THE HIGH COURT

[2021] IEHC 398

[HIGH COURT RECORD No. 1998/7694P]

[SUPREME COURT RECORD No. 2012/551]

IN THE MATTER OF A WARD OF COURT, M.O'B, AND IN THE MATTER OF HIGH COURT PROCEEDINGS BETWEEN M.O'B, A.O'B, R.O'B (A MINOR), SUING BY R.O'C, AND B.O'B (A MINOR), SUING BY R. O'C

PLAINTIFFS/APPELLANTS

AND

WESTERN HEALTH BOARD, E.O'D, D.J.O'G AND BY ORDER B.S.D.

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Irvine, President of the High Court, delivered on the 8th day of June, 2021

1. This ruling relates to an appeal currently before the Supreme Court brought by A. O'B., the second named plaintiff. In this appeal, A. O'B. challenges orders made by this court on 15th November, 2012 (McCarthy J.) in relation to a settlement in respect of injuries sustained by A. O'B.'s husband, M. O'B., a ward of court. As the settlement at the centre of this appeal involves the entitlements of a person who is a ward of court, before entertaining the appeal fully, the Supreme Court expressed its concerns regarding whether A. O'B. can and/or should bring the appeal in circumstances where no consent has been sought by the President of the High court on behalf of the ward to bring the appeal. On foot of these concerns, by order dated 6th December, 2019, it remitted the following questions to me for determination:

   (i) Whether it is now lawful and in the best interests of the first named plaintiff, a ward of court as determined on 18th December, 2013, that the second named plaintiff should continue to pursue the appeal in person herein without leave of the President of the High Court?

   (ii) Whether it is in the best interests of the ward of court that any further steps should be taken in the appeal herein, and if so, what steps?

   (iii) Whether having regard to the circumstances it is in the best interests of the ward of court that any other legal proceedings should now be taken and if so what should be the nature of such proceedings?

   (iv) Any other issues arising.

Preliminary

2. My decision on each of these issues was made having considered the content of the entire wardship file as it relates to M. O'B. and a full set of papers which had been lodged with the Supreme Court for the purposes of the appeal which led to the court's judgment of 6th December, 2019. Furthermore, having received correspondence from A. O'B., concerning the respondent's entitlement to be heard in relation to the aforementioned issues, I ruled that in circumstances where my decision would be based upon what was in the best interests of the ward, it would be inappropriate to engage with any submissions as might be advanced by the respondents who would understandably urge the Court to a view which would best favour their own position. It is also appropriate to indicate that A.

O'B. was content that I should reach my decision based upon the aforementioned papers. She made this position clear in her letter dated 11th May, 2021.

Background facts

3. Because the background facts to this application are set out extensively in the judgment of MacMenamin J. dated 6th December, 2019, I do not intend to do more than recite the facts which are core to the issues raised for my determination.

4. A. O'B, is the wife of the first named plaintiff M. O'B. The other plaintiffs are their children.

5. The within proceedings were commenced on 2nd July, 1998. The claim advanced on behalf of M. O'B. was that he had suffered severe cerebral damage due to the alleged negligence of the defendants in and about his treatment and care when suffering from viral encephalitis in 1996. Regrettably, that infection has affected him in every aspect of his life. He is unable to live on his own and requires 24 hour care.

6. Because of the significance of M. O'B.'s injuries, a large special damages claim was advanced. This included claims for loss of earnings, care (past and future) and housing etc. Relevant to the claim for the cost of care was the fact that since 1996 M. O'B. had been provided with 24 hour care indirectly funded by the HSE. Whether the HSE intended seeking to recoup the cost of that care from M. O'B. had not been ascertained when the parties first met with a view to negotiating a settlement of all claims.

7. Because M. O'B.'s legal representatives were not in a position to rule out the possibility that the HSE might, in the aftermath of the settlement of M. O'B.'s claim, seek reimbursement in respect of the cost of his past care, negotiations proceeded on the basis that in addition to any offer that might be made in respect of M. O'B.'s claim, an indemnity would also have to be provided in respect of any such claim as might later be advanced on behalf of the HSE.

