Neutral Citation: [2014] IEHC 538

THE HIGH COURT

[2009 No. 9088P]

BETWEEN

FRANK EGAN AND TUBBER WATER LIMITED

PLAINTIFFS

AND

MICHAEL BYRNE

DEFENDANT

JUDGMENT of Ms. Justice Donnelly delivered the 12th day of November, 2014.

Introduction

1. The place name Tubber is an anglicisation of the Irish word "tobar" meaning well. Unfortunately for the parties to this case, a dispute over wells has brought them to the High Court and back again. This judgment on the motions before the Court, a motion for attachment and a motion for the first plaintiff to be struck out of the proceedings, can only make sense if a short synopsis of the history of the proceedings is given.

Procedural History

2. The first plaintiff was named in the plenary summons as suing in his capacity as the trustee of a group Water Scheme known as Tubber Water Scheme. The Scheme was set up in the Tubber area, near Moate in County Westmeath in or about 1972. In common with other such water schemes, it was set up with the assistance of the Department of Local Government in order to provide drinking water to members of the Scheme. It was a non-profit operation financed by subscription from members and from the said Department. Tubber Water Scheme caused the incorporation of the second plaintiff (hereinafter referred to as "the Company") in December, 2002. This incorporation was necessitated by an otherwise inability to obtain insurance cover. The Trustees of the Scheme became Directors of the Company and the Company ran the Group Water Scheme thereafter.

3. At some point in or about 1981 negotiations between the first plaintiff in his capacity as a Trustee of the Scheme and the Byrne family led to the Tubber Water Scheme using a well on the Byrne property. The Scheme lined the well, erected a pump house and connected the well by an underground pipe approximately 1000m in length to a reservoir on an adjoining property. There was dispute over the precise nature of the agreement, if any, between the parties but, suffice to say, the Scheme operated the well for many years. The first plaintiff initially averred in his affidavit of the 8th October, 2010, sworn on behalf of both plaintiffs in the application for interim relief, that an undated deed executed by the defendant was found in which the Tubber Water Scheme was permitted access to the well and water pump in consideration of the payment of £3000 and the provision of water free of charge to the defendant up to the year 1995. The defendant in later pleadings refers to an agreement he claims was executed in 1985 containing the above conditions. He says that he was never paid the £3000. The first plaintiff had no recollection or record of any such sum being discharged although he asserts that the defendant was provided with access to water free of charge (an assertion the defendant contests). For the purpose of providing grants to improve the pump house, it appears that Offaly County Council required the Company to be in possession of the site through a conveyance or a lease.

4. Certain correspondence was entered into between the parties, but, it appears that an amicable way forward could not be found. In September, 2009 the plaintiffs alleged that that the defendant had dug a trench around 3 sides of the pump house and that this damaged the main pipe that ran from the pump house to the reservoir. It is alleged that this led to the second plaintiff having to notify Offaly County Council and Westmeath County Council of the risk of contamination of the water supply. This led in turn to what is known as a "Boil Water" notice being issued.

5. The plaintiffs wrote to the defendant demanding that he repair the damage and also desist with interfering from the plaintiffs' right of access to the well and pump house. In the absence of any agreement the plaintiffs issued proceedings which were aimed at restraining the defendant from interfering with their asserted right of way to and from the well and pump house. An order restraining the defendant from interfering with the quality of the drinking water in the well or water main was also sought.

6. The plaintiffs sought, and were granted, interim orders permitting them to enter the property for the purpose of pumping stagnant water, of backfilling the trench dug by the defendant and repairing the chamber so as to restore the well to its previous condition.

7. Pleadings were exchanged between the parties subsequently. In particular, the defendant filed a defence and counterclaim. In his defence and counterclaim he pleaded, *inter alia*, that he was entitled to a Declaration that the agreement of 1985 was null and void in light of the failure to provide any consideration.

8. The Declarations sought by the defendant were as follows:-

> a) A Declaration that the plaintiffs, their servants or agents have no interest in the lands of the defendant and contained in Folio: 5837F of the Register of Freeholders, for the County of Westmeath;
>
> b) A Declaration that the plaintiffs are not entitled to an easement of a right of way in the manner set forth within the statement of claim.

He also sought injunctive relief which would follow on foot of those declarations to restrain trespass.

By notice of motion dated the 8th March, 2012, the first plaintiff sought an order pursuant to O.15, r.14 of the Rules of the Superior Courts striking him out of the proceedings herein. That motion was adjourned to the hearing of the action.

