2022 but in the Amended Schedule dated 26th April 2023, the Dublin address only is used);

(iv) While it must be stated that I do not have a full booklet of *inter partes* correspondence, correspondence from the Defendants' solicitors seems to refer to the Letterkenny address of their opposites but much of the correspondence which I have seen says that it has been sent by email only, presumably due to the difficulties surrounding the Covid pandemic at that time;

(v) Correspondence from Gibson and Associates (although likewise referring to email communication) does appear to indicate that it is the Dublin office which is dealing

with matters (there are three addresses on the notepaper but there is a Dublin telephone number referenced).

17. It is common case that the Motions returnable for the 1st November 2021 and the 11th November 2021 were both sent to the Letterkenny address where they were served by registered post.

18. It is clear that the Order of Heslin J. was not complied with until the 29th March 2022, long after the four week extension period allowed by Egan J. In a letter sent by the Dublin Office of the Plaintiff's solicitors (*via* DX) on that date, the Schedule plus vouching was provided.

19. The Plaintiff seeks the reinstatement of the proceedings. The outcome for the Plaintiff is, obviously, one of considerable detriment if the proceedings remain struck out. However, clearly,

1. There was non-compliance with the March 2021 Order (by either party it would appear);
2. Correspondence between March 2021 and the issuing of the motions in June 2021 would appear to have been ignored by the Plaintiff (however, it must be noted that although this correspondence is referenced in the Affidavit on behalf of the Defendants herein sworn by Ms. Prendiville on the 6th July 2022 (at paragraph 9 thereof), it is not exhibited and thus I have not had evidence of same save for the

averment referenced which I have no doubt is correct as not contradicted by the Plaintiff in the context of the hearing before me);

3. The motions which issued in June 2021 (both of them) were served on the Plaintiff's solicitors' Letterkenny offices by registered post and it remains entirely unclear to me why one of these appears to have been ignored by a member of staff in that office. It also remains unclear to me why service was effected on the Letterkenny office in view of the clear terms of the Personal Injuries Special Summons. It was accepted during the hearing before me that there was a general acceptance of the usage of email during the pandemic period but there has been no suggestion that the "address for service" in the Summons was altered;

4. The Plaintiff says that the Order of Egan J. of the 15th November 2021 was notified by email to the Plaintiff's solicitors on the 17th December 2021 in response to the Plaintiff's email saying she would be seeking a hearing date. The Defendant says the Order of Egan J. of the 15th November 2021 was served via email on the 23rd November 2021. This latter is supported by the email exhibited at Exhibit "LP2" in the Affidavit of Ms Prendiville.

20. The law in relation to applications such as the present is clear. It is agreed that the applicable principles are those pertaining in respect of applications pursuant to Order 27, rule 15 (2) of the RSC seeking to set aside a judgement obtained by default. Essentially here, judgment has been obtained by the Defendants in their favour by way of a dismissal of the proceedings in circumstances of the Plaintiff's default in complying with an unless order.

"(2) Any judgment by default, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the default special circumstances (to be recited in the order) existed which explain and justify the failure, and any necessary consequential order may be made where an action has been set down under rule 9."

21. Most recently, this jurisdiction has been considered by this Court in the judgment of O'Donnell J. in ***Costern Unlimited Company v. Fenton*** [2023] IEHC 552 (in which all of the other pertinent authorities are considered).

"LEGAL PRINCIPLES – RELEVANT RULE

19. As noted above, the principal Rule of the Superior Courts engaged in this application is O. 27, r. 15 (2), which provides as follows: - "Any judgment by default, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the default special circumstances (to be recited in the order) existed which explain and justify the failure, and any necessary consequential order may be made where an action has been set down under rule 9".

20. In essence, the plaintiff's opposition to this application is based on the assertion that no proper explanation has been provided for the failure to deliver the defence on time, and that the defendant has failed to make out

any special circumstance justifying relief from the judgment that is being entered therefore the application should be refused.

