

APPROVED

[2023] IEHC 311



THE HIGH COURT

[2018 10500 P]

BETWEEN

MARIE PATRICIA MURPHY

PLAINTIFF

AND

DIGBY BRIDGE SAND AND GRAVEL COMPANY LIMITED

DEFENDANT

Judgment delivered on 12 May 2023 by Mr. Justice Tony O'Connor

1. The notice of motion before the Court filed on 21 March 2023 primarily seeks an order setting aside a notice of discontinuance dated 11 October 2019. There is no rule which provides for such an application, and so the plaintiff relies on the inherent jurisdiction of the Court.

Background

2. The plaintiff claims damages for a displaced fracture of her left elbow and a non – displaced fracture in her right wrist (“the injuries”). She suffered the injuries from allegedly tripping over a speed ramp on 24 February 2017 near No. 1, Thomond Road, Ballyfermot (“the locus”). The plaintiff alleged in the personal injury summons issued on 30 November 2018 that she was caused to trip on a speed ramp while seeking to avoid a skip placed on the footpath, on which she was running.

Affidavit of plaintiff’s solicitor

3. The affidavit of the plaintiff’s solicitor, sworn on 21 March 2023, deposed that the solicitors for the defendant (“Digby”) had advised his firm that the defendant had no skip in the vicinity of the locus on 24 February 2017. After further exchanges, a personal injury summons with record number 2019 4905 P was issued on 10 June 2019, claiming damages arising out of the alleged trip for the injuries from a firm trading as Panda Waste and other related parties (“Panda”).

4. In the 2019 proceedings the defence pleaded on 25 June 2020 at para. 3 (f) that if the accident occurred, the same was caused by the negligence of Digby, which had hired the skip and was responsible for locating it at the locus. Para. 5 of an affidavit sworn on 29 July 2020 grounding the application to join Digby as a third party averred: -

“... it will be [Panda’s] evidence at the trial of the action that ‘Digby’ hired the skip on 24 February 2017 in order to carry out works at 1 Thomond Road, and that

[Digby] its servants, officers or agents instructed [Panda's] servants or agents to place the skip at the location in question”.

5. Counsel for the plaintiff and Digby acknowledged that Digby had no standing at the hearing of this motion, as Digby was no longer a party to these proceedings at this stage.

Case law

6. Finnegan J., in *Smyth v. Tunney Devine and Crofter Properties* ([2009] 3 IR 322), allowed the appeal to grant the application to withdraw a notice of discontinuance. There, the applicant relied on circumstances which had changed in the following way: -

“On 9 July 2002 the Supreme Court in a decision in an action *Crofter Properties Limited v. Genport Limited* held that Ms. Devine, made the calls not only on her own behalf but also on behalf of *Crofter Properties Limited*”.

7. Finnegan J. stated: -

“A starting point as to the law in this jurisdiction is *Wiley on the Judicature Acts*. At page 437 he states that Order 26, Rule 1, forms a complete code as to the discontinuance of an action...”.

8. He referred to the right in England of a claimant “to institute fresh proceedings on the same grounds but subject to an exception where service of a notice of discontinuance was an abuse of the court’s process”. He cited an English judgment, *Costanho v. Browne and Root (UK) Limited* [1981] AC 557, where the notice of discontinuance was served following an agreement to make interim payments. The claimants there then issued a similar set of proceedings in Texas. Effectively, the court found that an abuse of process had arisen.

9. It is worth noting that Finnegan J. stated that: -

“The court has not been referred to any case in this jurisdiction or in England and Wales where this (i.e., withdrawal of notice of discontinuance) has been

permitted. There is no report of such case in either jurisdiction recognising an inherent jurisdiction to do so. . .”.

10. Barrett J. in *A v. Minister for Education and Science* [2016] IEHC 268 at para. 9 synthesised the applicable principles. That judgment concerned the claim by several plaintiffs against the State for its vicarious liability in respect of sexual abuse in schools. There, after the State had successfully defended a number of cases, the plaintiffs discontinued their proceedings on the basis that the State would not seek costs. However, the European Court of Human Rights in *O’Keeffe v. Ireland* 35810 / 09 (judgment of 28 January 2014) found that the State had breached its obligations under Article 3 of the European Convention on Human Rights by failing to provide a domestic remedy for its failure to protect the applicant from sexual abuse in schools. Barrett J. refused to make an order setting aside the notices of discontinuance, as the decision to serve the notices of discontinuance had been conscious and advised. There was no mistake as to the substance of Irish law and he found that there would be real prejudice for the State now in defending the proceedings.

11. Counsel for the plaintiff submitted that the notice of discontinuance was served following the representation of Digby’s solicitors. Representation is contradicted by Panda’s plea in the defence for the 2019 proceedings and by the averment of an officer of Panda to the effect that there will be evidence at the trial of those proceedings about Digby having placed the skip at the locus. Counsel accepted that it was open to the plaintiff to join Digby as a defendant in the 2019 proceedings, particularly as Digby was already a third party. Counsel however explained that this would necessitate an application to the Personal Injuries Assessment Board (“PIAB”). In the interests of justice and efficient administration of justice, he advocated granting liberty to withdraw the notice of discontinuance to consolidate these proceedings with the 2019 proceedings. Reference was made to the principle of estoppel

applying to Digby in resisting the withdrawal of the notice of discontinuance. No submission was made about the application of the statute of limitations.

Determination

12. The Court understands why Ms. Bradley, counsel for Digby, attended the hearing of this motion and notes her confirmation that Digby has engaged as a third party in the 2019 proceedings. The Court also appreciates the delay to be suffered by the plaintiff if she wishes to prosecute a claim against Digby by having to apply to PIAB again. However, the Court does not understand why the plaintiff did not apply to join Digby as an additional named defendant, at or soon after the hearing of the application on behalf of Panda to join Digby as a third party on 11 October 2021.

13. It may be open to the plaintiff to plead the representations made by the solicitors for Digby in any reply to a defence in the 2019 proceedings, which may plead the statute of limitations. The delay which may be incurred by applying to PIAB for authorisation is not a sufficient reason to invoke the quite limited inherent jurisdiction to set aside the notice of discontinuance. Therefore, I refuse the application to set aside the notice of discontinuance.

Solicitors for the plaintiff – Ferry’s LLP.

Counsel for the plaintiff – Mr. Laurenz Boss.