Neutral Citation Number: [2007] IEHC 245

THE HIGH COURT

[2001 No. 5369 P]

BETWEEN

PATRICK MOFFITT

PLAINTIFF

AND

AGRICULTURAL CREDIT CORPORATION PLC

DEFENDANT

Judgment of Mr. Justice Clarke delivered the 27th July, 2007

1. Introduction

1.1 This history of the events which give rise to these proceedings go back to the late 1980's. At that time the defendant ("ACC") brought debt collection proceedings against the plaintiff ("Mr. Moffitt"). On the 10th March, 1986, ACC obtained a judgment for the sum of IR£13,741.60 together with costs against Mr. Moffitt, in those proceedings, which had record no. 39/1986 in the Circuit Court, Midlands Circuit, County of Roscommon. Thereafter the ACC registered that judgment as a judgment mortgage against certain lands allegedly owned by Mr. Moffitt and brought well charging proceedings, again in the Circuit Court, on an equity civil bill with record no. E63/1986 between the ACC and Mr. Moffitt.

1.2 On the 18th March, 1987, O'Higgins J. made a well charging order in those latter proceedings in respect of the sum of IR£29,861.06 and continuing interest and costs together with an order for sale of the relevant lands which were described as those contained in folios 15053, 19966, 4376F and 3796F of the register for County Roscommon. That order also directed that the County Registrar for Roscommon take accounts and inquiries as to encumbrances, priorities between encumbrancers and amounts owing to the ACC and other encumbrancers and directed that the result of such accounts and inquiries be certified to the court.

1.3 Matters were complicated by the fact that a second well charging order in respect of at least some of the relevant folios was obtained by Bank of Ireland in this court (Blayney J.) and disputes arose between ACC and Bank of Ireland as to how the matter should proceed given that there were well charging orders in respect of what were, to a significant extent, the same lands, made by two different courts.

1.4 Those difficulties, at least in part, explain why little progress was achieved in attempting to move forward the accounts and inquiries on foot of the Circuit Court order. The issue of accounts and inquiries was resurrected by ACC in 1999, in a manner which I describe at para 2.1 of this judgment. In the meantime a number of changes in the registration of the lands comprised in the folios specified in the well charging order occurred. It would appear that two of the folios referred to now have no lands contained within them. Some of the lands originally contained within the original folios have been transferred into a separate folio in respect of which Mr. Moffitt remains the registered owner. Others of the lands have been transferred into folios in respect of which third parties are the registered owners. It is contended by Mr. Moffitt that the transfers to those third parties predate the registration of the judgment mortgage by ACC.

1.5 I should also note that there has been a significant history of other litigation relating to these matters which is relevant to the issue which I have to decide. I will turn to that other litigation in due course.

1.6 Mr. Moffitt commenced these proceedings as a litigant in person, although he is now represented by solicitor and counsel. In the general endorsement of claim, Mr. Moffitt seeks a declaration that the order for the sale of his lands by the Circuit Court of the 18th March, 1987, is "now statute barred and thereby is void and of no effect". He further seeks injunctions restraining any action being taken on foot of the order. The proceedings were not progressed by Mr. Moffitt until he filed a Statement of Claim on the 26th June, 2006. That Statement of Claim contains a small number of assertions. In respect of the original judgment made in March 1986, Mr. Moffitt contends that he had instructed solicitors to enter an appearance but that they failed to do so. It does not appear that this fact, if it be so, could have any influence on these proceedings. If there was a defence to the proceedings brought by ACC at that time and if, due to an error on the part of a solicitor instructed, that defence was not put up, then the proper course of action would have been to seek to have the judgment set aside. Any such application would, of course, have been to the Circuit Court. No such application was brought and it is now far too late for any such application to now be brought. Apart altogether from the delay generally further applications and steps have been taken in the Circuit Court without any challenge to the validity of the original order. The time is, therefore, long since past when the original order is capable of challenge.

1.7 The next contention contained in the Statement of Claim is to the effect that the obtaining by ACC of an order for sale showed "no respect for Patrick Moffitt's constitutional rights and the Family Home Protection Act *inter alia*".

