THE HIGH COURT

[2023] IEHC 322

Record no. 2017/5928P

BETWEEN

SIOBHAN MAY

PLAINTIFF

AND

BRENDA BARRETT AND DERMOT GEOGHEGAN

DEFENDANTS

Ex Tempore Judgment of Mr. Justice Mark Heslin delivered on the 18th day of May 2023

1. I propose to give an ex tempore decision now, the detail of which will reflect not only engagement with the oral submissions today but also the fact that I spent a number of hours with the entirety of the papers. That is as it should be, in order that the decision-making by this court can be as clear as possible as to the reasons. I will begin with a relevant chronology.

2. The plaintiff issued a personal injuries summons against the defendants on **30 June 2017**, wherein she described herself as a dentist and pleads that the defendants were, at all material times, the joint owners and/or occupiers of a certain premises in Co Carlow.

3. The plaintiff alleges that, on or about **16 January 2016**, whilst a visitor at the defendants' premises, she was caused or permitted to fall, when attempting to descend steps to a patio.

4. The plaintiff alleges that the defendants are guilty of negligence and breach of duty, including breach of statutory duty, as well as occupier's duty of care.

5. In addition to claiming damages for personal injury, the plaintiff's personal injuries summons identifies the following particulars of special damage:-

a. medical expenses - €continuing
b. travelling expenses - €continuing
c. PIAB expenses - €45 application fee
d. loss of earnings - €unascertained and continuing

6. On **31 January 2018**, the defendants raised a notice for particulars. In so doing the defendants specifically called upon the plaintiff to furnish both details and documentation. This is clear from the particulars sought at paragraphs 7 and 8 which state, and I quote: "*7. Pursuant to Section 11(2) of the Civil Liability and Courts Act 2004, please furnish documentation from the Revenue Commissioners outlining the Plaintiff's earnings both prior and post-accident. We will require the pre-accident documentation for a period of 5 years. 8. Please detail and vouch all special damages claimed.*"

7. On the same date, the defendants delivered a sperate notice in accordance with section 11 of the Civil Liability and Courts Act 2004, which called for the plaintiff to furnish information with respect to prior proceedings; prior awards; and prior relevant injuries. It does not seem to me that anything turns on the latter. It seems to me that the focus is very much on the former, namely the Notice for Particulars.

8. It is a matter of fact that the plaintiff did not provide replies to the Notice for Particulars. A motion was issued by the defendants on **23 August 2018**.

9. Of significance is when that motion came for hearing, Barr J made an order "*by consent*" on **19 November 2018** and it provided that, within 6 weeks from that date, the plaintiff must deliver, *inter alia*, Replies to Particulars; as well as a reply to the defendants s.11 Notice. It seems to me that this consent on the part of the plaintiff to the order which required her to provide a reply to particulars means that she could not, thereafter, argue that the documentation sought in the Notice for Particular (i.e. documentation which she agreed to furnish by consenting to the order made by Barr J) was a matter exclusively for discovery.

10. Replies to Particulars were furnished on **10 June 2019.** It will be recalled that Item number 8 of the defendants' (31 January 2018) Notice for Particulars called upon the plaintiff to "*detail and vouch all special damages claimed."* The reply provided by the plaintiff (on 10 June 2019) stated "*specials are being vouched and details of same will be forwarded in due course".*

11. I pause to observe that this is a reply which is entirely consistent with documents as well as details having been sought in the defendants' Notice for Particulars (and I refer again to queries 7 and 8). It is also entirely consistent with the plaintiff having consented to the order made by Barr J, requiring her to provide the Reply to Particulars sought. The reply given on the 10 June 2019 is clear and comprehensible. It is a statement by the plaintiff, in a formal reply to particulars, that specials *are* being vouched and details of same *will* be forwarded.

12. On the issue of vouching, this reply plainly does *not* state that vouching documentation is a matter for discovery and it would be entirely unexpected and frankly bizarre had it said that. Nor does it say that specials *cannot* be vouched or that only some specials can be vouched. In other words, going forward, the defendants were entitled to expect full compliance with what the court ordered in terms of Barr J's order and what the plaintiff herself committed to doing, namely vouch all 'specials' and detail all of same.

13. On the question of detailing the quantum in respect of any special damages claimed (as opposed to vouching documentation) the reply does not state or suggest that *details* cannot be given as opposed to, for example, an estimate only.

