[2018] IEHC 366

THE HIGH COURT

[2017 No. 252 S.P.]

BETWEEN

DAVID DULLY

PLAINTIFF

AND

ATHLONE TOWN STADIUM LIMITED

DEFENDANT

(No. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 30th day of May, 2018

1. In *Dully v. Athlone Town Stadium Ltd. (No. 1)* [2018] IEHC 209 [2018] 4 JIC 1203 (Unreported, High Court, 12th April, 2018) I removed the defendant as trustee in relation to the trust in these proceedings and directed the conveyance of the legal interest in the trust property to the new trustee. In *Dully v. Athlone Town Stadium Ltd. (No. 2)* [2018] IEHC 225 [2018] 4 JIC 1603 (Unreported, High Court, 14th April, 2018), I declined to order a stay on the conveyance of the legal title.

2. The plaintiff now seeks to progress his claim for damages and has sought to put in a further affidavit in that regard. The defendant has objected in principle to a further affidavit being filed at this stage. I have received helpful submissions from Mr. John Paul Shortt S.C. (with Mr. Martin G. Durack B.L.) for the plaintiff and from Mr. Michael Forde S.C. (with Mr. Laurence Masterson B.L.) for the defendant. Mr. Forde helpfully set out his objections under six grounds.

3. The first ground was that additional evidence should not be allowed due to the plaintiff's alleged "*bungling*" of the case and his taking up undue time with various applications. I would reject that as a characterisation of the plaintiff's conduct of the proceedings.

4. The second ground was that the plaintiff had already had ample time to put in affidavits and that there was no explanation for the delay. It seems to me that that is not a fatal reason because in giving the No. 1 judgment I envisaged that damages would be dealt with separately.

5. The third objection was that it was an abuse of the special summons procedure to allow the damages issue to be progressed in that way. However, O. 3 para. 22 of the Rules of the Superior Courts allows "*such other matters as the Court may think fit to dispose of by special summons*", to be dealt with under this procedure. There was some suggestion by Mr. Forde that there should be a plenary hearing of the issue, but it was not made clear why this was necessary. It seems to me that if the affidavit is allowed, if the defendant is given time for a replying affidavit, and if the previous order for cross-examination is applied to both, then the defendant is not disadvantaged or at least not in any way that has been identified to date.

6. The fourth objection was that the proper approach should be that before a trial starts, a plaintiff should indicate an intention to deal with damages or other consequential aspects after substantive issues have been dealt with. He gave an example where such an order was made in *Golden Belt 1 Sukuk Company BSC v. BNP Paribas; FCOF II UB Securities LLC and others v BNP Paribas* [2018] 1 BCLC 385 [2017] EWHC 3182 (Comm) at 392 *per* Males J. I agree that that is best, but failure to do so does not mean that the court is precluded from making such order as properly does justice between the parties.

7. The fifth objection was that what is at issue is more than just an assessment of damages, there might also be argument as to whether the defendant's actions sounded in damages at all as well as questions of causation. In the context where the objection is not to damages being dealt with but to that question being dealt with on the basis of an updated affidavit, the complaint made under this heading seems to me to me to be all the more reason why the court should not be precluded from dealing with this issue on the basis of hearing full evidence.

8. The sixth objection was that Mr. Forde claimed that I was *functus officio*. That is not so because I expressly reserved consideration of the question of damages when giving the No. 1 judgment. In the context of that submission, Mr. Forde incidentally said that he was not pursuing an application to revisit the judgment on the grounds of his previous complaint that prior to giving judgment I had glanced at Hilary Biehler's *Equity and the Law of Trusts in Ireland* (Round Hall, 2016) at p. 477, and that at para. 64 of the No. 1 judgment referred to that and to the case cited by Biehler. That complaint, in any event, is of no substance. The judgment would have been to the same effect even if para. 64 were deleted, and in any event, perhaps more importantly, the defendant was not in principle contesting its removal as a trustee but rather focused on its complaints in relation to the indemnity. I agree it is of course best practice to, and I normally would, draw the parties' attention to any additional materials I come across, but here it did not seem to me to make much difference, and in any event it related to a point that was not significantly in dispute. The passage from Biehler did not add anything new to the case, it merely provided backup for a point that Mr. Shortt had expressly made anyway. Mr. Forde was not deprived of an opportunity to reply to the point even if he was seriously contesting his removal as trustee.

9. Mr. Forde then seemed to make a seventh point that to allow the damages issue to be pursued by way of new evidence would involve a complete reopening of matters dealt with. That is not so. Such matter have been dealt with already and are not up for renegotiation. We are dealing with a consequential issue. It seems to me that the overriding objective of enabling the court to deal with cases justly and at proportionate cost must be born in mind. That principle is given statutory form in the U.K. in para. 1.1(1) of the Civil Procedure Rules, but the same principle is relevant in this jurisdiction. It seems to me that the interests of justice, relied on expressly by Mr. Shortt, lean in favour of the plaintiff being allowed to pursue its damages claim in reliance on a full canvassing of any evidential matters that it wishes to put before the court.

10. Returning to the issue of O. 3 (22), Mr. Forde did not seem to have any independent grounds for opposing a direction under that paragraph separate from why the plaintiff should not be allowed to file a further affidavit, so on that basis there is no particular reason why I should insist on the formality of a notice of motion to deal with that issue. The provision was previously considered in *McKenna v. J.G.* [2006] IEHC 8 (Unreported, High Court, 30th January, 2006) where Finnegan P. dealt with a motion by the defendant seeking a strike out the proceeding, not an application by the plaintiff under O. 3 (22), but nonetheless made the direction under that paragraph, which if nothing else emphasises that a formal notice of motion is not a necessity for operating that provision.

Order
11. For those reasons the order will be as follows:

(i). Pursuant to O. 3 (22) I will allow the plaintiff to deal with the matters set out in the special summons that remain outstanding, including damages.

(ii). I will allow the plaintiff to file the additional affidavit sworn on 23rd May, 2018 setting out details of the claim for damages and will hear counsel on a timescale for a replying affidavit.

(iii). The order for cross-examination on all affidavits will apply to these and any further affidavits and in addition the parties will be entitled at the damages hearing to cross-examine on pre-existing affidavits insofar as such cross-examination relates to issues relevant to the claim for damages.