Neutral Citation: [2013] IEHC 16

THE HIGH COURT

CIRCUIT APPEAL

RECORD NUMBER: E2011/21 CAT

NORTHERN CIRCUIT COUNTY OF DONEGAL

BETWEEN:

CARRICKFIN TRUST LIMITED

PLAINTIFF/APPELLANT

AND

WILLIAM FORKER, PATRICK FORKER AND TOGÁIL DHUN NA NGALL TEORANTA

DEFENDANTS/RESPONDENTS

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVRED ON THE 25TH JANUARY 2013:

1. On the 28th July 2011 His Honour Judge O'Hagan, on the application of the defendants in these proceedings, made an order striking out the plaintiffs claims in these proceedings as an abuse of process.

2. The basis for the abuse of process is that the issues between the parties the subject of these proceedings have already been determined between the parties in certain High Court proceedings (Record Number 2001 No. 14570P), but in the sense that in the latter proceedings a settlement was reached on the day that the case was listed for hearing, and the Court (Mr Justice Murphy) was asked to make (1) an order by consent directing that the plaintiff be registered as sole owner of the lands highlighted and marked pink on a map attached to that order (Map 3) – that map having been signed by the solicitors for each of the parties – and (2) an order "striking out the balance of the proceedings". The order as drawn provides for these two matters, as well as for a no costs order on the undertaking of one of the defendants to pay €4000 towards the plaintiff's costs which was also part of the settlement arrived at. A recital in the Court's order states as follows:

> *"And it appearing that a settlement has been reached herein The parties agree to compromise the matters at issue between them as follows …".*

Thereafter the orders to which I have referred are provided for in the curial part of the order.

3. I should state that the agreed terms of settlement were not presented to the Court in the usual form, namely a document containing the signatures of the parties, duly witnessed also by the parties' solicitors. No such document appears to have been drawn up and signed. There has been exhibited a copy of a hand-written note of the terms of the order proposed and which is reflected in the Court's order as drawn. I understand that this may have been a note of the proposed order prepared by junior counsel and which was used by Counsel for the defendants, almost as a speaking note, when informing the Court of the fact that the case was settled. That is the suggested provenance of this note as understood by Mr Gillespie the solicitor appearing for the plaintiff on this application and who was involved in the negotiations leading to the settlement of the proceedings before the Court on the 4th November 2010. However, counsel for the defendants is adamant that it represents faithfully the agreed settlement, and that the order reflects that settlement, including the fact that "*the parties agree to compromise the matters at issue between them*" as appears both in that document and in the perfected order.

4. In those High Court proceedings the plaintiffs had sought declarations not only that they are entitled to be registered as sole owners of the lands on Map 3, but also of other lands to the east of the lands on Map 3, referred to as Plot 134. The plaintiff's solicitor has stated on affidavit that it was their understanding of the settlement of the High Court proceedings, and indeed his own, and that they were so advised at the time of the settlement by their Senior Counsel, that the settlement reached on the 4th November 2010 did not preclude them from seeking in other proceedings the remainder of the reliefs claimed in the High Court proceedings, including a declaration that they are entitled to be registered as sole owners of Plot 134. They say that any order striking out the balance of the proceedings is not an order which precludes them from further pursuit in other proceedings of the balance of their claims and that the settlement was never intended to exclude such further proceedings. They have said that the reason behind leaving over the balance of the proceedings to new Circuit Court proceedings was that the rateable valuation of the remaining lands in dispute was within the Circuit Court jurisdiction, and that it was considered preferable to conduct that dispute more cheaply and expeditiously in the Circuit Court. They submit that there can be no question of the new proceedings being an abuse of process on the basis of *res judicata* since there was no adjudication on the merits by Mr Justice Murphy, and in an event the parties to the new proceedings are not identical to those in the High Court.

5. The defendants contend that the High Court order says what is says and that it is clear that all issues between the parties had been compromised on the basis that the plaintiff would be registered as sole owners in relation to the Map 3 lands, and that thereafter it was not open to the plaintiff to commence fresh proceedings in relation to any other lands which were the subject of the earlier proceedings.