14. The question of the plaintiff's income is plainly a significant issue in the present application and the background which gives rise to it. Therefore, I make the obvious comment that the reply furnished by the plaintiff in 2019 does *not* state or suggest that it is impossible for the plaintiff to identify her income, in the context of her earnings and her husband's being jointly-assessed. In the manner I will presently explain, that is asserted by the plaintiff at a later point.

15. Whilst it is a statement of the obvious, it seems to me that this court is entitled to take it that the Replies to Particulars served by the plaintiff's solicitor accurately reflect the plaintiff's position and the instructions to her solicitor. Given the explicit terms of the plaintiff's reply to query number 8, on 10 June 2019, the defendants were entitled to expect two things. First, that all special damages would be *vouched*; and second, that *details* would be forwarded in due course.

16. There can be no criticism of the defendants for expecting the plaintiff to do precisely what she committed to do, and was required to do by Barr J's order.

17. To continue with the chronology, a full defence was delivered on **27 November 2019**. Save for the description of the parties, the plaintiff was put on 'full proof' of every aspect of the claim.

18. On **15 September 2020,** the defendants' solicitors wrote to the plaintiff's solicitor, making reference, *inter-alia*, to reply number 8, as furnished on 10 June 2019, and stating, *inter-alia*, that the plaintiff was in breach of section 10 of the Civil Liability and Courts Act 2004 in failing

to detail her special damages in the personal injury summons, and in failing to do so since then, despite having been called upon so to do.

19. That letter also gave notice of the defendants' intention to bring a motion, in the event the plaintiff failed to detail and vouch her special damages within a further 14 days. There was no response to that letter and therefore, very obviously, a reply was not sent in which it was claimed that special or loss of earnings could not be vouched.

20. In the manner touched on earlier, given what the plaintiff had done by means of her conduct in replying to particular number 8, there can be no criticism of the defendants for making good on the threat to issue a motion.

21. On **17 February 2021**, the defendants did just that, bringing a motion seeking to dismiss the plaintiff's claim for failure to deliver adequate Replies to Particulars and/or for failure to provide particulars of the plaintiff's loss of earnings.

22. In the alternative, the defendants' motion sought an order directing the plaintiff to provide full and proper Replies to Particulars, and to furnish the defendants with a schedule of any claim being made for loss of earnings.

23. In this manner, the defendants were simply calling on the plaintiff to comply with the obligations she had (under the order made by Barr J) and also holding the plaintiff to the very commitment she made (by means of reply number 8 in her reply to particulars of 10 June 2019), wherein she confirmed that special damages would be *vouched* and would be *detailed*.

24. In the manner presently explained, despite that commitment by the plaintiff given in June 2019, that there would be a detailing and vouching of specials "*in due course*", the plaintiff's conduct was entirely otherwise. More than 2 years followed without that commitment being made good and in the manner I will explain, it was never honoured.

25. By the time the defendants' motion came for hearing before this court on **21 June 2021,** the plaintiff still had not vouched or detailed her special damages or her loss of earnings claim.

26. It is common case that there was no appearance by or on behalf of the plaintiff at the hearing of the motion on 21 June 2021. I do, however, have to have regard to the averment at paragraph 9 of an affidavit sworn, on the 22 July 2022, by Mr Michael McDarby, solicitor for the plaintiff, wherein he avers that the non-appearance by the plaintiff's solicitor or counsel, was due to a regrettable diary mistake in his office.

27. I accept entirely that averment made by someone who is an officer of the court. It is uncontroversial to say that mistakes can and do happen, and it would be entirely unfair to lay any personal blame for that at the door of anyone. However, two further comments seem appropriate. First, it was certainly not a mistake or fault on the defendants' part. Second, because of the fact that there was no appearance by the plaintiff on 21 June 2021, there was very obviously no explanation proffered to the court at that point, to the effect that the plaintiff had any difficulty whatsoever in either vouching or detailing all special damages claimed and the loss of earnings claimed, in the manner she was required to do by Barr J's order (and, indeed, had committed to do 2 years earlier by means of item 8 of the plaintiff's Reply to Particulars dated 10 June 2019).