1.8 Again any issues which could have been raised relating to the appropriateness or otherwise of making the order for sale should have been raised at that time, whether before the Circuit Court or, if desired, on appeal to this court. It is again far too late to raise those issues.

1.9 Finally, Mr. Moffitt asserts that any claim by ACC under the court order "is statute barred pursuant to s. 11(1)(a) and s. 11(2) of the Statute of Limitations 1957". I will return to this issue in due course.

1.10 Mr. Moffitt brought a motion for judgment in default of defence against the ACC. The ACC, in turn, brought a motion seeking to have Mr. Moffitt's proceedings dismissed as being bound to fail. It was agreed between the parties that, logically, the ACC motion should be considered first so that, in the event that it should succeed, there would be no need to file a defence and in the event that it should fail ACC would seek a brief extension of time to file a defence. I am, therefore, concerned, at this stage, solely with the ACC application. As that application is, to a significant extent, based upon a contention that the issues now sought to be raised by Mr. Moffitt are *res judicata* it is important that I now set out the history of the previous proceedings in this court between the parties.

2. The previous proceedings

2.1 The previous plenary proceedings brought by Mr. Moffitt bore record no. 1993 No. 3165 P ("the previous proceedings"). In those proceeding Mr. Moffitt sought an order restraining ACC from enforcing the order previously made by O'Higgins J. and a declaration to the effect that that order was of no force and effect. The statement of claim in that case was delivered on the 26th August, 1999 and alleges a lack of service, the fact that there was a family home on the lands and that a Michael Bailey and a Thomas Kenny were the rightful owners of some of the land. The context of those proceedings was that, in February, 1999, ACC had brought an application before Kennedy J. sitting at Tullamore in the Circuit Court for orders designed to resurrect the holding of the accounts and

inquiries which had been directed over a decade earlier. Kennedy J. made an order directing the County Registrar for Co. Roscommon to make the accounts and inquiries concerned. Mr. Moffitt appealed that order to this court. The appeal came on for hearing before Smyth J. on the 19th July, 1999 and, on the 26th July, 2006, an order was made dismissing the appeal and affirming the order of the Circuit Court. It would also appear that, at that time, Mr. Moffitt had sought leave to bring judicial review proceedings in this court which leave was refused. An appeal was taken to the Supreme Court in respect of the refusal to grant leave, but does not appear to have been pursued.

2.2 In any event ACC brought an application to this court in respect of the previous proceedings seeking to have them dismissed as disclosing no cause of action. The matter came before Murphy J. who made an order on the 3rd November, 2000, directing that the proceedings be struck out "on the ground that it discloses no reasonable cause of action" and that the proceedings were frivolous and vexatious. Mr. Moffitt appealed against that decision. The appeal was struck out on the basis of no appearance and Mr. Moffitt sought to have same reinstated, but that application (which was made almost two years after the original order dismissing the appeal) was ultimately refused by an order of the Supreme Court made on the 13th October, 2006. Against that background, ACC contends that the issues now sought to be raised by Mr. Moffitt are exactly the same as those which were already raised in the previous proceedings and are *res judicata*. That being so it is argued that these proceedings are bound to fail. It is clear from a reading of the papers connected to the application brought by ACC that the case made was that Mr. Moffitt's proceedings were bound to fail.

2.3 I shall turn firstly to the legal principles by reference to which this matter should be determined.

3. The law

3.1 The jurisdiction of this court to dismiss proceedings which are bound to fail has been clear since the decision of Costello J. in *Barry v. Buckley* [1981] I.R. 306. The relevant principles are well settled. It is a jurisdiction to be exercised sparingly and the onus rests upon the defendant to satisfy the court that there is no prospect of success. In addition the court should not judge the matter on a narrow or technical basis referable to the pleadings. It is well settled that, even if the proceedings as currently drafted might have no chance of success, the proceedings ought not be dismissed if, by an appropriate amendment, the proceedings could be recast in a fashion which would give rise to a prospect of success. (See the judgments of McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 and Fennelly J. in *Lawlor v. Ross* (Unreported, Supreme Court, Fennelly J., 22nd November, 2001 at p. 10).

