Neutral Citation: [2017] NIQB 42 | *Ref:* **COL10283**

Judgment: approved by the Court for handing down | *Delivered:* **28/4/2017**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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2013 No. 97460

BETWEEN:

J19

Plaintiff;

-and-

FACEBOOK IRELAND LIMITED

Defendant.

_____

COLTON J

Background

[1] In this action the plaintiff seeks damages against the defendant for breach of privacy and misuse of private information arising from the posting of various photographs, information and comments on Facebook webpages in September 2013.

[2] The action was listed for hearing along with another similar action namely J20 v Facebook Ireland Limited on 15 March 2016. The J20 action arose from similar postings at the same time and gave rise to the same legal issues as those that arose in this action.

[3] This action was opened by Mr David McMillen QC on behalf of the plaintiff in the course of which he indicated to me, the trial judge, that the plaintiff had suffered a panic attack, had gone home and would not be in a position to give evidence.

[4] On the following day Mr McMillen applied to adjourn the trial of the action on the basis that the plaintiff had received medical advice not to attend court that day having suffered a panic attack the previous day. He also raised a query as to whether the plaintiff would ever be fit to give evidence in these proceedings because of his medical condition.

[5] On the basis that medical evidence would be submitted in support of these submissions the defendant did not ask for the proceedings to be dismissed nor did it oppose the plaintiff's adjournment application.

[6] I granted the plaintiff's application to adjourn the trial on the basis that a GP report would be submitted to the court within 21 days supporting the submissions made by the plaintiff's counsel, namely:

(a) That the plaintiff was unfit to attend court on 15/16 March 2016 on medical grounds; and

(b) As to the question of whether the plaintiff would ever be medically fit to give evidence in these proceedings.

[7] The J20 trial proceeded and judgment was reserved. Because a Court of Appeal decision was awaited in a similar action there was a delay in delivering the judgment but at the request of the plaintiff's solicitors in the J20 action in fact judgment was delivered prior to the Court of Appeal judgment on 19 December 2016.

[8] In relation to the J19 action on 7 April 2016 the defendant's solicitors wrote to the plaintiff's solicitors reminding them of the court's direction as to service of a GP report but received no response.

[9] After delivering judgment in the J20 action these proceedings were reviewed by me on 9 January 2017 at which point I indicated that I would adjourn the matter for two weeks but would not adjourn the matter further in the absence of the medical evidence initially directed on 16 March 2016.

[10] I reviewed these proceedings again on 23 January 2017, whereupon I made an "unless order" to the effect that the action be struck out unless a GP report was filed and served by Friday 27 January 2017.

[11] On 27 January 2017 the plaintiff's solicitors served a letter from Dr B Cardwell regarding the plaintiff's condition in the following terms:

> "J19 is a patient at this surgery.
>
> He has a history of alcohol dependence syndrome, alcoholic hallucinosis and depression. He is reviewed

> approximately every six months by a consultant psychiatrist at Old See House, Mental Health Team, Belfast Trust.
>
> His on-going symptoms include auditory and visual hallucinations.
>
> His current medications are as follows:
>
> Thiamine 100 mg three times a day
> Propranolo 80 mg once a day
> Venlafaxine MR 75 mg once a day
> Risperidone 4 mg once/twice a day
> Vitamin tablet one daily
> Pantoprazole 40 mg one daily."

[12] I reviewed the matter on 3 February 2017. The plaintiff's counsel asked for a further week within which to file an updated medical report and for the case then to be reviewed in a week's time. However I rejected this application and instead adjourned the matter to allow the defendant an opportunity to bring a formal application to "strike out" the plaintiff's action.

[13] The defendant's solicitors then issued a summons on 1 March 2017 seeking the following relief:

> "1. An order under the inherent jurisdiction of the court and/or pursuant to Order 18, Rule 19(1) of the Rules of the Court of Judicature (Northern Ireland) 1980 that the statement of claim be struck out (Rule 19(1)(d));
>
> 2. In the alternative, an order pursuant to Section 86(3) of the Judicature Act (Northern Ireland) 1978 and/or the inherent jurisdiction of the court staying this action on the grounds that it is an abuse of process;
>
> 3. An order that the defendant costs of and incidental to this application be paid by the plaintiff."