28. It was in this context, and in the absence of any participation on the Plaintiff side, that the Court made an order on **21 June 2021** which included the following:-

> *"It is ordered that the plaintiff's claim be dismissed unless the plaintiff complies with the order herein dated the 19th day of November 2018 within a period of 8 weeks from the date hereof…"*

29. That was of course Barr J's order; and 8 weeks from 21 June 2021 expired as of **16 August 2021.** The *status quo* at that point in time was that proper and adequate replies were required in the manner sought by the defendants when bringing the motion. In short, compliance in full with Barr J's order was outstanding and there was an 8 week period for the plaintiff to mend her hand. The costs of the motion were also ordered against the plaintiff and directions were given in relation to notification to the plaintiff of the making of the 21 June 2021 order.

30. It is not in dispute that the plaintiff's solicitor received notice of the making of the said order on **22 June 2021.** The plaintiff plainly chose not to appeal this order.

31. On **11 August 2021,** i.e. 5 days prior to the expiry of the 8 week period in the 'unless order', the plaintiff's solicitor wrote to the defendants' solicitor replying to items 7 and 8 of the defendants' Notice for Particulars, in the following terms:

> *"7. The plaintiff does not maintain a claim for past loss of earnings other than the 12 weeks she was absent from work due to her injuries which is estimated at €16,824.00. The plaintiff does not maintain a future loss of earnings claim. Notwithstanding the above, the plaintiff has had to work longer hours to maintain her income in circumstances where she works at a slower pace due to pain which requires her to take a rest and also, due to fear of making a mistake due to reduced finger control/ dexterity. Updated particulars of injury will be furnished. The plaintiff further fears that future reduced dexterity and possible osteoarthritis as she ages will impact on her earning potential and result in a further reduction of same.*
>
> *8. Special damages herewith…"*

32. I pause her to say that, while the word "*estimated*" is used in relation to the figure of €16,824.00 there is absolutely no detail given whatsoever as to how that very specific figure was calculated. That seems to me to be inadequate compliance with what the court ordered. Furthermore, even though this letter indicates that the Plaintiff is now maintaining only a 12 week claim for loss of earnings and does not make any future earnings claim, the letter simultaneously flags the possibility of her future earnings being adversely affected. This seems to me to be inadequate compliance with the order of the court, in circumstances where no details of earnings whatsoever and no documentation whatsoever with respect to earnings, accompanied the reply (notwithstanding the obligation on, indeed the commitment on the part of, the plaintiff to both detail *and* vouch).

33. Turning then to the accompanying 'Schedule of Special Damages' it contains the following entries:-

- *"VHI medical fees/outlay - €2860.27*
- *4 consultations with Mr Paul Murphy - €800.00*
- *Neurophysiological Assessment - €500.00*
- *Injuries Board assessment - €45.00*
- ***TRAVELLING @ 0.72 per mile***
- *10 trips to beacon hospital @ 3.9 km return - €28.08*
- ***LOSS OF EARNINGS***
- *12 weeks - €16,824.00*
- *All specials are ongoing* " (emphasis in original)

34. In response to the foregoing, the defendants' contended in correspondence that the plaintiff's claim stood dismissed. In the defendants' view, the Plaintiff had not complied with the order originally made by Barr J, in the manner ordered by this Court when giving the 8 weeks in the unless order. I agree.

35. The defendant's Notice for Particulars sought detailed information and vouching documentation pursuant to s.11(2) of the Civil Liability and Courts Act 2004. This, I have already referred to when quoting items 7 and 8 of the Notice for Particulars itself. Judge Barr ordered that this be

furnished. It was not furnished. Adequate details and vouching documentation was, as a matter of fact, not provided. It was not provided in response to Barr J's order. It was not provided in "*due course*" as the plaintiff had committed to doing, by means of reply number 8. It was not provided in the wake of this Court's 'unless order'.

36. The only loss of earnings figure eventually given by the plaintiff (namely €16,824) was, as I say, expressed to be an *estimate*, only, as opposed to being detailed. Indeed no detail whatsoever as to its calculation has ever been provided. As I have said more than once, the plaintiff failed to furnish any vouching documentation with respect either to earnings or special damages. For these reasons, I am satisfied that, as a matter of fact, there was not adequate compliance by the plaintiff with the obligations on her imposed by the 'unless order' which, of course, did no more than impose the obligations which she had already been under (*per* the consent order made by Barr J).