3.2 The principal basis advanced on behalf of ACC for suggesting that these proceedings are bound to fail is that the same issues have already been determined. In that context it is important to identify the scope of the doctrine of *res judicata*. It is well settled that in order for a plea of *res judicata* to succeed, the judgment upon which it is founded must be a final and conclusive judgment on the merits. There is no doubt but that the judgment of Murphy J. is a final judgment (at least since any prospect of an appeal from that judgment has disappeared by virtue of the order of the Supreme Court made in October, 2006). There is, however, an issue between the parties as to whether it can properly be said that the judgment of Murphy J. in the previous proceedings is a judgment on the merits. In that context, it is clear that the dismissal of proceedings for want of prosecution (see for example *Pople v. Evans* [1969] 2 Ch. 255) or by virtue of prematurity (see *Barber v. McQuaig* [1900] 31 OR 593) do not give rise to a bar to future proceedings.

3.3 In that context there is an issue as to whether a dismissal on the basis that proceedings are frivolous and vexatious or are an abuse of process amounts to a judgment on the merits. Counsel for Mr. Moffitt places reliance on the decision of this court in *Dalton v. Flynn* (Unreported, High Court, Laffoy J., 20th May, 2004). One of the issues which arose in that case was as to whether a counterclaim brought in previous proceedings amounted to a bar to the prosecution of the case under consideration. To that counterclaim an objection was raised in the Reply and Defence to Counterclaim to the effect that the matters raised were "unnecessary, scandalous and designed to embarrass and furthermore were frivolous and vexatious". Following an application in that regard, Finnegan P. ordered the counterclaim to be struck out. It is not clear from the judgment of Laffoy J. as to the precise basis upon which the counterclaim was struck out. Laffoy J. concluded, at p. 12, that the counterclaim in the previous proceedings was not adjudicated on the merits and that, therefore, it could not be a bar to the prosecution of the proceedings with which she was concerned.

3.4 It is suggested, therefore, that *Dalton v. Flynn* is authority for the proposition that a dismissal on the basis that an action is bound to fail does not amount to a dismissal on the merits such as would give rise to a bar to the same issue being raised again. There may well be cases where the fact that proceedings are dismissed as being frivolous or vexatious may not give rise to a bar to further proceedings. However it seems to me that where proceedings are dismissed as being bound to fail following on from a hearing in which the court considered the merits of the case for the purposes of determining whether the case had any chance of success, then it follows that fresh proceedings on the same basis are barred. In order to determine that proceedings are bound to fail, the court must enter into a consideration of the merits. Indeed it does so on the basis of allowing the benefit of the doubt concerning any factual or complex legal issues to be determined in favour of the plaintiff. The proceedings will only be dismissed, under *Barry v. Buckley*, where the court is satisfied that there is no prospect of success on the merits. Such a hearing can, in my view, be properly described as a hearing on the merits.

3.5 There may, of course, be other reasons why proceedings may be dismissed as being frivolous or vexatious which would not require the court to go fully into the merits of the case. In those circumstances a dismissal may not amount to a bar to future proceedings.

3.6 I am, therefore, satisfied that where a court enters into a consideration of the merits of a plaintiff's claim on a motion to dismiss as being bound to fail and comes to the conclusion, on the merits, that the proceedings are bound to fail, that it follows that the same proceedings cannot be recommenced without infringing the doctrine of r*es judicata*.

3.7 A second, and analogous, issue arises in relation to the so called rule in *Henderson v. Henderson* (1843) 3 Hare 100. This rule is concerned with a similar, although different, situation than that to which the doctrine of *res judicata* strictly speaking applies. *Res judicata* per se applies where the matter sought to be litigated has already been decided by a court of competent jurisdiction. *Res judicata* can relate to the cause of action (which may involve a consideration of whether two separate causes of action arise) or an individual issue (issue estoppel). In the latter case the issue sought to be litigated must be identical to the issue decided in the previous proceedings. (See for example *Royal Bank of Ireland v. O'Rourke* (1962) I.R. 159). The rule in *Henderson v. Henderson*, on the other hand, applies where a new issue is raised which was not, therefore, decided in the previous proceedings but is one which the court determines could and should have been brought forward in the previous proceedings.