6. In fact, on the very next day following the settlement by which they were declared entitled to be registered in relation to the lands highlighted on Map 3, the plaintiffs commenced proceedings in the Circuit Court by way of Equity Civil Bill seeking to be declared the sole owners of Plot 134, and other related reliefs.

7. The plaintiff relies upon the fact that, because the balance of the proceedings were struck out by consent, there has been no judicial determination in relation to the Plot 134 lands and any other issues in the proceedings, and that accordingly the doctrine of *res judicata* cannot apply. For that principle to apply it is well accepted on good authority that one of the requirements is that there

has been in proceedings between the same parties a final adjudication upon the issues raised in the new proceedings. Clearly there was no adjudication as such on the issues relating to Plot 134 by Murphy J. when upon the case being settled and by consent he made an order for the transfer of the other lands and struck out the balance of the plaintiff's claims by consent. But it seems clear on the authorities that there can be circumstances where the nature of the case and the terns of the settlement and the order made on foot thereof can be considered to be a final determination of the issues between the parties. It depends greatly on the nature of the case. Whether it is the principle of res judicata which operates, or whether it is rather an estoppel by conduct which prevents the matters again being litigated will depend on the facts of each particular case. By whatever rubric the point is decided, each serves to protect the parties and the courts from abuse of process.

8. It appears to be accepted by the plaintiff that during the course of the negotiations which led to the settlement the plaintiff's side never intimated to the defendants' side that while agreeing to a settlement by which the plaintiff would be declared sole owners of the Map 3 lands, and to the balance of the claim being struck out, they were retaining an entitlement to pursue the balance of their claims in further proceedings. While the plaintiff's Counsel appears to have given them that advice during the course of the negotiations, or possibly after their conclusion, that prospect was never communicated to the defendants' legal team who believed that all issues in the High Court proceedings were now at an end. Indeed it is worth noting that the High Court proceedings commenced in 2001, and it was only 9 years later that this settlement was reached.

9. The first and second named defendants in the present proceedings were not defendants in the High Court proceedings. The affidavits explain that the reason for that was that it was only on the 3rd November 2010, the day prior to the listing of the case for hearing, that the defendant Togáil Dhun Na nGall Teoranta (the 4th named defendant in the High Court proceedings) transferred portion of its lands to two directors of that company, William Forker and Patrick Forker. Because of that transfer of part of the lands it was deemed necessary to include them as defendants in the Circuit Court proceedings.

10. In essence the issue between the parties on this application boils down (a) as to whether the order of the High Court striking out "the balance of the proceedings" amounts to a final determination of the proceedings such that the plaintiff may not again seek to litigate the balance of the issues in those proceedings, on the basis of the *res judicata* principles in *Henderson v. Henderson* [1843] 3 Hare 100, and as followed and explained in the judgments of the Supreme Court in *Re: Vantive Holdings* [2010] 2 IR 118; and/or (b) whether by their conduct and the nature of the settlement announced to the High Court by consent the plaintiff is estopped from again litigating the issues forming the balance of the proceedings which were all struck out by consent.

11. The counter argument is that there is at a minimum a dispute between the parties as to what the settlement was, and that rather than dismiss the proceedings as an abuse of process at this stage, the Court should permit the proceedings to continue so that evidence can be adduced at the trial of the action in relation to the negotiations leading to the settlement, and so that the judge hearing those proceedings can determine whether it is reasonably to be held that the parties intended the terms of settlement to exclude the pursuit of the balance of the plaintiff's claims. It is submitted that this Court cannot at this stage be in a position to determine that issue on this appeal as it would be necessary to hear the oral evidence of all involved in the negotiations. On the basis of the evidence before me it certainly appears that the parties are not *ad idem* on that matter.