37. Continuing with the chronology, and as to *why* the plaintiff had not done what was required of her, in a letter, dated **26 October 2021**, from the plaintiff's solicitor the following was stated inter alia: *"From the outset, the plaintiff has had difficulty supporting any loss of earnings claim in circumstances where she and her husband (who is also a dentist) are jointly assessed…".* That letter went on to assert that the plaintiff and her husband were unable to identify each of their incomes within what was described in the letter as the **"***global figure*" in respect of earnings. The 12 weeks earnings claim (in relation to which an *estimated* figure had been given), was said to be for what the letter described as: *"… the period directly following the accident, when the plaintiff's wrist was in plaster of paris and…as a dentist, she simply could not work".* I pause to observe that that is an explanation which refers to a temporal period only, it gives no clue as to how the figure itself, which as I say is a very specific one, was calculated.

38. The said letter of 26 October 2021 concluded in the following terms:

> *"Regarding the balance of the specials furnished, the plaintiff cannot vouch same as the physiotherapy she received was given by a friend who has not as yet furnished her with a bill.*
>
> *In circumstances where there are no vouchers to support the loss of earnings and specials furnished for the reasons set out above, the plaintiff formally withdraws these claims.*
>
> *It is not this office's practise to fail to attend motion hearings, and missing the application on 21st of June was an error. Given the order, please furnish your bill of costs for the motion.*
>
> *You might now consent to set this matter down for trial without any further delay."*

39. I pause at this juncture to make a number of comments. This letter does not refer to *why* the Plaintiff cannot vouch, for example, medical expenses such as VHI medical fees; consultations with Mr Paul Murphy; or neurophysiological assessment. Furthermore, the statement that the plaintiff is *unable* to vouch special damages, and the explanation as to why the plaintiff *cannot* provide details of her alleged loss of income is given, for the *first* time, in October 2021 (which is 2 years and 4 months after the plaintiff gave a commitment to do the very thing she now says is impossible, namely, to both vouch and detail her special damages). Furthermore, this information in the 26th October 2021 letter plainly came *after* the self-executing effect of the 'unless order'.

40. Unsurprisingly, notwithstanding the contents of the 26 October 2021 letter, the Defendants' attitude remained that that the plaintiff's case stands dismissed, by reason of a failure to comply, fully, with the order made by Barr J, within 8 weeks of 21 June 2021. For the reasons explained in this ruling thus far, the defendants are correct in that. Therefore the position, as of the 17th August 2021 and thereafter, is that the plaintiff's claim stood dismissed. That remains the position right up to today's application.

41. It is also appropriate to state that although such explanation as has been given on behalf of the plaintiff for the failure to vouch and detail special damages, in particular loss of earnings, was furnished for the first time in October 2021 (which was *after* the proceedings stood dismissed), it was also at this later point, (namely, *after* the proceedings already stood dismissed) that the plaintiff signalled her intention to abandon both her special damages and loss of earnings claims.

42. Another observation seems to me to be appropriate, which is that although the 26 October 2021 letter seeks consent to the proceedings being set down for trial, no request is made for the defendants to consent to the withdrawal, by the plaintiff, of both the special damages and the loss of earnings aspects of her overall claim. In addition, whilst there is a request for a bill of costs in relation to the motion which gave rise to the 'unless order', the 26 October 2021 letter does not address in any way the costs incurred by the defendants in addressing the special damages and loss of earnings claims, which the plaintiff pleaded and only latterly signalled an intention to abandon.

43. To conclude the relevant chronology of events, the plaintiff called upon the defendants to alter their view that the plaintiff's claim stood dismissed. The latter, unsurprisingly, declined to do so, in correspondence of **10 November 2021**.

44. The plaintiff issued the present motion, after some months it has to be said, on **25 July 2022**, and the primary relief at paragraph 1 of the motion seeks an order *deeming good*, compliance with this court's 21 June 2021 unless order.

45. Before looking at this application through the lens of principle, it is also matter of fact that the plaintiff did not have consent either from the defendants, or from this court, in relation to the withdrawal of the relevant claims, as signalled in the 26 October 2021 letter.