3.8 The importance of the distinction lies in the consequences. If a matter is *res judicata* then, in the absence of a defence to the application of the doctrine such as fraud, the availability of fresh evidence in respect of issue estoppel only, estoppel, or other special cases, the plea will necessarily succeed.

3.9 On the other hand, where reliance is placed on the rule in *Henderson v. Henderson* to the effect that it would be an abuse of process to now allow the party concerned to raise a different issue which could have been raised in the original proceedings, it is well settled that the court adopts a more broad based approach. In *A.A. v. The Medical Council* [2003] 4 I.R. 302 Hardiman J. (speaking for the Supreme Court) noted the principle to the effect that a party to previous litigation is bound not only by matters actually raised, but matters which ought properly have been raised but were not. However Hardiman J. went on to determine that a rule or principle so described could not, in its nature, be applied in an automatic or unconsidered fashion and that the public interest in the efficient conduct of litigation did not render the raising of a defence in later proceedings necessarily abusive where in all the circumstances the party was not misusing or abusing the process of the court.

3.10 The distinction is, therefore, quite material. If the actual matter in issue has been determined in previous proceedings, then in the absence of a specific reason, such as estoppel or fraud, it will not be open to the party who lost to re-litigate that question. However, where a party seeks to make a new and different case which, it might be said, ought to have been included in the earlier proceedings, the court enjoys a wider discretion to consider what the result should be having regard to the competing interests of justice.

3.11 I propose applying those principles to the facts of this case.

4. Application to the facts of this case

4.1 As currently pleaded it seems to me that these proceedings are undoubtedly caught by the doctrine of *res judicata*. The substance of the claim in this case is exactly the same as the substance of the claim in the previous proceedings which were dismissed as disclosing no cause of action. Both claims, in substance, seek to assert that the judgment of the Circuit Court providing for accounts, enquires and sale on foot of a well charging order are "statute barred". That is the cause of action in both proceedings. That proposition has, already, been determined by Murphy J. to be bound to fail and there is no basis for departing from that view.

4.2 However in the course of the hearing before me, counsel for Mr. Moffitt made the point, which is correct so far as it goes, that in all of the other proceedings in which Mr. Moffitt had sought to challenge the current status of the Circuit Court order concerned, he has represented himself. She also articulated a number of arguments concerning the current validity or effect of the well charging order and the order for sale which, it has to be said, do not arise from the pleadings as currently constituted. However, as I have pointed out, if proceedings can be saved by an appropriate amendment, then the court should give active consideration to whether that course of action should be adopted.

4.3 In summary the issues raised were as follows:

> a. It is said that it is arguable that a well charging order does not "travel" with land where the land concerned changes from one folio to another and where the lands described in the well charging order are delineated by reference to the folios concerned. In those circumstances, it is said that the well charging order can no longer have any effect on the land that was formerly comprised in the folio specified in the order but which is now comprised in a separate folio.
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> b. In addition, it is said that by virtue of the fact that the folios were referred to collectively and some of the lands the subject of those folios have been transferred out of them, the entirety of the well charging order is incapable of continued enforcement.
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> c. It is said that the statute of limitations applies to the amount of interest that can properly be said to remain due on the debt declared to be well charged.

4.4 It was intimated that it would be the intention of his legal advisors to make an application on behalf of Mr. Moffitt to amend the pleadings so as to allow those issues to be litigated. In those circumstances it is appropriate that I consider whether a Statement of Claim incorporating claims within those general parameters could be said to put forward a claim which was bound to fail.

4.5 I propose dealing briefly with the third issue first as it seems to me it can readily be disposed of. What the Circuit Court order of the 18th March, 1987 did was to declare the amount which stood well charged as of the date of the order. It conferred a jurisdiction on the County Registrar to determine, by enquiry, the amount which might be due at any future relevant date (such as the time when the property might come to be sold). In those circumstances the question of the amount of interest properly due on the judgment debt, having regard to the Statute of Limitations, is a matter which is completely within the jurisdiction of the County Registrar, and there does not seem to me to be any basis for invoking this Court's jurisdiction to interfere with the process before the County Registrar, particularly when the Country Registrar has made no determination adverse to Mr. Moffitt.