The Settlement of Proceedings

9. On the 27th April, 2012, an agreement was signed by Padraig Farrell (Chairman of the second plaintiff) and stated to be "signed for and on behalf of the Plaintiffs". It was also signed by the defendant. The heading to the Agreements incorporated the Title to the Proceedings and commenced:-

> "IT IS HEREBY AGREED between the parties herein that the above entitled proceedings be compromised upon the following terms and further that same be received by the Court and Orders made therein
>
> 1. A declaration that the Plaintiffs, their successors, administrators and assigns have no legal or beneficial interest in the land of the Defendant - [*land delineated*] and in particular the water well contained therein;
>
> 2. A declaration that the Plaintiffs, their successors, administrators and assigns have no entitlement to a right of way as set forth and the matter described within the Statement of Claim;
>
> 3. The Plaintiffs undertake to vacate the property and cease draining [*this word is in some dispute as it is difficult to read in the original and could be "drawing"*] water from the well in the manner hereinafter set forth:
>
> i. The Defendant acknowledges the right of the Plaintiffs to draw water from the well for the benefit of its current members,
>
> ii. The Plaintiffs to cease all such activity within four months from 1st May 2012
>
> iii. [*This provided for schedule of payment for the said water*]
>
> iv. [*This provided for means of payment*]
>
> 4. The Plaintiffs agree to vacate the lands and cease extraction of water no later than on or before the 19th October 2012;
>
> 5. The Plaintiffs to remove all the equipment from site at the cessation of extraction of water, and reinstate lands, repair damage to Defendant's property howsoever arising
>
> 6. The Defendant undertakes through himself, his servants and agents not to interfere in anyway with any future planning applications made by the Plaintiffs to obtain alternative water supply and in particular not to lodge any objection to such application;
>
> 7. The Plaintiffs are hereby authorised to enter upon the lands for the purposes of carrying out repairs to fencing around the pump house and to the pump house itself to comply with the directions of the local authority;
>
> 8. [*This provided for the discharge of a sum to the Defendant by the Plaintiffs in full and final settlement of all claims arising, such sum to be inclusive of costs*.]
>
> 9. Liberty to apply;
>
> 10. Strike out proceedings and no order as to costs."

10. On the 2nd May, 2012, the matter was listed for ruling before Laffoy J. The Order reads:-

> "And upon reading the pleadings herein and the terms of the said Consent (a copy of which is annexed as a Schedule hereto) executed on the 27th day of April 2012
>
> Whereupon and on hearing what was offered by said Counsel for the respective parties
>
> IT IS ORDERED that the declarations in the terms of the said consent be made orders herein According the Court Doth Declare
>
> *1. [Declaration as above.]*
>
> *2. [Declaration as above)*
>
> AND IT IS FURTHER ORDERED that the matter herein be struck out with no further order.
>
> Liberty to apply."
>
> The Order was perfected on the 11th June, 2012.

A copy of the handwritten agreement is attached to the Order and the words "received and Filed in Court this 2/5/12 P. Healy Registrar" are noted thereon.

Motion for Attachment and Committal and Sequestration

11. The defendant issued a motion dated the 3rd March, 2014, seeking three reliefs:-

> a) The Attachment and Committal of the first plaintiff
>
> b) The Attachment of eight named officers of the second plaintiff
>
> c) The sequestration of the property of the second plaintiff

12. These reliefs were all based upon the same allegation of breach of a term of the Court Order perfected on the 11th June, 2012. It is stated that the plaintiffs were required to "cease extraction of water no later than on or before a given date in October 2012". That date appears not to be the same as the handwritten agreement but no party made an issue of that.

13. At the hearing of the motions, the defendant indicated he would not be proceeding with his motion against the first plaintiff nor against certain of the named officers. The defendant does so in circumstances where he says that based upon the first plaintiffs assertion in his replying affidavit that he, the first plaintiff, was not involved in the settlement agreement, the defendant will not "go behind" that. The first plaintiff avers that he had previously issued a motion to be struck out as a plaintiff, that the said motion was adjourned to the hearing of the action, that he did not participate in the settlement, that he did not execute its terms and that his application to be struck out had not been disposed of by the trial judge. The first plaintiff then brought another motion to be stuck out as a plaintiff and that motion stands to be decided in the course of these proceedings. In relation to the particular officers of the Company, it became apparent that they were not directors at the relevant time (a fact which had not properly been reflected in the Company Office Records).