The arguments

[14] Mr Peter Hopkins who appeared on behalf of the defendant in his able submission says that the conduct of the plaintiff is sufficient to justify a strike out or stay of the action. On 16 March 2016 when the defendant was ready to defend the action it did not seek judgment pursuant to Order 35 Rule 1 of the Rules of the

Supreme Court on the basis that the plaintiff would produce medical evidence to support his argument that he was unfit to attend at the trial. Despite the clear and unequivocal direction of the court the medical evidence which was directed has not been produced despite the fact that the plaintiff has had ample to opportunity to do so. Thus the defendant has been prejudiced. More importantly the conduct of the plaintiff is such as to merit a strike out or a stay of the action. The only inference that can be drawn from his conduct is that in fact he had not received medical evidence that he was unfit to attend on 15 and 16 March. Thus the adjournment of the trial has been improperly obtained.

[15] The defendant submits that rather than proceeding with his claim at the requisite time the plaintiff has awaited the outcome in the related action of J20 who having obtained a measure of damages has encouraged the plaintiff to maintain his action in the hope of a similar outcome.

[16] The defendant submits that the plaintiff's conduct amounts to an affront to the court and that he should not be permitted to continue to prosecute his claim. By his conduct he has forfeited the right to have the court consider his action. Further, it is submitted that to allow the proceedings to continue would waste valuable resources of the defendant, the Legal Services Agency (which funds the plaintiff's claim) and the court.

[17] It is submitted that the plaintiff's conduct is in the true sense of the words an abuse of the judicial process because he has abused the machinery of the court. The court should strike out the plaintiff's claim in the interests of public policy and justice. It should sanction the plaintiff's conduct as unacceptable, both as a reflection on the plaintiff himself, and as a more general indication that such conduct will not be permitted in court proceedings.

[18] In response Mr McMillen who appeared on behalf of the plaintiff with Mr David Heraghty argued firstly that this was not a case to which Order 18 Rule 19(1)(d) of the Rules of the Supreme Court Rules applies. In short this rule provides for a pleading to be struck out or amended on the basis that:

> "(d) It is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be made out accordingly, as the case may be."

[19] He submits that the power under Order 18 Rule 19 relates to the content of the pleadings and it does not relate to the circumstances that arise in this case.

[20] He accepts that the court has a power to stay an action under Section 86(3) of the Judicature (Northern Ireland) 1978 which states:

> "(iii) Without prejudice to any other powers exercisable by it, a court, acting on equitable grounds, may stay any proceedings or the execution of any of its process subject to such conditions as it thinks fit."

[21] Mr McMillen argues that this discretion should manifestly not be exercised in this particular case.

[22] In relation to the defendant's prejudice in terms of failure to have the action dismissed on 16 March he argues that in fact Order 35 Rule 1 would not have assisted the defendant.

[23] The relevant part of Order 35 provides:

> "… (2) If, when the trial of an action is called on, one party does not appear, the judge, may proceed with the trial of the action or any counterclaim in the absence of that party. …
>
> (3) The judge may, if he thinks it expedient in the interests of justice, adjourn a trial for such time, and to such place and upon such terms, if any, as he thinks fit."

[24] Therefore contrary to the defendant's contention he argues that Article 35 does not give the court jurisdiction to dismiss the case of a plaintiff who fails to personally attend the hearing of his action, indeed it specifically permits the court to proceed to hear the case. Mr McMillen indicated that in the event of my refusing the application he would have sought to rely on affidavit evidence which had been submitted on behalf of the plaintiff when an interim injunction was sought in this action. Indeed he pointed out that the defendants also relied on affidavit evidence. The fact that the plaintiff is personally absent does not mean that he is absent as a party to the proceedings. The plaintiff was represented by an appropriate solicitor and counsel and was therefore present at the trial. Thus insofar as any argument is founded on the potential implications of Order 35 he argues that such an argument is misconceived.

[25] In terms of the discretion of the court he points out that it is abundantly clear from the medical evidence already served in this action that the plaintiff is a psychologically fragile and vulnerable individual. A consultant psychiatrist, Dr Mangan, confirms that the plaintiff has a diagnosis of schizophrenia and also of paranoid episodes. He indicated that he had met with the plaintiff on 14 March 2016 when he was clearly "unwell".

[26] His instructing solicitor avers that:

> "I also met the plaintiff along with counsel on the morning of 15 March. It was immediately obvious to me that the plaintiff was in even poorer mental condition than he had been in the day before. He was exceedingly nervous and unsettled by the impending and formal court proceedings. He indicated that he had found it impossible to sleep the night before and that he was feeling physically ill. Efforts were made to put the plaintiff's mind at ease by discussing the process in the nature of giving evidence. Shortly before the case was called on in court it became clear that the plaintiff had left the court building. Attempts were made to telephone him. Further associates of the plaintiff were contacted in a further attempt to make contact. I spoke to the plaintiff and he advised that whilst he wished to attend court he felt that he was mentally unable to do so and was going to attend the doctor's surgery that day. I advised him that we required a medical note in this regard. I do not recall ever seeing this medical note."

