THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 199

[2016 No.79]

The President
Hogan J.
Hanna J.

BETWEEN

PAUL DORMER AND GERARD DORMER

APPELLANTS

AND

ALLIED IRISH BANK PLC

RESPONDENT

JUDGMENT of the President delivered on 6th July 2017

1. This is an appeal by the Dormers against two orders made on 5th February 2016, whereby the High Court refused their application to amend the statement of claim in this action and also struck out the proceedings on the ground that they were an abuse of process.

2. The case arose out of the settlement of summary summons proceedings brought by AIB in December 2013. The Dormers claimed to have discovered material to establish that the bank had not complied with the terms on which the claim was compromised and they sued in respect of the alleged breaches of that settlement agreement.

3. The background is that the Dormers had very substantial borrowings from AIB and Bank of Scotland Ireland at the time of a transaction on 8th October 2013. On that date, AIB wrote to the Dormers' financial adviser enclosing a document entitled "Term Sheet" which the letter said contained "Heads of Terms in relation to the refinance of Bank of Scotland Ireland facilities and restructuring of existing AIB debt." The intention was that the Dormers would be able to discharge their liability to Bank of Scotland on the basis of a written down debt which AIB would finance. This was subject to terms and conditions precedent and subsequent.

4. On 6th December 2013, AIB wrote to each of the Dormers calling in the facilities provided to them pursuant to letter of sanction dated 1st October 2012, which it said were payable on demand and which then amounted in total to some €17.6 million odd. The letter referred to the terms of 8th October 2013, claiming that a special condition as to written confirmation from Bank of Scotland had not been forthcoming. When the money demanded was not paid in the time specified, the bank proceeded by Summary Summons which was admitted to the Commercial List of the High Court in due course.

5. The bank's proceedings came for hearing on 30th January 2014, but following negotiations the parties reached a settlement. The agreement provided that if certain events had not happened by 5 p.m. on 3rd March 2014, the Dormers would consent to judgment for the full amount of the bank's claim plus interest accrued and costs. One of the terms was that a deed of settlement with Bank of Scotland was to be effective by the deadline. The agreement was dependent on AIB's providing the funds necessary for implementation. Another term provided that the officials in AIB dealing with the Dormers' accounts would apply to its credit committee for approval, as appears from the material part of Clause 5 (3): –

> "Eamonn Conneely, Sarah Bowen and Michael Morris will . . . recommend to the Area Credit Committee of the Plaintiff a proposal for credit facilities on the terms of the Heads of Terms as issued on 8th October, 2013, as may require to be varied or amended on such terms as Mr Conneely, Ms Bowen and Mr Morris believe to be necessary insofar as is required to take account of valuations received by the Plaintiff pursuant to Special Condition 1 of the Heads of Terms . . . "

6. The officials submitted a proposal in intended or purported compliance with this provision but the Area Credit Committee declined the proposal and the bank's solicitor wrote to the Dormers' solicitor on 12th February 2014, reporting the decision. It followed that the Dormers were unable to comply with the terms of the agreement applying to them. When the matter came back before the High Court on 4th March 2014, the bank sought and obtained judgment in accordance with the agreement, following argument on behalf of the Dormers about the extent of compliance by the bank with its part. They sought unsuccessfully to have the proceedings adjourned so that they could put forward a defence along those lines.

7. The Dormers instituted proceedings against AIB and two receivers appointed by the bank by plenary summons dated 3rd December 2014, claiming, inter alia, various declarations that the bank was obliged to advance funds to them, that the bank misrepresented the terms of the settlement agreement and employed irrelevant or extraneous information in making its decision to refuse funds. The reliefs sought included an order that the judgment be vacated, an injunction restraining enforcement and damages under various heads. In their statement of claim delivered on 7th January 2015, the Dormers alleged that the bank did not comply with its part of the settlement agreement in that the approach to the credit committee "was manifestly and clearly different from the October Heads of Terms." By contrast, it is claimed that the Dormers complied with their part of the bargain. It is stated that the pleaded wrongdoing of the bank was subsequently discovered under a Data Protection request.

8. On the institution of the proceedings, the Dormers obtained an interim injunction and the application for an interlocutory order was admitted to the Commercial List and was heard in February 2015. McGovern J. refused the relief sought and vacated the interim injunction. He held that the Dormers had not shown that there was a fair case to be tried and they also failed on the other grounds they put forward. In his judgment, the judge noted that the Dormers had expressly stated that they were not relying on fraud and he

held that the judgment in issue was not obtained on consent. Hr said that the law was clear in the circumstances as he set out as follows and he concluded as a result that the Dormers could not have the judgment given on 4th March 2014 set aside or vacated.