8. The affidavits material to the issues raised by the Supreme Court reveal that the negotiations proceeded on this basis and that M. O'B.'s legal team, comprising senior and junior counsel, were happy to recommend a settlement of all the claims for a sum of €4.2m provided that an indemnity was given by the defendants to cover any possible claim by the HSE in respect of M. O'B.'s past care. Of the said sum of €4.2m, a total sum of €225,000 was in respect of the claims of the other plaintiffs and there is no dispute as to these settlement figures. The third and fourth named plaintiffs were to each receive €25,000 and the second named plaintiff, A. O'B., a sum of €175,000.

9. It is important in the light of all that happened later in the negotiations to note that neither M. O'B.'s legal representatives or indeed A. O'B. considered the value of M. O'B.'s claim, exclusive of any claim for the cost of care to date, should result in an overall settlement figure in excess of €4.2m. That sum was clearly considered by A. O'B. and M. O'B.'s legal team to be one which would provide fair and just compensation for M. O'B.'s

injuries and all of his other financial loss when the sums due to the other plaintiffs in settlement of their claims had been deducted.

10. There is a dispute between the parties as to how the negotiations proceeded after initial discussions in the course of which consideration was given to the possibility of settling all claims for the total sum of €4.2m with an indemnity in respect of the costs of M. O'B.'s past care. Senior Counsel for M. O'B. considered he had received an increased unconditional offer of €4.5m. On the other hand, the defendants have from the outset maintained that the offer of €4.5m was on the basis that there was, at the time of the offer, a claim for past care which had not been waived by the HSE and that they were prepared to offer an additional sum of €300,000 in respect of that aspect of M. O'B.'s claim so that the proceedings might be finalised. However, they also maintained that the offer was on the basis that if the HSE decided to forego its claim, in respect of past care, that the sum was to revert to the original €4.2m.

11. On 27th May, 2011, counsel for M. O'B. apparently sought the court's approval for a settlement in the sum of €4.5m. Counsel for the defendant attended court to consent to judgment in that sum but failed to mention that in the event of the HSE's respective claim for the costs of past care being withdrawn that the defendants' liability would be in the lesser sum of €4.2m.

12. From the court file it seems that no order was made on 27th May, 2011. It appears that Quirke J., who heard the application, was not satisfied to finalise the ruling until the HSE clarified whether or not it was making a claim in respect of the cost of M. O'B.'s past care and he adjourned the matter until 2nd June, 2011. By that time, the HSE had confirmed that it would not be pursuing any claim with the result that the High Court Judge drew his order and approved the settlement.

13. Hearing of the court's ruling of the settlement at €4.5m at a time when M. O'B.'s legal team were aware that the HSE was making no claim for past care, the defendant applied to Quirke J. on 14th July, to set aside his order approving of the €4.5m settlement on 2nd June, 2011. He acceded to that application.

14. Given that Quirke J. set aside his order approving of the overall settlement in the sum of €4.5m, the plaintiffs were left in the position of either having to go ahead with their respective claims, appealing Quirke's J. order or recommencing settlement negotiations, although it would seem that there was never any difficulty with settling the claims of the second, third and fourth named plaintiffs. The difficulty was always about the €300,000 which had earlier been offered by the defendants against the risk that the HSE would seek to recover some or all of the costs of M. O'B.'s past care.

15. On the 14th July, 2011, after Quirke J. vacated the order approving the 4.5m settlement, it is common case that negotiations recommenced and that the defendants offered €4.2m to settle all claims subject to court approval. A. O'B. accepts that she agreed to the settlement being put before the court for its approval although she says that she was bullied into accepting the sum offered in respect of M. O'B.'s claim. This settlement was

then approved by Quirke J. by order also dated 14th July, 2011. A. O'B. maintains to this day that the offer of €4.5m, an offer made when the HSE's claim for past care remained live and which was approved of by the court on 2nd July, 2011, remains binding, as Quirke J. had no jurisdiction to set aside his order approving of that settlement.