14. The defendant claims that the terms of the Order were "wilfully breached by the plaintiffs in that Tubber Water Limited had continued to extract water from the zone of contribution which supplies my well". This allegation is made in circumstances where the second plaintiff had drilled two wells on adjacent property to source water from the "same zone of contribution". These wells are located either 15/16m away from the defendant's land, as per the defendant or 20ms away as per the second plaintiff. It appears the location of these wells had been visible to the defendant at the time of the settlement agreement. The defendant avers with respect to the said extraction of the water, that "this is in clear disregard of the spirit and letter of the terms agreed between the parties and made a rule of this Honourable Court."

15. The defendant relies upon expert evidence to show that pumping from the Company's new well reduces the amount of water available in the defendant's well. In the main, the Company does not really dispute that contention, but says that it has no bearing on the issues between the parties. The Company says, save in very particular circumstances, there is no property right in water.

16. The factual case the defendant makes is contained in para. 6(a) of the affidavit of Conor Quinlan, the defendant's hydrologist in which he says:-

> *"Assuming the term 'alternative water supply ' as contained in paragraph 6 of the "terms ruled by the High Court of the settlement" between Frank Egan and Tubber Water Limited and Martin Byrne dated 2nd May 2012 is understood to mean an alternative supply of water from outside the groundwater zone of contribution to Martin Byrne's well, that the second named plaintiff can be considered to have not sourced its water from an alternative supply".*

The Order of the 2nd May, 2012

Preliminary Issue

17. The preliminary issue in this case is whether the terms of the settlement between the parties amount to Orders of Court, including in particular, undertakings to the Court. Or are the Orders of the Court merely limited to the Declarations as set out above?

18. The second plaintiff urges on the Court an interpretation that the settlement terms, apart from the Declarations made by the Court, are merely contractual and cannot be enforced as Court Orders. The defendant urges on the Court that the undertakings given in the proceedings were solemn undertakings to the Court and that they have been breached.

19. Undoubtedly, if the second plaintiff had given an undertaking to the court they would have been under the same obligation to abide by its terms as if it were an injunction. Was this such an undertaking? That is a matter of construction of the Order of the 2nd May, 2012.

The law

20. Both parties have referred the Court to the case of *In Re Shaw* [1918] P 47. In that case the terms of settlement had by decree been directed to be filed and made a rule of court. In those circumstances, Warrington L.J. held:-

> "[I]n my opinion, notwithstanding that the terms were made a rule of Court, the liability to pay the annuity remains contractual. The effect of making the terms a rule of Court enables the terms to be summarily enforced without the necessity of bringing an action."

The case of *Smythe v. Smythe* [1887] 18 QBD 544 CA, relied upon by the Company, simply confirms that agreements between the parties may be made a rule of court and subsequently may be made an order of the Court.

21. A more recent authority on this issue is that of McDermott J. in the case of *D.L. v. M L.* [2013] IEHC 441 in which he states:-

> *"The court is satisfied that making the clause of an agreement a "rule of Court" does not have the same effect as making an order in the terms of the clause. It provides a shortened procedural route to enforcement of the term by way of application with the proceedings whereby an order may be made merging the terms of the clause with the existing order of the court thereby providing a means for the enforcement of the agreement without recourse to separate proceedings. In formulating the precise terms of the order to be made, the court may have regard to the nature and extent of the settlement. It may be inappropriate to make such an order, if it were to affect a third party's rights who is not a party to the proceedings or, if the terms of the clause relied upon are so vague or imprecise as not to be capable of formulation as an order by this court. "*

22. McDermott J. also held that while it may be prudent to claim the specific relief requiring conversion of the rule of court into an order of the Court he held that strict adherence to this procedure may cause injustice on occasion. He made that finding having regard to the executory nature of many court orders, particularly in family law such as the case he was dealing with.

23. The defendant says that *In Re Shaw* was a case where both parties were *ad idem* that the terms of the consent had been made an order of the Court by having them ruled. Even if that is so it is irrelevant to what was actually decided in the case, which was that the terms of the settlement were contractual terms and were not in fact orders of the Court.

24. The defendant seeks to rely upon the Court of Appeal of England and Wales decision in *Independiente Ltd v. Music Trading On-Line (HK) Ltd.* [2007] EWCA Civ 111. In that case proceedings were compromised by a settlement agreement under which the

defendant agreed to give undertakings to the court that it would not carry out specified acts. Those undertakings were embodied in a consent order. The claimants brought a further action for breach of contract and alleged breach of the undertakings. The Court of Appeal held that in the circumstances, the undertakings had been given to the claimants as well as to the court, and, were therefore actionable as breaches of contract. That case was really the converse of this case but the defendant relies upon it to show that undertakings can be both given under the contractual terms in the settlement but also to the court.