9. The order of 4th March 2014 is a final order. It was perfected on 14th March 2014, and no appeal was taken against it. There can be no doubt that these proceedings are designed to achieve the setting aside of that judgment. But the law is clear that nothing short of fraud, pleaded with sufficient particularity and established on the balance of probabilities would constitute sufficient grounds for upsetting a previous decision given by the court and which has not been appealed: see *Tassan Din v. Banco Ambrossiano S.P.A* [1991] 1 I.R. 569, 578, where Murphy J. said:

> "It seems to me, therefore, that all that can be said is that at one time a court might have set aside a judgment of a court of co-ordinate jurisdiction not merely for the grounds of fraud but also on the basis of the discovery of new evidence. The law, as I understand it, in this country is that (in the absence of fraud) 'new evidence' can be availed of as part of the appeal process or not at all…."

10. This view of the law was endorsed by the Supreme Court in *Kenny v. Trinity College* [2008] IESC 18.

11. McGovern J. then turned to the question for the Dormers of res judicata. Having considered the transcript of exchanges between counsel and Kelly J at the hearing on 4th March 2014, he concluded as follows:

> "Now that is exactly the same case that the plaintiffs make in these proceedings. So where does that leave the plaintiffs? They say they are not making out any case in fraud. They claim that they were induced to enter into a settlement with the bank on the basis of a misrepresentation, namely, that the three named representatives of the bank would make a recommendation to the Area Credit Committee whereas, in fact, the "recommendation" actually made was nothing of the sort. But that issue has already been canvassed before Kelly J. on 4th March, 2014 and he decided against the Dormers and gave judgment to the bank. The order of Kelly J. has been perfected and not appealed. The issues raised in the present case were canvassed before Kelly J. and he has decided upon those issues. It follows that the plaintiffs are precluded from seeking an order in this Court setting aside or vacating the order of the court made in the earlier proceedings, as no fraud is alleged. Furthermore, the plaintiffs in this action are *estopped per rem judicatam* from making the case that they now seek to make as a means of challenging the judgment against them."

12. The Dormers appealed the decision of McGovern J. to this court and the matter was due to be heard on 23rd November 2015, but the appellants withdrew the appeal on 13th November. On 20th November 2015, the Dormers issued the motion to amend their statement of claim that is now before this court. The defendants had issued a motion on 31st March 2015, to strike out the plaintiffs' claim and that also is before us. In his judgment delivered on 5th February 2016, McGovern J. ruled on the two motions that he had heard together, ordering that the Dormers' application for leave to amend their statement of claim be refused and that the proceedings be struck out on the basis that they disclosed no reasonable cause of action against the defendants and were vexatious and amounted to an abuse of process. The Dormers appeal those decisions.

13. In his judgment, McGovern J. held, first, in relation to the motion to amend:

> "In their original proceedings and in the written and oral submissions made to the court at the hearing of the interlocutory injunction application, the Dormers did not allege fraud against the bank and the other defendants. The present application was seeking to add a new claim for rescission of the settlement agreement in its entirety and/or damages for deceit alleging that AIB was guilty of fraudulent misrepresentation. This claim is totally at variance with the position previously adopted by the Dormers. They based that application on what they said was new evidence, namely, the material in the Addendum document of 14th January 2014. The Dormers were however aware of this report at the time of the application for the interlocutory injunction which was heard on 11th and 12th February 2015. The Defence was not delivered until 2nd February 2015, and the Dormers could have amended their statement of claim without leave if they wished to do so. The application had to be refused because it amounted "to nothing less than an attempt to completely recast the proceedings in order to overcome a fatal legal impediment to the setting aside of the summary judgment obtained".

The Dormers had offered no satisfactory explanation as to why they did not amend the statement of claim when they could have done so without leave of the court.

14. Secondly, concerning the motion to strike out, McGovern J. held that AIB was entitled to succeed under O. 19, r. 28. The court held that its judgment on the interlocutory application was that the Dormers were making precisely the same case in the proceedings as they raised before Kelly J. in trying to resist summary judgment. That judgment was not appealed. In respect of the order made by McGovern J. on 26th February 2015, the Dormers appealed that judgment but withdrew their appeal. The findings made by McGovern J. accordingly became final. It followed that the pleadings as originally presented disclosed no reasonable cause of action against AIB and the other defendants.