21. In approaching this application, the plaintiff placed particular emphasis on two judgments of the High Court, first, De Souza v. Liffey Meats & Ors [2023] IEHC 402 ("De Souza"), and second, O'Brien v. McMahon [2023] IEHC 393 ("O'Brien"). The defendant relies on the same judgments, but places emphasis on the earlier judgment of the Supreme Court in McGuinn v. Commissioner of An Garda Siochana [2011] IESC 33 ("McGuinn").

22. In De Souza, which was a personal injuries action, the defendants sought to set aside a judgment of this Court on foot of an unless order which was dated 23 May 2022, and which required the defence to be delivered by 31 July 2022. In that case, the defence was not delivered until 20 September 2022. The solicitor acting on behalf of the defendant relied on the following matters by way of explanation: First, he was not aware that an unless type order had been made because a legal secretary or legal executive who was dealing with the matter did not understand the nature of an "unless order", and she had not told him that she had consented to such an order. Second, when the "unless order" was sent by email to the defendant's firm of solicitors, the solicitor averred that he had not reviewed the order. Third, counsel for the defendant had been instructed to finalise a defence, but difficult personal circumstances involving the serious illness and subsequent death of his mother delayed the finalisation of a defence. In that case, the court carried out a close and helpful analysis of the wording of O.

27, r. 15 (2), and the analogous approach adopted by the Court of Appeal in cases concerning applications to renew a summons pursuant to Order 8 of the RSC.

23. In O'Brien, O'Moore J. was faced with an application which he treated as one brought pursuant to O. 27, r. 15 (2) of the RSC seeking to set aside a default judgment. In that case, the court found that there was no reason for the defendants not to have delivered a defence or to have attempted to defend a motion for judgment in default of defence. The explanations that had been proffered essentially were: First, that the defendant was hoping to resolve the matter through negotiation. Because of this the defendant's solicitor assumed (wrongly) that this would have been drawn to the attention of the plaintiff solicitors, and, therefore, did not reply to correspondence as they hoped negotiations would bear fruit. The court did not accept that this was an adequate explanation. Second, there was a bald assertion that the defendants did not attend the hearing of the motion for judgment in default of defence "due to the unfortunate circumstances of Covid in our office affecting staff at that time". O'Moore J. found that explanation to be "so vague as to be effectively meaningless". In the premises, the court did not consider that special circumstances had been made out. Moreover, in that case the court was clear that the proposed narrow point of defence which the defendant wished to agitate was one which simply could not succeed.

24. Without in any way disagreeing with any aspect of the judgment in O'Brien, but because of the very fact specific analysis required in an application of this type, I do not consider that the judgment in O'Brien assists in resolving this application. This motion proceeds from a very different set of factual circumstances. I propose dealing with this motion on the basis of the close analysis of the relevant rules conducted by the court in De Souza.

THE APPROACH TO DETERMINING WHETHER "SPECIAL CIRCUMSTANCES" EXIST

25. In De Souza, Ferriter J. engaged in an extensive analysis of this question, considering the language of the Rule, and drawing by analogy with the analysis by the Court of Appeal (Haughton J.) in Murphy v. HSE [2021] IECA 3 ("Murphy"), which analysed similar language that had been utilised in O. 8, r. 1 (4) concerning applications to renew summonses. I agree with the analysis and approach adopted in De Souza.

26. In my view, the following matters emerge from De Souza: -

- *First, the question of special circumstances under the Rule is to be treated not just at the date at when the court's order was made, but principally at the date of judgment by default; in effect when the "unless order" crystallises. This was so on the basis that it is only when the judgment crystallises on foot of the "unless order" that there is a "failure" within the meaning of the Rule to deliver a defence, and the plaintiff will be*

entitled to proceed to have the case set down. Ferriter J. considered that this analysis was consistent with that of the Supreme Court in McGuinn.