25. Paragraph 7 of the judgment in *Independiente* sets out the terms of the settlement relevant to the undertakings. It is clear that the settlement stated:- "will each give undertakings to the court in the form set out in draft order annexed hereto..." The judgment also records that the Order of the Master refers to the defendants "undertaking to the court ...". In my opinion, the factual circumstances in that case are wholly different from the situation here. In *Independiente*, the agreement expressly envisaged the undertakings being given to the Court and the Order of the Court expressly reflected that the defendants gave those undertakings. No such terms are present in this case and the Order does not record the giving of an undertaking.

26. At various stages in correspondence to the Company or in his affidavit, the defendant has referred to the "spirit and the letter" of the Agreement and also to the settlement being made a rule of Court.

27. It has been urged upon me by counsel for the defendant that this settlement was in solemn form - that this word "undertaking" was not used lightly. He argues that an officious bystander would have known that the undertaking was to the Court. It is striking that in the defendant's supplemental submissions the argument is made that, in circumstances where undertakings given in a compromise are then ruled on by order of the Court with the agreement scheduled to the order, "[t]here is an *implied* undertaking to the Court to abide by the terms of the compromise agreement and breach of those undertakings amounts to a contempt of court as well as to a breach of contract." (emphasis added).

28. The true test of construction is to have regard to the nature and content of the Order that was made following the settlement. The following matters are relevant-

> a) The settlement does not state that any undertaking was to be given to the Court b) The court order does not record that any undertaking was given to the Court
>
> c) The Order records that the matter was listed for ruling
>
> d) That the Order records that the terms of the Consent (i.e. the settlement of the parties) are annexed as a Schedule to the Order
>
> e) That the terms of the said Consent are noted to be received and filed in court
>
> f) That the Court made two Orders by way of Declarations regarding the defendant's title to the land and the lack of entitlement of the plaintiff to a right of way over those lands.

Conclusion on first motion

29. I am quite clear that in all the circumstances of the case, no undertaking was given to the Court. The settlement was silent about the giving of an undertaking to the Court. Crucially, there is simply no evidence of any such undertaking on a true construction of the Order of the Court. An undertaking to any Court is a matter of great solemnity and not to be given lightly. A breach of undertaking lays a person open to the considerable powers of the High Court for contempt of court. Any such undertaking must be given in a clear and unambiguous fashion. That is not the case here.

30. I do not consider that there was an implied undertaking given to the Court in this case. Furthermore, I am of the view that it would be wrong to even consider that an undertaking could ever be implied by the Court. An undertaking is either given or it is not. I have considered the case of *Irish Shell v. J. H. McLoughlin (Balbriggan) Ltd*, an ex tempore decision of Clarke J. delivered on the 19th December, 2005, in which he held as follows:-

> *"It seems to me that having regard to the serious consequences that arise in any case where someone may be said to be in breach of an undertaking given to the court, that it is not appropriate for the court to imply undertakings or to construe indications or commitments given as being undertakings which carry with them serious consequences, unless the matter referred to is specifically given in the form of a formal undertaking to the court and noted in the court order, in which circumstances the parties would be very clear as to the potential consequences of being in breach. "*

That is a clear statement of the law with regard to "implied undertakings".

31. Where the relief sought is one for orders of attachment arising out of contempt, no question of telescoping procedures as McDermott J. did in *D.L. v. M.L.* can really arise. If there was no Court Order there cannot be a breach giving rise to a contempt.

32. I would also comment that the words "rule of court" do not appear on the settlement but the Order simply records that the matter was in for ruling. The terms of the consent were "received and filed in court". If the matter was received and filed only, and not made a rule of court, then on the basis of the decision in *Ascough v. Roe* (Barron J., unreported, 21 May, 1982) it appears that the Court would be *functus officio*. However, there has been a concession by counsel for the Company that he was not arguing for a second set of pleadings and his case was argued on the basis that the settlement had been made a rule of court.

33. It is also fair to note that the Company has argued strongly that the terms of the settlement do not mean that the plaintiff cannot draw water from another source beyond the defendant's land even if it uses the same source of water. The second plaintiff has argued that the law is long settled that there is no property right in water. He argues that such rights only exist where there are well defined watercourse or channels. He deploys this as a two-fold argument. In the first place, he is simply saying that there was no breach, but also saying that this settlement would have had to be in far clearer terms if the usual legal provisions regarding water rights were to be set aside. He also refers to the fact that the new wells of the plaintiff were under construction at the time of the settlement and were visible from the defendant's land.