15. The Dormers could not succeed on the basis of new facts because the matters that they now complain about were known to them at the time of the interlocutory proceedings and in fact it would appear that they became aware of them in January 2015. The judge held that AIB would be prejudiced severely if the amendment were granted because they would now have to defend the action on a wholly different case than was originally made. The court would not allow the Dormers to do that in circumstances where they were possessed of the relevant information at the time of the previous hearing.

16. McGovern J. found that the Dormers had offered no credible evidence to suggest that the facts were as asserted in the amended statement of claim. They were also unable to overcome the rule in Henderson v. Henderson [1843] 3 Hare 100. To allow them to do so would involve a rehearing of the interlocutory injunction with a further right of appeal. The matters now in dispute between the parties were *res judicata*.

The Notice of Appeal and Respondents' Notice

17. The following issues accordingly arise on this appeal:

> (a) Can the Dormers bring such a case without pleading fraud?
>
> (b) Are they entitled to an amendment to make that plea when they have disavowed it in course of earlier proceedings?
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> (i) Should the court decide that issue on a motion to amend?

(ii) Can the decision be made on principle or in general as it was?

(c) Res judicata

(d) Henderson v. Henderson: is that a reason for refusing the amendment or an argument why it ought to be permitted?

(e) How can the procedural complexities of the case be resolved?

Summary of the Appellant's Submissions

18. The Dormers submit that the purpose of the application for an adjournment before Kelly J. was to explore a potential breach of the settlement agreement. The arguments made before McGovern J. were substantiated by evidence of a breach of the settlement agreement which was not available before. The issue is not *res judicata*. The arguments put forward by the Dormers in the summary proceedings were for the purposes of an adjournment and not a defence against the summary proceedings. Moreover, they were made on the basis of unsubstantiated claims as to the potential breach of the settlement agreement. The application heard by McGovern J. was fundamentally different as there was evidence of an actual breach. Kelly J. never decided on whether or not there was a breach, merely refusing to allow an adjournment to explore the issue further. In the summary proceedings, and prior to the settlement agreement, the Dormers had contested the application for summary judgment. It is submitted that they consented to the judgment was made on the basis of the settlement agreement. Following the rejection of the Dormers' application for an adjournment to determine conformity with the settlement agreement, they made no further submissions to the court and acquiesced to judgment being granted against them. The Dormers emphasise that an application for an adjournment is wholly separate and distinguishable from an application for summary judgment. As such, McGovern J. was wrong to hold that the Dormers contested the application as it was contrary to the evidence which was before the court.

19. As Murray J. said in *L.P. v M.P.* [2002] 1 IR 219, the courts have an inherent jurisdiction to amend or set aside a final order in exceptional circumstances where it is established that there has been a fundamental denial of justice through no fault of the parties concerned and when no other remedy such as an appeal is available. This involves something extraneous going to the very root of the fair and constitutional administration of justice. Murray J. held the fact that a matter is un-appealable is relevant to this issue of whether an application to set aside judgment must be brought by separate substantive proceedings. Judgment obtained by consent is subject to an *estoppel per rem judicatam*. In *Keating v. Judge Crowley* [2010] IESC 29, [2010] 3 I.R. 648 the court held:

> "Absent fraud, or some fundamental issue of justice arising from the conduct of the proceedings, it is difficult to contemplate circumstances in which a party would be permitted, in an appeal or otherwise to impugn a determination by the High Court of an issue, such as liability, which has been expressly conceded by the party concerned. Of course, it is not contended that there was anything in the nature of fraud or fundamental injustice and, in any event, the setting aside of a determination by the High Court on such grounds would require the bringing of separate proceedings before the High Court".

20. In *Charalambous v Nagle* [2011] IESC 11, the Supreme Court dealt with the issue of setting aside a consent judgment. Denham J. dismissed the appeal, but noted that the Court would have considered the application if the appellant had introduced evidence of fraud.

Motion to Amend Pleadings

21. The amended statement of claim alleges fraudulent misrepresentation on the part of AIB. It was submitted that:

(a) the amended statement of claim was necessary for the determination of the real issues in controversy between the parties;

(b) no prejudice to the Respondent arises as a result of the proposed amendments to the Statement of Claim;

(c) The Appellants have advanced credible reasons as to why these amendments are necessary;

(d) There is no basis on which a Court might decide that the Appellants' amended claim was bound to fail.