16. As A. O'B. was not content with the revised settlement of €4.2m, she applied by way of motion on notice dated 27th August, 2012 to have the orders of Quirke J. of the 14th July, 2011 set aside and/or vacated. Following a hearing on 15th November, 2012, McCarthy J. did not accede to this application. It is this order of McCarthy J. refusing the relief sought that A. O'B. has appealed to the Supreme Court.

17. I will pause here momentarily to make a number of brief observations. First, I find it hard to understand why A. O'B. on the 14th July, 2011 considered that the €4.2m offered to settle all claims in some way denied M. O'B. a sum that he was lawfully entitled to. It was precisely the same sum that she and the legal team acting on behalf of all plaintiffs considered to be a fair and just settlement when negotiations first commenced if one excluded the value of any claim for M. O'B.'s past care. The only difference between the offer made on the 14th July and that which A. O'B. had been earlier been willing to accept, was that M. O'B. was not being offered any indemnity or any sum in respect of his claim for past care, hardly surprising given that the HSE at that point had waived its entitlement to claim for those costs.

18. Second, it is clear beyond a shadow of a doubt that the only reason for the original offer being uplifted from €4.2m plus an indemnity in respect of past care costs to €4.5m was because of the risk of those care costs emerging. The total value of all claims including that of M. O'B. was never considered by anyone to be worth €4.5m if there was no claim for past care.

19. Thirdly, and most importantly, whether A. O'B. felt bullied into agreeing to accept total offer of €4.2m made on 14th July, 2011, after the order which had provided for the €4.5m settlement was set aside, is legally, irrelevant as far as M. O'B.'s entitlement under the settlement is concerned. M. O'B. lacked capacity to accept any offer made in settlement of his claim. Only the court could approve or withhold consent to the settlement of his claim. If M. O'B.'s lawyers were recommending the €4.2m settlement to the court on the basis that M. O'B. would be unlikely to improve on that portion of the settlement as related to his claim, the court was entitled to approve of the settlement regardless of A. O'B.'s views. If A. O'B. had informed counsel that she was unhappy with the sum then offered in respect of M. O'B.'s claim, counsel, if they considered the case should not be fought in light of the offer received, which they clearly did, would have been obliged to bring the offer to the court's attention and seek its approval for the settlement proposed. And, whilst counsel would obviously have brought the concerns of A. O'B. to the attention of the court, it is difficult to imagine any basis upon which the court would not have approved the settlement, the claim for past care no longer forming part of the claim.

20. A. O'B. fell out with her legal advisers following the court's order of 14th July, 2011, and ultimately sought to set aside that order by application made to the High Court by notice of motion dated 27th August, 2012.

21. It should be stated that regardless of the steps taken by A. O'B. in the aftermath of 14th July, 2011, the defendants paid into court the sum of €4.2m following which substantial payments out were made to A. O'B. in respect of loss of consortium (€175,000) and (€500,000 to A. O'B. in respect of her past care). M. O'B., for reasons which remain unclear, was not brought into wardship until 18th December, 2013.

Is it lawful and in the best interest of M. O'B. for A. O'B. to continue to pursue the appeal?

22. Having regard to the order of the Supreme Court, the principal question that I need to answer is whether it is lawful and in the best interests that the appeal be pursued further. One important aspect of determining what is and is not in his best interests is to assess the merits of the appeal and how it might be pursued, in particular in light of potential costs implications for M. O'B. That being so, before I could consent to M. O'B. pursuing the appeal against the order of McCarthy J. I would have to be reasonably confident that the appeal would succeed. And, having considered the papers submitted for my consideration, I believe the prospects of the appeal succeeding would be very slim indeed.

23. Some preliminary difficulties arise from the irregular fashion in which the appeal has been run to date. First, although the appeal is currently being pursued by A. O'B., A. O'B. had in fact no entitlement to either apply to McCarthy J. to set aside the orders of Quirke J. of 14th July, 2011 or to bring the appeal, in so far as M. O'B.'s entitlement under the settlement is concerned. As M. O'B. had no capacity to instruct anyone in that regard, any steps that would affect M. O'B. could only be pursued with court approval through exercise of its wardship jurisdiction. I should mention at this point that, although M. O'B. had not been formally brought into wardship through the statutory procedure, something criticised by MacMenamin J. in his judgment, because M. O'B. lacked capacity, his consent could nonetheless only be validly obtained through the courts, it being vested with an inherent wardship jurisdiction in that regard usually exercised by the President of the High Court.