46. Turning to principle, the learned authors observe in chapter 25 of the 4th Edition of 'Delany & McGrath' on Civil Procedure that *"The court has a discretion to relieve a party from the consequences of an unless order, although that discretion will generally not be exercised in favour of a party who has wilfully defaulted on the order."*

47. Among the written submissions filed on behalf of the defendants (who are obviously the respondents in respect of this motion) is the following:

> *"Instead of taking the opportunity to mend her hand and to comply with the order made by Mr Justice Barr and Mr Justice Heslin, the plaintiff instead seeks to avoid doing so by purportedly withdrawing her claims for loss of earnings and special damages. (The letter of the 26 October 2021 – McDarby & Co).*
>
> *It is submitted that such an approach should not be countenanced by the court, as a claimant cannot be permitted to make formal claims on proceedings and when they are subjected to scrutiny or requirements to validate, to thereafter withdraw them with impunity.*
>
> *The defendants are entitled to interrogate the claims made by the plaintiff and, if they are found to be false or exaggerated, to seek the appropriate relief including an order dismissing the plaintiff's claim pursuant to the provisions of section 26 of the Civil Liability and Courts Act 2004 (or indeed pursuant to the inherent jurisdiction of the court).*
>
> *The plaintiff should not be allowed to avoid such a consequence by simply withdrawing claims which she has made and which she clearly cannot stand over. It is submitted therefore that the court should not exercise its discretion and extend the time for the plaintiff to comply with the order previously made…"*

48. It seems to me that the gravamen of this submission is for the defendants to assert that the plaintiff has made a *false* or an *exaggerated* claim and that the plaintiff is seeking to *avoid the*

dismissal of her claim, pursuant to s. 26 of the 2004 Act, by withdrawing her special damages and loss of earnings claims at this point. Based on this proposition, the defendants contend that this court should not permit the plaintiff to withdraw her claims.

49. Carefully considering the evidence before the court, as I must, it does not seem to me that the evidence supports a finding of, in effect, false conduct and motives on the part of the plaintiff. I say this in circumstances where the Plaintiff's solicitor, Mr McDarby, has made the following averments at paragraph 17 of his 22 July 2022 affidavit (and I quote):-

> *"The plaintiff is in an unusual circumstance whereby her husband, who is also a dentist, prepares their tax return jointly. As a result, whilst the plaintiff, who is a dentist, was necessarily limited in her ability to work for the 12 weeks she was in a cast, she is unable to differentiate their earnings in their accounts to vouch her loss of earnings claim. As a result, the plaintiff has withdrawn this aspect of her claim."*

50. Several observations seem to me appropriate to make in relation to these averments. First, they are made by an officer of the court. They are explicit averments, not as to what the plaintiff has told Mr McDarby to be the case, but as to the factual position itself. In this regard, Mr McDarby has also made, *inter alia*, the following averment at para 1 of the same affidavit: **"***I make this affidavit from facts within my own knowledge save where otherwise appears, and, where so otherwise appearing, I believe the same to be true and accurate*". That being so, it seems to me that the court must take it that, as a matter of fact, it is an inability to differentiate the plaintiff's earnings from her husband's which is the reason that the plaintiff cannot detail or vouch her loss of earnings claim and, hence has sought to withdraw it. This averred *inability* to detail or vouch a claim is fundamentally different to *falsehood* or exaggeration being the reason to withdraw the claim.

51. Furthermore, no application to cross examine Mr McDarby on his affidavit has been made. Nor has any affidavit been sworn on the Defendants' side which takes issue with Mr McDarby's averments. Therefore, the state of the evidence is that these are uncontroverted averments. It seems to me that I cannot fairly ignore this evidence and, therefore, taking due account of it, as I must, means that the Defendants have not established falsehood or exaggeration, or such conduct, with respect to motives on the Plaintiff's part as being the reason she seeks to withdraw claims, in particular, the loss of earnings claim.

52. That said, I do take the view that the present, very unhappy situation has been brought about through no fault of the defendants. It arises exclusively from the plaintiff's conduct.