4.6 The other two issues are, in my view, somewhat different in character. They go to the question, if they be good points, of whether there remains in force an order capable of legitimate execution. The real question in respect of those matters is as to whether the issues concerned are *res judicata.* Having carefully considered the pleadings in the previous proceedings, it does not seem to me that those issues were specifically raised. Complaint was made about the fact that some of the land comprised in the folios in respect of which the well charging order was made was owned by the named third parties. There is no doubt that the transfer of portions of the folio to those third parties led to the reorganisation of the folios which is at the heart of the point made.

4.7 However it seems to me that the issue raised is not one of *res judicata* per se (the precise issue not having been raised in the previous proceedings) but rather is an issue to which the rule in Henderson v. Henderson could be said to apply.

4.8 In those circumstances it seems to me that I need to consider, on a broad basis, the merits of allowing, or not allowing, Mr. Moffitt to continue with these proceedings. It is important, in relation to this aspect of the case, (though it would not have been relevant in respect of a pure *res judicata* point) to note that Mr. Moffitt represented himself. The points now sought to be relied on are purely legal points and Mr. Moffitt could not, in those circumstances, have been expected to raise them. In those circumstances much less blame attaches to him for those issues not having been raised in his previous proceedings, than might be the case had he been represented.

4.9 Secondly if the points be good points they are, in my view, appropriately dealt with in these proceedings rather than in accounts and inquiries before the County Registrar. The issues are issues of principle concerning the circumstances in which a well charging order can have continued practical application where there has been a change in the folios in which the lands the subject of the order are comprised.

4.10 There is no doubt but that the principle in *Henderson v. Henderson*, prima facie applies. These issues are very closely connected with the issues which were litigated in the previous proceedings. If Mr. Moffitt had the benefit of legal advice at the time of those

proceedings, I would have no hesitation in determining that the attempt to raise these new, but analogous, issues in these proceedings would be an abuse of process and would require to be restrained. However he did not have the benefit of such advice.

4.11 On the other side of the coin the issues which are now sought to be litigated are, in my view, narrow legal issues whose litigation will not place any significant burden on ACC other than the obvious risk that if they turn out to be well made points, ACC's entitlements may be altered. The conduct of the litigation would not, of itself, be burdensome.

4.12 In all of those circumstances I have come to the view that the sort of special circumstances identified by Hardiman J. in A.A. exist in this case and that it is appropriate to allow some latitude to Mr. Moffitt. However it is clear that the proceedings as presently constituted cannot continue. It is also clear that the issues concerning the original orders of the Circuit Court cannot be permitted to be litigated. The only two issues which, in my view, are not caught by the *res judicata* doctrine are the two issues which I have just identified. As those issues are pure issues of law I am minded to direct that they be tried as a preliminary issue of law on the basis of agreed facts.

4.13 In those circumstances it seems to me that I should adopt the following course of action:-

> a. I will give Mr. Moffitt's legal advisors an opportunity to produce an amended statement of claim which confines itself to seeking relief based on the two issues which I have identified;
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> b. I will invite the parties to agree the facts which are relevant to those two issues. It seems to me that the only facts that are relevant to those two issues are the history of the movements in the composition of land by reference to folios which are at the heart of the points made. I would wish to make clear that I do not propose allowing Mr. Moffitt to raise any issues other than the technical legal questions which I have identified.

4.14 On the basis that an agreed statement of such facts can be arrived at I would propose directing that a preliminary issues be tried as to whether those facts create any infirmity in the existing well charging order and the order for sale that flows from it. I would then propose having that issue set down for trial in early course.

4.15 On the assumption that an appropriate statement of claim in produced in accordance with a timescale which I will discuss with counsel, I would then propose refusing this motion but reserving the costs of it to the judge who would try the preliminary issue which I have identified.