24. Regarding the court's consent on behalf of M. O'B., I am satisfied from the papers before me that neither of my predecessors gave their consent to the steps which have been taken by A. O'B. concerning the settlement of M. O'B.'s claim since 14th July, 2011. I say this for several reasons. First, there is no court order permitting A. O'B. to pursue an application to set aside the order of Quirke J. of 14th July, 2011, as would be required in circumstances where the relief sought would affect the settlement of M. O'B.'s claim, and neither is there any order giving her liberty to appeal the order of McCarthy J. of 15th November, 2012.

25. And, insofar as it might be suggested that such consent could have been obtained notwithstanding the absence of court orders to that effect or alternatively was not necessary because she rather than M. O'B. was the moving party in each instance, such a

proposition is unstateable. First of all, A. O'B. is not a qualified solicitor. That being so she has simply no entitlement to represent another party in their legal proceedings and that is what she was purporting to do when she applied to McCarthy J. to set aside the settlement approved of by Quirke J. on the 14th July 2011, even though she herself is a party to the proceedings.

26. Second, if the President for the time being had authorised A. O'B. to pursue the application to set aside the order of Quirke J. or to appeal the decision of McCarthy J., for the benefit of M. O'B, it would not have been A. O'B. who would have been entrusted with conducting these proceedings. The court would only have authorised proceedings if satisfied that M. O'B. would have legal representation in relation to any application as might impact on his interests.

27. Finally, it is inconceivable that the President would have approved of any application which might put M. O'B.'s funds or any part thereof at risk without a formal opinion from senior counsel advising as to the likely success of the strategy proposed. And the President's decision, whether made in chambers or in open court, on any such application would always result in the making of a formal order. None of this happened in this case.

28. For these reasons, it is clear that A. O'B. had no authority to pursue the application before McCarthy J. to seek to set aside the order of Quirke J. and neither did she have the necessary authority to pursue the appeal presently before the Supreme Court in circumstances where it is clear that the appeal has nothing to do with the settlement of her own claim or that of the third or fourth named plaintiffs and puts the funds of M. O'B. at risk. This raises the question of whether the appeal is not wholly invalid in circumstances where M. O'B. never consented to an appeal and would now be out of time to appeal the order.

29. Aside from these procedural issues, and more importantly, the appeal is unlikely to succeed having regard to the substantive issues raised. First, the appeal appears to be based upon the premise that the court was bound by the order it initially made, approving the settlement of €4.5m. The courts are, however, unlikely to accept this type of argument. The court can, in situations such as this, lawfully revisit an order earlier made. For a settlement to be valid, whether it is embodied in a court order or not, requires that consent be given to it by the parties. Because M. O'B. lacks capacity to consent, the settlement of M. O'B.'s claim, as distinct from A'O'B's claim or those of the other plaintiffs, could only ever have been concluded with the agreement of the court. In effect, it is the trial judge, when asked to approve of a settlement for a person who lacks capacity who stands in their shoes, so to speak, to conclude the agreement on their behalf by giving consent to it. And, importantly, in the same way in which the court can accept a settlement offer, it can accept a variation of the terms, particularly in circumstances where it misunderstood the terms initially presented. The court is not bound by matters of *functus officio or res judicata* or bound by decisions it made earlier. It does not adjudicate a dispute but rather agrees to a contract on behalf of a person lacking capacity. As a result, it was entirely lawful for Quirke J. to depart from the initial €4.5m settlement and

consent to the variation on behalf of M. O'B. Thus, A. O'B.'s submission that there was a concluded agreement for €4.5m which could be viewed as binding on the court is misplaced if the court itself takes the view that it misunderstood the terms of the offer and the appeal is unlikely to succeed on this basis.