53. At the risk of repeating aspects of this conduct, they include:-

(i) promising to vouch *and* detail her losses, but failing to do so, despite the passage of well over 2 years;

(ii) failing to comply fully with the terms of Barr J's order;

(iii) failing to comply fully with the terms of this Court's 'unless order', (which, in turn, required compliance with Barr J's order);

(iv) thus, permitting the 'unless order' to self-execute, resulting in the dismissal of the claim;

(v) saying *after* the dismissal of her claim, through her solicitor, that, in effect, it is not possible for her to do what she previously committed to doing, and what she was obliged to do, in terms of vouching and detailing her claim, in particular, as regards loss of earnings;

(vi) not saying this from the outset. She could have said this in June 2019 when replying to particulars. She could also be criticised for not saying this when consenting, on 19 November 2018, to the making of the order by Barr J. She can also be fairly criticised for not saying this at any point during the following two years, up to October 2021.

54. I am conscious of the Court of Appeal's decision in *Harrington v Greenway Properties and Others* [2022] IECA 55, a decision by Barniville J, which has helpfully been drawn to my attention in the submissions made by Mr Clarke. It is certainly the case that the failure on the part of the plaintiff to appeal the 'unless order' is a significant factor and weighs against relief of any sort being granted. However, although I am entirely satisfied that there was a failure to comply with the terms of the 'unless order' resulting in the plaintiff's proceedings standing dismissed as of the 17 August 2021 (and therefore the plaintiff has failed to establish an entitlement to the relief at paragraph 1, in other words deeming good compliance), it seems to me that, having regard to the averments made by Mr McDarby, it would not be entirely fair to hold that the plaintiff's failure was wilful.

55. In other words, if one looks at the loss of earnings claim, the effect of Mr McDarby's averments is that it was not possible to do what the court ordered. Thus, there was certainly a failure; but a failure to do what it is not possible to do would not seem to be a wilful failure. That may be somewhat of a 'Jesuitical' point, but nevertheless, an important point in my view. However, it takes nothing away from the entirely sub-standard conduct by the plaintiff which I have referred to. I say this given that, at all material times, she knew or ought to have known, or had the means readily to find out, what she could, and could *not,* ascertain and vouch in relation to her own earnings and alleged losses.

56. The defendants fairly accept that this court has a jurisdiction to 'save' proceedings dismissed by reason of a failure to comply with the terms of an 'unless order'. I accept that that is a jurisdiction which this court should exercise sparingly. It is a statement of the obvious that in exercising that jurisdiction, the court must respond to the needs of constitutional justice in light of the particular facts. Looking at the facts which emerge from the evidence, in the manner I have explained in the ruling thus far, it seems useful to examine the core question from a first principles perspective, by asking the following question:-

> *"Is it consistent with natural and constitutional justice that a plaintiff's entire claim, in these particular circumstances, would stand dismissed and would not be re-instated by reason of her failure to particularise an aspect of that claim which, on the evidence of her solicitor, she was not in a position to particularise, which claims the plaintiff no longer maintains going forward?"*

57. In my view, it would not be consistent with constitutional justice to take that course of action. Rather the appropriate course is to reinstate, with appropriate orders, the portion of the claim sought to be maintained. I say this against the backdrop of the constitutionally protected right of access to the courts. It would also be *disproportionate* for the entire of the plaintiff's claim, in these particular circumstances, to be dismissed by reason of a failure to particularise and to vouch aspects of that claim, which the plaintiff no longer intends to maintain.

58. 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.

59. It cannot be gainsaid that we are all here today in circumstances of the plaintiff's creation. She has not established an entitlement to have compliance with the relevant orders *deemed good*. Therefore, she is forced in the present application to look to the secondary and tertiary relief, (para 2 of the motion being relief in terms of an order reinstating her claim; and para 3 being such further or other order as the court might deem appropriate). The need for those reliefs arises, as I say, exclusively due to the plaintiff's conduct and is no fault of the defendants; yet, plainly, they have been required to participate today in this application.

60. Order 26(1) of the RSC deals with the question of "Discontinuance" and, although I do not propose to read the entire of Order 26 for the purposes of this ruling, its provisions are well known. Selected extracts from Order 26, rule (1) include the following:-"*1. The plaintiff may, at any time before receipt of the defendant's defence… withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs …occasioned by the matter so withdrawn*."

61. Later the rule speaks of circumstances where claims are withdrawn by consent. Later still, the rule states *inter alia* the following:-

> "*Save as in this rule otherwise provided, it shall not be competent for the plaintiff to discontinue the action without leave of the Court, but the Court may before, or at, or after, the hearing or trial, upon such terms as to costs…as may be just, order …any part of the alleged cause of complaint to be struck out*."