[27] The plaintiff's GP notes and records up to March 2016 show that he suffers on-going anxiety issues. There is an entry of 30 January 2016 which makes reference to him suffering from depression. An entry on 9 December 2015 states that he has depression, worsening low mood after the last few months, alcoholic hallucinosis. On 16 October 2015 there is an entry which states "anxiousness symptoms increased anxiety threats on Facebook".

[28] He argues that the conduct of the plaintiff falls short of what is required to justify the extreme sanction of dismissal or a stay which would have the effect of denying an opportunity to have his case adjudicated on the merits. In relation to the suggestion that he simply awaited the outcome of the J20 judgment Mr McMillen reminded me that when he sought to adjourn this matter he indicated that in the event of J20 being unsuccessful he would obviously have an obligation to advise the Legal Services Agency of that and that he would take a pragmatic approach to the case.

[29] Mr McMillen confirmed that the plaintiff wished to continue with his action.

The law

[30] It seems to me there is no real dispute on the legal principles. I agree with Mr McMillen that this is not really an application to which Order 18 applies but at its heart is whether or not the plaintiff's conduct is sufficient to justify me exercising my undoubted discretion to stay this action.

[31] As per Black LJ in the context of an Order 18 application in the case of Mulgrew v O'Brien [1953] NI 10:

> "This however is a very strong course to take and the jurisdiction is one which will be exercised with the greatest care and circumspection. The theory of our law is that every subject has prima facie a right to have his action brought to trial."

[32] The principle is perhaps best set out in the judgment of Mummery LJ in Masood v Zahoor (Practice Note) (CA) [2010] 1 WLR 746 at paragraph [71] in the following way:

> "In our judgment, this decision is authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim then the claim may be struck out for that reason. In the *Arrow Nominees* case [2000] 2 BCLC 167, the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. The question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It is not necessary for us to express any view as to the kind of circumstances in which (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised."

[33] Mr Hopkins points out that I am not involved in a "balancing exercise" in this case and that it is not necessary to show prejudice. In this regard he relies on the judgment of the Supreme Court in Summers v Fairclough Homes Limited [2012] UKSC and in particular to paragraph [35](iii) of the judgment of Lord Clarke:

> "The court had power to strike out a claim on the ground of abuse of process, even though the effect of doing so would be to extinguish substantive rights. It follows from the conclusion in *Birkett v James* [1978] AC 297, that the court could strike out a claim as an abuse of process for intentional and contumelious conduct amounting to an abuse of the process of the court without the necessity to show prejudice that the fact that a strike out might extinguish substantive rights is not a bar to such an order."

[34] I was also referred to the judgment of McCloskey J in Anglo Irish Bank Corporation Limited v Williamson and Lyness [2010] NIQB 117 when he refused an on-going adjournment application because of inadequate medical evidence. In that case there had been a succession of adjournments which differs from the circumstances of this case.

Conclusion

[35] I accept I have a discretion to stay this action. Circumstances in which abuse of process can arise are very varied and there is no fixed category as to the circumstances in which the court should exercise this salutary power.

[36] It is clear that this power should only be exercised in very clear and obvious cases when one is relying on misconduct of a party. On the basis of the authorities to which I have referred this conduct has been described as "misconduct so serious that it would be an affront to the court to permit him to continue …" or "intentional and contumelious conduct".

[37] This is exemplified by the very conduct described in the judgments. In Masood documents relied upon in the litigation were forgeries and thus the litigation was tainted with fraud. In Summers the misconduct complained of was a fraudulent claim for loss of earnings in circumstances where disclosed surveillance evidence showed a plaintiff living a normal existence without any significant disability, including playing football and who was in fact working.

[38] In this case there is no doubt that the plaintiff has behaved poorly by indicating that he had received medical advice that he was unfit to attend court and by failing to provide any evidence to support this contention. I do however assess this in the context of his undoubted medical frailty and condition and having regard to the representations made on his behalf as to his condition on 15 and 16 March. In my view his behaviour falls short of conduct such as to forfeit his right to have an adjudication of his claim. In my view it falls short of the type of conduct envisaged that would constitute an affront to the court or which would amount to intentional and contumelious conduct. I do not find that there has been a persistent and flagrant conduct of the type which would justify such an order and I have come to the conclusion that the plaintiff should be given the opportunity to have his claim adjudicated on the merits.

[39] Accordingly, I dismiss the defendant's application and will give directions as to the further conduct of the action on hearing the parties.