30. In this context I should point out that once the variation has been accepted on consent and there is no consent to any further variation by the parties to the settlement, the parties are contractually bound to it. Bar the establishment of any voiding orvitiating factors, they cannot withdraw or vary the terms unless the other parties agree to any such variation. M. O'B., as indeed the other plaintiffs, were contractually bound to the settlement when agreement was reached for the second time on 14th, July, 2011 and the settlement was promulgated in the order of the court. Settlement agreements, where there is no further agreement to vary it are final and can, generally speaking, not be unravelled.

31. Second, in so far as A. O'B. contends that when Quirke J. made the orders of the 14th July, 2011 was labouring under a mistake having, as she contends, wrongly set aside these orders and that this mistake means that the settlement now agreed cannot stand, such a proposition is very unlikely to succeed. First, it will be difficult to establish that Quirke J. made a mistake when setting aside the €4.5m settlement and agreeing to the €4.2m settlement, not only for the reasons outlined earlier, but also for the fact that this would most likely be held to constitute a collateral attack upon a judgment that was never appealed. If A. O'B. or M. O'B. wished to establish that Quirke J. was wrong to make those orders, they would have had to appeal his decision which they did not do. More importantly, even if A. O'B. were to succeed in establishing an actionable defect in Quirke's J. orders, any such defect would be cured by the fact that the matter was lawfully resettled on 14th July, 2011 with the consent of all concerned. This also raises the question as to what possible effect the setting aside of McCarthy's J. order could have upon the unappealed orders of Quirke J.

32. Even if the appeal before the Supreme Court was stateable, I am not satisfied that it would be in the best interests of M. O'B. that it be pursued. Having considered the likely prospects of success of the appeal and the risks it would carry for M. O'B., I am satisfied that the appeal should be withdrawn particularly in circumstances where the defendants/respondents have indicated that they will not pursue any costs in respect of the proceedings since 14th July, 2011, in the event of the appeal being withdrawn. Whilst she may well not recognise it, this is a valuable concession to A. O'B. who, being the only party to the appeal at this point, would be liable for any costs to date should the appeal fail. However, should M. O'B. be added as an appellant at this point, he would be a mark for all costs hereinafter incurred should the appeal fail. And, because I believe the appeal will fail I could not authorise the continuation of the appeal. In so concluding I have factored into my consideration the risk to M. O'B. in terms of costs.

33. If the appeal was to proceed M. O'B. would have to be legally represented. Solicitor, junior counsel and senior counsel would have to be retained. And, it is likely that the defendants would have similar level of representation.

34. In the event that the appeal was unsuccessful, the law which governs the manner in which costs orders should routinely be made would mean that the costs of the appeal would be awarded against the appellants on a joint and several basis. And, in addition to the respondents' costs, M. O'B.'s own legal team would have to be paid their legal costs, too. And, whilst I may not have expert evidence of the costs that might likely be incurred in that scenario, my knowledge is sufficient to allow me estimate that the overall cost bill could be something in the region of €80,000 or thereabouts. And, given that those costs would potentially have to be met from funds which are needed to provide for M. O'B.'s care for the rest of his life, to allow this appeal be pursued would not be in M. O'B.'s best interest.

Miscellaneous point

35. There is just one final point worth emphasising even though it does not go to the legal merits of the appeal. The appeal is not being pursued by A. O'B. on the basis that the €300,000 reduction in the overall settlement figure in this case was a sum targeted for M. O'B.'s future care and that absent those additional funds he would suffer prejudice. What is to be remembered is that the €300,000 which it is sought to recover is the sum which the defendants were willing to offer to counter the risk faced by M. O'B. in respect of past care costs. And, we know those care costs have since been withdrawn. Thus the €300,000 would be something of a windfall to M. O'B. if recovered on the appeal.

Conclusion

36. For all of the reasons set forth above, it is not lawful or in the interests of the first named plaintiff, a ward of court, as determined on 18th December, 2013, that the Second Named Plaintiff should continue to pursue the appeal in circumstances where the court is not willing to provide its consent to the course of action proposed. It is in best interests of the ward of court that no further steps be taken in these or any other proceedings.