62. It is uncontroversial to say that this is a very wide jurisdiction conferred on the court.

63. In summary, Order 26 permits a plaintiff to withdraw a part of their claim at an early stage *without leave* of the court.

64. In addition, and prior to the case being set down for trial, claims can be withdrawn by *mutual agreement* of the parties.

65. Furthermore, and at any stage, the court may give *consent* to discontinuance or may strike out a portion of the plaintiff's claim.

66. Focussing then on the question of permitting withdrawal, which is a question that must be looked at after the earlier question of reinstatement, this court cannot be 'blind' to the reality that the plaintiff has now withdrawn her entire claim for special damages including loss of earnings. It was, of course, the special damages and loss of earnings claim which lay at the heart of the 2018 order and the failure on the plaintiff's part to comply with this Court's 'unless order'.

67. It seems to me, therefore, that notwithstanding the plaintiff's failure to comply with the 'unless order', it would be unjust for the entire claim to stand dismissed without aspects of the claim being reinstated, which reinstatement requires consent on the part of this court.

68. Referring back to correspondence which is before the court as exhibited, it will be recalled that in the letter sent by the Plaintiff's solicitor, on 11 August 2021 (namely, 'within time' insofar as the 8 weeks in the 'unless order' was concerned) the plaintiff did not abandon the entire loss of earnings claim at that stage. That letter made clear that the plaintiff did not maintain a future loss of earnings claim. However, the plaintiff (with respect to historic loss) flagged an intention to continue to maintain a claim for 12 weeks which was "*estimated*". Also, at that juncture (namely, before the proceedings stood dismissed) the plaintiff was still maintaining her special damages claims. As I have said, it was not until the letter of 26 October 2021 that the position materially changed, insofar as withdrawal is concerned. The following, by way of reminder, is a quote from the 26 October 2021 letter:

> *"In circumstances where there are no vouchers to support the loss of earnings and specials furnished…the Plaintiff formally withdraws these claims"*

69. Therefore, in any order the court makes today, there can be no question of any special damages or any loss of earnings claim, be that past or future, surviving a reinstatement of the plaintiff's claim.

70. I am satisfied that the justice of the situation requires reinstatement of the balance of the claim and an essential element of this court's decision to reinstate (what was a dismissed claim from

the 17 August onwards), must be to give consent to the withdrawal of the special damages and loss of earnings aspects, in the manner which Order 26 permits.

71. I am fortified in that view, namely, the view that it is appropriate to give consent to the withdrawal of these aspects of the plaintiff's claim, by the decision in *Galway Roscommon Education and Training Board v. Orla Macken Walsh* [2022] IEHC 235, wherein Hyland J stated the following at para 8:

> *"8. Laffoy J. in Shell E & P Ltd v McGrath (No. 3) [2007] 4 IR 277 set out the basic rules applicable to discontinuance. In short, the Court has a discretion as to what Orders it will make in the context of permitting discontinuance. A key concern for a court in granting liberty to discontinue is the question of costs. A court will not ordinarily refuse to allow a party to discontinue proceedings. As identified in the judgment of Noonan J. in Joint Stock Company Tog-liatt-iazot v Euro-toaz Ltd [2019] IEHC 342, there is no requirement for the party seeking to discontinue to provide reasons for same."*

72. This dicta seems to me to be consistent with the principle that it is contrary to justice to compel a plaintiff to litigate a claim, or an aspect of a claim, against their wishes.

73. I would also observe that no rule or authority has been opened to the court in the present motion, to the effect that *retrospective* consent to the discontinuance of an aspect of the plaintiff's claim cannot be given. Even though that is so, it seems to me that, in reality, it is *not* retrospective consent that the plaintiff can seek. Rather, this motion has provided a vehicle for the plaintiff to seek, *not* retrospective consent to the withdrawal (in circumstances where the claim stood dismissed from the 17th August 2021 onwards). Rather, consent is sought *today*, and must be sought today, being as I say, an essential element of the court's preparedness to reinstate the claim today.