- *Second, by reference to Murphy, what amounts to "special circumstances" must be decided on the facts of a particular case and it would be unwise to lay down any hard and fast rule. However, the test of "special circumstances" as expressed by Haughton J. in Murphy, is "generally accepted [as being] a higher test than that of 'good reason". As explained by Haughton J., and as accepted by Ferriter J. for the purpose of O. 27, r. 15 (2), "while this does not raise the bar to "extraordinary", it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present".*
- *Third, in effect, the court is obliged to engage in what amounts to a two-step analysis. The test is whether the court can be satisfied that there are special circumstances which justify an extension. However, factors that go to justification will be considered only if the court is satisfied in the first instance that there are special circumstances. In that regard, and by reference to the judgments of the Court of Appeal in Nolan v. Board of Management of St. Mary's Diocesan School [2022] IECA 10 ("Nolan"), and in Murphy, "special circumstances" must be established before the overall justification issue arises. Hence, questions of prejudice and the interests of justice form part of the analysis of the justification, and not part of the question of special circumstances. On that analysis, if the court is not satisfied as to the existence of sufficient special circumstances it*

will not be necessary to proceed to consider the "interests of justice" type issues.

- *In that regard, it appears to me that there are some apparent differences of emphasis in the approaches adopted by the Court of Appeal in Murphy and Nolan. In the earlier judgment of Murphy, Haughton J. seems to suggest that the need for the court to consider the interests of justice type issues, "is not a second tier or limb to the test. The need for the court to consider under sub-rule (4) [of Order 8] the interests of justice, prejudice and the balancing of hardship is in my view encompassed by the phrase "special circumstances [which] justify extension". ... The High Court should consider and weigh in the balance all such matters in coming to a just decision." On the other hand, in Nolan, a judgment from July 2023, Noonan J. explained the above comments as meaning that "special circumstances and the justification for renewal are not two separate and distinct matters, but fall to [be] considered together in the analysis of whether it is in the interests of justice to renew the summons. Prejudice is a component of that analysis." Noonan J. went on to clarify that "before that analysis can be arrived at, it must be established that there are special circumstances." It seems to me that whether the test is approached as a single composite test or a test in effect comprised of two components, there is a clear need for the court to be satisfied that there are special circumstances. As noted later, in this application I explain why I was satisfied that special circumstances have been established, and for that*

reason, it is not necessary to address how the court should proceed if there is a strong interests of justice argument combined with a weak special circumstances argument (albeit it is hard to envisage how that would arise).

- *Fourth, in the preponderance of cases, inadvertence or inattention on the part of a solicitor rarely will constitute "special circumstances". This flows from a number of factors, including the words of the sub-rule itself. As explained in De Souza and by reference to Murphy, part of the rationale for requiring a more demanding set of reasons or circumstances is that there has been a general tightening of the approach to compliance with deadlines and the expedition of litigation in light of the constitutional and convention imperatives of ensuring that justice is administered efficiently and expeditiously. This imperative likewise informs the rationale for seeking to apply O. 8, r. 1 (4) in a consistent manner with O. 27, r. 15 (2). Flowing from that, as noted by Ferriter J., "the general point remains that to treat a mistake or inadvertence by a solicitor as to the period ordered by a court for delivering a defence, failing which judgment will follow, would risk undermining the rationale for the rule being that of ensuring greater compliance with deadlines and court orders and ending the old culture of lax approaches to court-imposed deadlines and indulgence of disregard for court orders on procedural matters".*

22. It is clear from the judgment in ***O'Brien and Others v. McMahon*** [2023] IEHC 393 (O'Moore J.) that using Covid 19 challenges in a vague, non-specific way as a excuse will not be sufficient to excuse situations such as the present. O'Moore J. stated:

> *"(d) "We were not in attendance on the 6th March due to the unfortunate circumstances of Covid in our office affecting staff at the time."*
>
> *This explanation is to be so vague as to be effectively meaningless. It is not indicated who (or what sort of person in the office) contracted Covid. It is not explained how the contracting of Covid on the part of this individual prevented attendance at the hearing of the motion on the 6th March. It is not explained when the individual contracted Covid, or the extent to which they were absent from the office or capable of working from home as a result of having been infected with the virus. It is not explained why, if an outbreak of Covid had a direct effect on the person due to attend in court, a letter or email was not sent to the solicitors for the plaintiffs to notify them of that fact."*

23. However, it must be remembered that the date upon which the default judgment had been granted in that matter was 6th March 2023, far from the period of intense civic restriction relating to the pandemic. Such civic restrictions were in place at the time of the 'unless' order herein and the curtailments in operation in respect of motions at that time were accepted by both sides at the hearing before me. It must also be remembered that the motion before O'Moore J. was unsuccessful also because (as he found) the proposed defence was one which is simply unstateable, and therefore permitting the defendant to plead it would be pointless. This is not the position here.

24. In the present case,

A. The address on the Personal Injuries Summons was Dublin. This is amply clear in Schedule III of the Summons. At Paragraph 5 thereof it states: "The Plaintiff's address for service is C/o Gibson & Associates Solicitors, Solicitors for the Plaintiff, 331 The Capel Building, St. Mary's Abbey, Dublin 7." It is not disputed that the Motion subject of the within application was not served at this address. No explanation has been given by the Defendants as to why the June motions were served at another address;

B. All correspondence from the Plaintiff's firm that I have seen indicates that this matter is being dealt with by the Dublin office (it is clear, however, that correspondence from the Defendants' solicitors to the Letterkenny office was responded to but in circumstances in which email transmission was being used for the most part). The widespread use of email for correspondence etc at this time is entirely understandable;

C. There was an Order of Heslin J. for the exchange of documentation as required by the RSC. It would appear that neither side complied with this Order;

D. The Affidavit grounding the present motion states that "The preparation of the Plaintiff's case had been delayed by the fact that the Plaintiff resides in the United Kingdom and as a result of the Covid 19 pandemic." I note that it was vouching documentation which was outstanding and Covid 19 undoubtedly impacted on the ease with which such vouching documentation could be obtained although I am also aware that much of the documentation ultimately provided long pre-dated this

period. The Plaintiff herein referenced the expectation of communication by email, the pattern of behaviour in relation to other motions and, in particular, the expectation that there would be communication in advance of the hearing of the motion. I have significant reservations as to whether these matters amount to special circumstances. It is clear that the Plaintiff was not in attendance at the hearing of the motion, and it is clear that this Order was made at a time when procedures for the hearing of motions were being considerably impacted by Covid restrictions. It is clear that civic society was operating in special circumstances at the times relevant to this motion and Order;

25. In light of the above, I am of the view that special circumstances exist and having so found, I am of the view that the interests of justice are such as justify the granting of the relief sought by the Plaintiff herein. In this regard, the dictum of Heslin J. in ***May v Barrett and Another*** [2023] IEHC 322 at Para. 58 is apposite:

> *"Taking everything into account, I also take the view that, were the entire claim of the plaintiff to stand dismissed without being reinstated in any respect, it would be a disproportionate response by this Court to the plaintiff's conduct, which I have no hesitation in saying has been substandard. However, it seems to me that that conduct can more appropriately and more justly be dealt with by means of appropriate costs orders."*

26. Having so found and having regard to the fact that there has now been compliance by the Plaintiff with the terms of the RSC (and I am unclear as to whether there has been such

compliance by the Defendants), I will grant the reliefs sought but on the basis that the costs of the motion are borne by the Plaintiff.

27. Pursuant to Order 27 rule 15(2), the recited special circumstances will be:

1. The fact that the Motion concerned was not served on the address recited in the Personal Injuries Special Summons;
2. The fact that the original Order of 22nd March 2021 placed obligations on both of the parties, referencing an exchange of documents and neither would appear to have complied in the timeframe permitted;
3. The acknowledged procedural restrictions which were in operation at the time of making of the unless Order herein and at surrounding times.