12. The defendant submits that even if the plaintiff and its advisers honestly believed that following this settlement it remained open to it to pursue the balance of the claims, it was an erroneous belief as a matter of law, and that the High Court order is very clear in that regard, namely it recited that the parties, as it had been so informed, had agreed to compromise the matters between them on the terms appearing, and the Court went on to strike out the balance of the plaintiff's claims as agreed.. It is submitted that the importance of finality in litigation would be diminished if the plaintiff was permitted to now revive the balance of its claims on a mistaken belief as to or its understanding of the terms upon which the High Court proceedings were concluded.

13. Whether this case fits neatly into the principles in *Henderson v. Henderson* can be debated. It can be argued that there was no determination by the Court of the issues which were not part of the settlement. In its classic formulation, the rule in *Henderson v. Henderson* is to the effect that parties to a litigation must bring forward their whole case, and will not be permitted, save for some exceptional circumstance, to raise in other proceedings any matter which they could have raised but failed to do so, whether because of negligence, inadvertence or even accident. Any such attempt to re-litigate such matters will be restrained as an abuse of process, because there is both a public interest and the litigant's interest in the finality of litigation. Behind the rule is the interest in the finality of litigation and, in the words of Murray CJ (as he then was) *in Re: Vantive Holdings* [supra], " *to protect a party from being harassed by successive actions by another party when the issues between them either were or could have been determined with finality in the first proceedings …".* Denham J. (as she then was) expressed similar sentiments in her own judgment in *Re: Vantive Holdings* when she stated:

> *"There are exceptional circumstances, in the interests of justice when a matter may be revisited. But the fundamental principle is that it is in the public interest and for the common good that there should be finality in litigation. An aspect of this principle is that parties should not be exposed to multiple litigation and should have closure on an issue. Also there is the public interest that the limited resources of the court should be used justly and with economy …".*

14. I prefer not to decide this case on the basis of *Henderson v. Henderson*, given that the issue in the present case is not strictly speaking that the plaintiff in the High Court proceedings failed to raise issues which they could have raised, or bring forward all their arguments. The new proceedings are not seeking to raise new arguments on the same issues which they could have raised in the High Court proceedings.

15. The next question is whether or not the principle of *res judicata* operates so as to preclude further litigation in relation to the "*balance of the proceedings*" which were struck out by consent as part of the settlement terms. I have been referred to a number of helpful authorities by each side. I will not refer to them all. Some of these cases have arisen from motor car accidents where each party took proceedings against the other, and an issue arise as to whether a settlement of one case determined liability in the other. The plaintiff has referred to the judgment of Carswell J. (as he then was) in *Trainor v. McKee* [1988] N.I.566. In that case each party had sued the other for personal injuries. McKee's case came on first for hearing but on the day was settled and, by consent, judgment was entered against Trainor for the agreed damages and costs. I should add that there was a plea of contributory negligence in the case. Trainor's case proceeded at a somewhat leisurely pace, but eventually an order was made directing a preliminary issue be tried as to whether the issue of liability in the case was already *res judicata* by virtue of the settlement and order made in the earlier proceedings. Carswell J. saw the issue as being "*whether the consent judgment involved by necessary implication an acceptance of full liability by Mr Trainor in the action brought by Mr McKee, so as to estop him from claiming in this action that McKee was negligent*". In the case it was contended on the part of McKee that unless it had been expressly agreed that the settlement was made without prejudice to Trainor's right to claim in respect of his injuries in further proceedings, he must be taken to have accepted full liability by consenting to the judgment. On the other hand it was contended by Trainor that it was for McKee to obtain express agreement to the effect that further proceedings would not be pursued by Trainor if the settlement was to be

regarded as one of full liability. Carswell J. agreed that this onus was upon McKee, and that in the absence of express agreement it is generally not possible to determine whether a settlement in such action was based on full liability or took into account a deduction for contributory negligence. He went on to conclude that by agreeing to the settlement of the proceedings brought by McKee, neither Trainor nor his insurers acknowledged that Trainor was fully liable and that it was open to Trainor to pursue his claim against McKee, and that he was not estopped for so doing by the earlier consent judgment.