34. It is not for me to resolve these issues at this stage in light of the decision I have made. I will refrain from making any comment as to the meaning of the settlement, save for the interpretation I have given as to the issue of whether undertakings were given to the Court in the matter.

35. For the reasons set out I am refusing the relief set out in the motion seeking Orders of Attachment and Sequestration.

The first plaintiff's motion to strike him out of the proceedings
36. This is a motion that has been brought in highly unusual circumstances. It is moved in a situation where an Order has been made which on its face says that the matter has been struck out. If that is the case there is no necessity for the first plaintiff to come off record. That argument appears to gather strength in circumstances where the defendant has agreed not to proceed against that plaintiff for the Order of attachment and committal. However, the situation is more involved than that.

37. It appears that the first plaintiff brought this motion to be struck off as a plaintiff earlier in the proceedings but it was not heard at all. What occurred was that the settlement agreement between the second plaintiff and the defendant had the effect that the entire matter was recorded as being struck out. The first plaintiff avers that he was not party to that settlement but it is clear that all parties acted thereafter as if the entire proceedings had come to an end as between all parties. There was no pursuit by the first plaintiff of his motion and no pursuit by the defendant as to any other final order including costs as against the first plaintiff.

38. The rule under which the motion has been brought is Order 15, rule 14. It appears that O.15, r.2 has no application as that rule is confined to a situation where the application is to add or substitute a plaintiff. The only issue here is whether the first plaintiff should be struck out as a plaintiff in the proceedings.

39. The first plaintiff swore an affidavit grounding his initial motion to be struck out as plaintiff on the 8th March, 2012. He averred that due to the public health issue with the Boil Water Notice the application for the injunction was rushed. He did not get to see "details of the pleadings in advance" and was not consulted as to their content. He says he did not realise that he was named separately as a plaintiff nor was it indicated to him that this would occur. He says he was then a 78 year-old farmer with no legal training. He says that he was the spokesperson for the Company and at no stage did he think he was receiving correspondence as the first plaintiff. He says that it was only in August or September, 2011 that he realised he was co-plaintiff when it was pointed out to him by family members. He says that he wrote to his solicitor and asked for his name to be removed as he was anxious about his exposure to costs. He says that he never gave his consent or instructed to be named separately and that he could see no good reason why he should be named separately. It appears that his solicitor retired and a new solicitor came on record who he then instructed to bring this motion. He resigned as Company Secretary and Director on 20th February, 2012.

40. In his grounding affidavit in relation to this motion he repeats what was said before. He also says that the Order of this Honourable Court does not reflect what was agreed. In particular, he says that in fact his own motion was not disposed of by the trial judge. He says that he did not participate in the settlement and he did not execute the terms resulting therefrom. He says that the persons who signed the settlement for the second plaintiff had no authority to execute it on his behalf. He says that he is not an officer of the Company and that at no time since 2002 had he taken steps on behalf of the Scheme (as distinct from the Company). He says that his continued involvement in the proceedings was an oversight on the part of those negotiating the settlement and an oversight in bringing to the attention of the court his application to be struck out as a plaintiff.

41. The response of the defendant is as follows:

> a) The rule only allows a plaintiff to be struck out or substituted at any time before trial by motion or at the trial of the action.
>
> b) He argues the motion was unsuccessful and is *res judicata*.
>
> c) He argues that Mr. Egan, the first plaintiff says his involvement with the Company had ceased many years before when this is plainly not the case on the plaintiff's own affidavit.
>
> d) He strongly challenges the first plaintiff's claim as to how he could say he had no knowledge of the pleadings. In particular he refers to the affidavit of the first plaintiff grounding the application for interim relief.

Conclusions on the second motion
42. It appears to me that O.15, r.14 must be read in conjunction with Order 15, rule 13. Rule 13 provides that that the Court may "at any stage of the proceedings" strike out a party. Indeed parties have been joined in proceedings before the Supreme Court where it is "in the interest of justice" to do so e.g. *O'Keeffe v. An Bord Pleanála* [1993) 1 IR 39. Furthermore, O.15, r.14 refers to "at the trial of the action". There has been no trial of this action and it is apparently the contention of both sides that the proceedings themselves had not been concluded between these particular parties.

43. There is no final order recording that the original motion to strike out the proceedings was heard and determined. There is, therefore, no question of *res judicata* arising on the facts.