74. At the risk again of repeating the point, but looking at matters from another angle, the basic point I wish to make is that the plaintiff's claim stood dismissed by virtue of the self-execution element of the 'unless order'. Therefore, prior to today, the plaintiff had no consent to withdraw any aspect of her claim. Nor could the defendants give such consent, because the claim had already been dismissed. Nor could the defendants give consent to reinstatement, as they simply do not enjoy that jurisdiction. In other words, everything hinged on the necessity for the plaintiff (because of her conduct) to bring today's application and to seek relief at 2 and 3.

75. Drawing the ruling to a conclusion, I am satisfied that the justice of the situation requires the reinstatement of the non 'special damages and loss of earnings' aspects of the plaintiff's claim. However, a *sine qua non,* of such reinstatement, is to give *now,* consent to the withdrawal by the plaintiff of her claims for special damages and loss of earnings.

76. I also want to make clear that, in coming to this decision, I have had regard to the rights and interests of *both* parties, but I take the view that balancing these competing interests 'tips the scales' in favour of the proceedings being permitted to continue. This is, as I say, on the basis that all special damages claims and all loss of earnings claims have been withdrawn, with consent to such withdrawal being given as of *now*.

77. In my view this outcome does not create an injustice for, or cause prejudice to, the defendants. I say that for the following reasons.

78. First, they no longer have to face any claim for special damages or loss of earnings. Second, the plaintiff will remain available to be cross-examined on such evidence as she gives under oath at a future trial. Third, the fact that the claim for loss of earnings and special damages (including special damages such as the cost of medical treatment) are no longer being maintained, would not seem to me to prevent in any way the plaintiff being cross-examined on what medical

treatment she, in fact, received and/or on issues such as what effect the alleged accident and alleged injuries had on all relevant aspects of her life, including her working life.

79. Finally, to hold today that the prejudice to the defendants arises because they are denied the opportunity to make a section 26 application, seems to me to require the court to take a view, today, on the evidence before it, that there has been falsehood or exaggeration or inappropriate motives on the part of the plaintiff. For the reasons explained, in the light of Mr McDarby's averments, I cannot safely take that view.

80. That is the court's ruling and the reasons for it.

Costs

81. On the Plaintiff's side it is submitted that there should be no order as to costs, or reserved costs, whereas, on the defendants' side it is submitted that the defendants are entitled to their costs. It seems to me that the need for the present application stemmed exclusively from the plaintiff's conduct and, as we are all aware, s.169 of the LSRA 2015 refers to conduct in a very particular context. It was the plaintiff who needed to have her claim reinstated. The defendants' position as maintained in correspondence, right up until moments ago, was entirely correct. The claim stood dismissed. The plaintiff not only needed to seek relief from the court by means of having a portion of her claim reinstated, she also needed the consent of the court to withdraw the special damages and loss of earnings aspects.

82. In this particular application, to be of assistance, the 'normal rule' (to the effect that 'costs follow the event'), which is given statutory expression in s.169 requires one to 'drill down' into the facts to see what the 'event' actually is. The defendants plainly could not have reinstated the plaintiff's claim once the 'unless order' took effect. The defendants could not have given consent to the withdrawal of the relevant aspects of the plaintiff's claim, because that withdrawal was only flagged some months *after* the proceedings themselves stood dismissed. Therefore, if looked at through the lens of 'events', the success really has been on the defendants' part, in terms of their stance being vindicated, whereas the plaintiff had to come to this court to get relief as a result of her conduct and this occasioned costs to the defendants.

83. It also seems to me that s.169(4) of the 2015 Act is also relevant. It provides that a party who discontinues or abandons proceedings is liable to pay the reasonable costs of the party who has incurred costs in defending what is abandoned. Therefore, carefully considering all matters, the justice of the situation seems to me to best be met by the following orders: an order in favour of the defendants in respect of the costs of this application; and an order that the plaintiff pays the costs incurred by the defendants in respect of the defence of the plaintiff's claims for special damages and loss of earnings, to be adjudicated in default of agreement. Those costs orders must run up to today, in circumstances where it was not until today that the consent to withdrawal and the reinstatement orders have been made. I will invite the parties to liaise in terms of a draft order and to submit it, in agreed form, to the Registrar.

84. On the question of a 'stay' I do not think I can fairly impose a stay unless it is agreed. Why, flows from my findings in relation to why we are here today and it seems, in net form, to flow exclusively from the plaintiff's conduct. Therefore, unless a stay was agreed, and it is not agreed, I am not placing a stay on the order for costs.