16. The plaintiff has also referred to the judgment of Keane J. (as he then was) in the Supreme Court in *McCauley v. McDermot* [1997] ILRM 486. The facts in that case are very different, but the plaintiff refers to the judgment for its helpful recital of the necessary ingredients for issue estoppel to arise i.e. "*(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies*". It is urged in the present case in particular that since the parties in the present case are not the same parties as in the previous case there can be no question of an estoppel arising.

17. The plaintiff has referred also to the decision of the House of Lords in *Bradshaw v. McMullen* [1920] 2 IR. 412 as authority for the proposition that simply because an order is made by consent following a compromise of the proceedings does not mean that there has been an adjudication on the issues in the proceedings such that an issue estoppel or estoppel by record arises. In his speech, Lord Shaw of Dunfermline stated in this regard:

> *" … the overruling consideration is that there should have been a judicium. That is to say, that the merits of the identical dispute between the identical parties, on the identical subject-matter, and on the same media, should have been settled by judgment. The judicial mind should have been applied to it. This is the principle, familiar and fundamental. And it is confirmed by the highest authority. I refer in particular to Jenkins v. Robertson (1) 5 M (H of L) at p. 34, and White v. Lord Moreton's Trustees (2) 3 M (H of L) at p.60. From the former case I venture to cite this passage from the opinion of Lord Romilly: 'Res judicata, by its very words, means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that the one side or the other side is right, and has pronounced a decision accordingly; but when an action of declarator is brought, and a verdict is obtained by the pursuers, and that is set aside, and then an arrangement takes place by which in consideration of the payment of a sum of money, an interlocutor is pronounced for the defenders, and the Court simply registers that interlocutor, without expressing any judicial opinion on the subject, I am of opinion that it is contrary to all principle to consider that that can be treated really as res judicata'".*

18. Interestingly, however, Lord Shaw went on immediately to state:

> *"It is, I am aware, possible to maintain that a judgment by consent has the qualities of a judicium to which I have referred. There are expressions of opinion in some of the numerous English cases upon the subject. It seems to me that such a doctrine may be founded, not upon the judgment pronounced, but upon the consent with all its limits and to all its extent which preceded the judgment; that, in short, you have there left the region of strict res judicata, and entered the region of a possible wide estoppel."*

This latter passage is interesting because it seems to have relevance to the present case, because, while there is no doubt in my mind that there was never any adjudication upon any issue in the balance of the proceedings by Murphy J. when he made the consent order, and that the principle of *res judicata* ought not to operate for that reason in relation to those remaining issues, nevertheless there may yet be an estoppel arising by virtue of the consent of the plaintiff to the disposal of the proceedings in this way. It begs the question of course as to what was being consented to and what was understood by both parties as to what was embraced in that consent. I agree that in such circumstances the question leaves the strict area of res judicata and enters the realm of estoppel, and in particular perhaps, estoppel by conduct.

19. The defendants have referred to a judgment of O'Neill J. in *Sweeney v. Bus Átha Cliath* [2004] 576 in support of their contention that the order made by consent in which a declaration was granted and the balance of the proceedings were struck out is to be distinguished from a case were simply the proceedings are struck out by consent with no further order. In the former case it is submitted that there has been a judicial determination, whereas in the latter there clearly has not, since the judge has simply been asked to strike out the proceedings. I will not set out the very clear and helpful terms of that judgment in detail. But I would refer to a passage on page 583 where the learned judge agrees that "*where, by consent, the court pronounces a judgment in favour of a party to litigation, that gives rise to an estoppel in respect of those issues which were necessarily determined for the purpose of that judgment*". He went on to state:

> *"Where, as in this case, the proceedings are brought to a conclusion by an order simply striking out the proceedings, it cannot, in my view, be said that any judgment is given or that any decision is made. The essence of a strike out of the proceedings is to terminate the proceedings without any recourse to a judicial decision on the claims made in the proceedings. A judgment by consent is wholly different because what happens there is that the court, with the agreement of the parties, moves to an agreed determination on the claims made in the proceedings. Hence, although there is not a judgment which expressly deals with the issues raised in the proceedings, it can, nevertheless, be said that in order for there to be a judgment, certain issues were necessarily determined for that purpose. Nothing of the kind can be said where the proceedings are terminated by a simple strike out. It cannot be said, without further evidence, what the outcome of the case has been between the parties and it cannot be inferred from a strike out what issues are necessarily determined. Hence, in my view, as a matter of principle, an order of the kind made in the Circuit Court proceedings here, although final, cannot satisfy an essential requirement in order to invoke the doctrine of res judicata, namely, to indicate the issues either expressly determined or necessarily determined, so that it can be said that these same issues cannot be litigated again in further proceedings by a party against whom they have been determined."*

20. I respectfully agree with that analysis and, adopting it for the purpose of the present case, it seems to me that I should conclude that while the declaration made by Murphy J. by consent on the 4th November 2010 renders the issue relating to the ownership of the lands identified on Map 3 finally decided for the purpose of the *res judicata* principle, one cannot say the same in relation to the balance of the proceedings which were merely the subject of a strike out order by consent, and that accordingly the commencement of fresh proceedings in the Circuit Court in relation to the balance of the proceedings is not an abuse of process by reason of *res judicata*.

21. Nevertheless, on the available evidence it would appear that the plaintiff withheld from the defendant during the negotiations its belief and intention to re-commence proceedings in the Circuit Court in relation to the balance of the claims brought in the High Court, even though it was consenting to and did consent *to the "balance of the proceedings being struck out*". The plaintiff kept its powder

dry in that regard. It was perfectly understandable for the defendants to have believed, as they say they did, that all the issues between the parties were resolved by agreement and on the basis that orders would be made by the High Court in the terms said to have been agreed in order to dispose of all issues between the parties. In fact they have stated that it was a matter of great relief to them that after such a lengthy dispute between the parties all issues were finally disposed of.

22. Counsel for the plaintiff and Counsel for the defendant were in court when the terms of settlement were announced to Mr Justice Murphy. In my view, if it was the intention of the plaintiff to commence fresh proceedings in the Circuit Court on the very next day, that intention should have been communicated to the defendant's legal team, and indeed it would have been wise to include in the terms read out to the court something to the effect that it was agreed that this settlement and order was without prejudice to the plaintiff's entitlement either to continue with the balance of its claims in new proceedings in the Circuit Court, or indeed to have the balance of their claims transferred to the Circuit Court for hearing. In my view that would have been the correct thing to do, and indeed an obvious things to do, given the fact that the plaintiff had already formed the intention to commence fresh proceedings, or had at least been advised by its lawyers that this was permissible.

23. In view of my conclusion that the balance of the proceedings are not caught by the doctrine of res judicata and are not therefore an abuse of process, I will set aside the order of the learned Circuit Court judge, and the make an order that the defendant's motion to strike out the plaintiff's claims be struck out. It follows that the action will now proceed. No Defence has yet been filed and delivered on behalf of the defendants. It will be a matter for them to plead as they wish and are advised in relation to the conduct of the negotiations which led to the settlement of the proceedings, to adduce what evidence there may be in that regard, and to raise any issue they see open, as to whether or not during those negotiations anything was discussed, agreed or understood between the parties in relation to whether all issues were thereby resolved and finally disposed of, or whether any issues forming part of the "balance of the proceedings" were understood to be left over for another day, and thereby argue successfully that by its conduct the plaintiff is estopped from further pursuing the issues now again raised.

24. That question cannot be determined on the present appeal as oral evidence will be required. The only issue decided by me now is that the issues forming the balance of the proceedings have not been finally determined by virtue of the strike out order in respect of them which was made by consent on the 4th November 2010, and that the present Circuit Court proceedings are not for that reason an abuse of process, despite the obvious desirability for the parties, and indeed the public interest that there be finality in litigation.