44. In my view, the defendant has misunderstood what the first plaintiff was saying in relation to his involvement with the water scheme. The first plaintiff distinguished between his involvement with the Scheme and the Company. I believe the first plaintiff made clear that his involvement with the Scheme stopped in 2002 and that he continued his involvement with the Company until he resigned on 20th February, 2012.

45. There is a significant issue with the plaintiff’s contention that he had no knowledge that he was named as a plaintiff. He swore an affidavit on the 8th October, 2009, seeking interim relief. In that affidavit he stated that he was the first plaintiff and said he was swearing it on his own behalf as well as on behalf of the second plaintiff. The affidavit specifically refers to the Company as the second plaintiff and it explains why that Company was incorporated. He averred that he was advised by Counsel and believed that the rights of the Trustees of the Scheme in the pump house, well and pipe line had been transferred to the Company. The first plaintiff gave an undertaking as to damages and in the Order of the gth October, 2009, it is recorded that it is the undertaking of the plaintiffs' (plural).

46. It is of great concern to this Court that a party could swear any affidavit, in particular an affidavit seeking interim injunctive relief from the High Court, without being aware of the contents of that affidavit. The swearing of an affidavit is a solemn event and the deponent takes responsibility for the contents of the affidavit. The defendant correctly draws attention to the fact that relief was granted on foot of this affidavit, the contents of which are now said by the first plaintiff not to have been fully explained to him, and by implication, not read by him.

47. However, it is also true that the fact that the first plaintiff was averring to his lack of knowledge of the contents of the pleadings was known to the defendant since the time of the service of the first motion brought to strike out the first plaintiff from the proceedings. Furthermore, at the time of the settlement between the defendant and the Company and the making of the Order on the 2nd May, 2012, no action was taken by the defendant against the first plaintiff in relation to the first plaintiff's averments.

48. Order 15, rule 13 contains the term "improper joinder". That would appear to mean that something in the nature of a lack of consent by the plaintiff would be a necessary proof. The first plaintiff says on affidavit that he did not know he was joined as a plaintiff. That is a highly dubious proposition in light of his earlier clear affidavit and the Order of the High Court in which the undertaking of the plaintiffs (plural) as to damages is noted. I am of the view that his age at the time and his lack of legal training are irrelevant. He makes no case of mental infirmity and I note that he continued as an officer of the Company for about 3 years after swearing the affidavit. If I was bound to look at this as a question of improper joinder only I would refuse the relief sought.

49. On the other hand the Court must have regard to the first sentence of rule 13. That says "[n]o cause or matter shall be defeated by reason of the *misjoinder* or non joinder of parties, *and* the courts may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it". In my opinion, the real matter in controversy from the date of the proceedings to the present day, is and was, between the Company and the defendant. The Scheme had long since ceased to operate and it appears it was joined due to doubts about the validity of any agreement between the Company and the defendant. Of greater importance, however, is that the proceedings were compromised on the basis of an agreement between the Company and the defendant. The reality of the situation is that the defendant did not continue the proceedings against the first plaintiff at the time of the settlement. The defendant was obviously content that all matters had apparently been resolved. There was no further pursuit of the first plaintiff for costs. There was no pursuit of the first plaintiff on the basis that he had misled the Court at the interim injunction stage even though all the facts were known to the defendant at the time of the settlement of the case. All parties appear to have acted as if the Order of the High Court had resolved all the matters between all the parties. If there had been no further issue about the water from the new wells there would have been no further applications to court. The defendant correctly recognises that the first plaintiff cannot be pursued for a breach of the settlement agreement. The first plaintiff has no involvement with the operation of the Company, apart from being a member in the ordinary event for the purpose of obtaining water. He had resigned as secretary and director of the Company by the time of the settlement agreement.

50. While I have grave concerns about the contents of the first plaintiff's averments I consider that this is an application which must be looked at in light of the totality of all the circumstances as outlined. I consider that there is no outstanding issue of any real substance between this plaintiff and the defendant. Matters were accepted and acted upon by both parties as if they had been resolved on the 2nd May, 2012. If any matter had been outstanding it could and should have been dealt with at that time. I am of the view that I am entitled pursuant to O.15, r.14, or as part of the inherent jurisdiction of the Court to control its own procedure, to strike the plaintiff from the proceedings. In my view, given all the circumstances as outlined, and in particular the manner in which both parties acted at the time of the settlement of the proceedings and the lack of any current real controversy between the parties, it is in the interests of justice to strike out this plaintiff from the proceedings.