22. The doctrine of *res judicata* does not apply because there has been no adjudication on the substantial issues in either the amended or original claim and the rule in Henderson does not operate as a bar to proceeding or as grounds for a dismissal. The Dormers have not engaged in the tactical withholding of information or arguments, but rather they have been the victims of same. They acted bona fide throughout. There was no delay in seeking to amend their claims. Indeed, the Dormers attempted to obtain consent to amendment the Statement of Claim before bringing their motion to amend. The interlocutory motion was made on the 3rd December 2014, some two months prior to the new 'facts' emerging on 26th January 2015. The written submissions were prepared in early February 2015, the Dormers could not, at short notice, evaluate the true content of the information being disclosed and process the raw information into facts sufficient to stand a claim as to fraud. The trial judge did not appreciate what was described as the "bombshell" nature of these late disclosures.

No Reasonable Cause of Action

23. It is submitted that Kelly J. did not decide on those issues during the summary proceedings. McGovern J. ruled the respondents were entitled to an order striking out the proceedings as the Dormers disclosed no reasonable cause of action against the Respondents. It was also held that the proceedings amounted to an abuse of process. Citing *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21, the Dormers submit that the distinction between the types of application is clear. An application under the R.S.C. is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out in *Barry v. Buckley* [1981] I.R. 306, 308, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under O. 19, r. 28. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the court to prevent abuse can be invoked. It is important to keep that distinction in mind. It is also important to note the many cases in which it has been made clear that the inherent jurisdiction of the court should be sparingly exercised. It must further be recalled that all a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and

which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.

A Party Opposing Application for Leave to Amend must show Prejudice
24. No discovery or trial of the case has been conducted such that the appellants' application to amend should prejudice the respondents. The Dormers submit that the trial judge did not have any regard to the fact that the Bank did not disclose the information until the exchange of affidavits during the course of the interlocutory injunction, which prejudiced the appellants as they had ran a case for breach of contract on an entirely different basis.

The Plaintiffs have offered Credible Evidence
25. It is submitted that the learned judge erred in finding that the appellants had not given any credible evidence to suggest that the facts are as asserted in the proposed amended statement of claim.

Satisfactory Explanation Offered to Court
26. The respondents had delivered their defence on the 2nd February 2015 and the appellants had filed and served on the respondents the amended statement of claim with a request to consent as early as 20th October 2015 in advance of abandoning their appeal to the Court of Appeal. That request was refused by the respondents on 6th November 2015, and only after on 13th November 2015 was the appeal withdrawn for the purpose of determining the real questions in controversy between the parties. The appeal was withdrew on the basis that the amendments would crystallise the origin of the appellants' claims to a time on and or prior to signing of the Settlement Agreement and not merely subsequent to 30th January 2014. There is no argument that the new information was available before the defence was received and before the interlocutory hearing. The appellants maintain that they were fully preoccupied with injunction proceedings in February 2015 when these 'facts' emerged (27th January 2015) only a few days before the interlocutory hearing. As is noted from the above, the respondents sought to restrict discovery and did not subsequently make any discovery, which added to the time taken to reach a conclusion that fraud was apparent. It is submitted that the learned High Court judge erred in stating that the appellants gave no reasons as to why they did not amend the statement of claim earlier.

Summary of the Respondents' Submissions
27. It is submitted that the Dormers' appeal is not a substantial challenge of the High Court's findings, but rather the refusal to allow them to amend their Statement of claim. The Respondents note that the issues with the application for an interlocutory injunction were the subject of a prior appeal which was subsequently withdrawn. Consequently, having withdrawn their appeal, the Dormers' must be bound by the High Court's initial findings when considering the validity of a motion to strike-out or amend their statement of claim. Moreover, the judgment entered against them was done by way of consent. In such circumstances they could only challenge the judgment through the appeal mechanism and not through separate proceedings. The withdrawal of that appeal prevents the Dormers from disputing or impeaching Kelly J's findings. It is submitted that the Dormers are seeking to tactically change their pleadings from breach of contract to fraud in an attempt to subvert the findings of the High Court.

28. It is argued that the claim that AIB withheld material information is one without merit. To the contrary, AIB exhibits the material in question before the hearing of the interlocutory application by way of an affidavit. They did so without being compelled to do so by the court. The Dormers acknowledge that the claim of fraudulent misrepresentation is a new one. It is submitted that the argument that the rule in Henderson ought not to apply to proceeding by reference to earlier determination of interlocutory matters is misguided. The purpose of the rule in Henderson is to avoid a "replay" of the action in the same court. The Court of Appeal considered an attempt to amend proceedings in this manner as an abuse of process and would prejudice the other party. The High Court's rulings are based on similar understanding of the purpose of the rule in Henderson.

29. It is unclear why having received the material prior to the hearing of the interlocutory proceedings could not have been incorporated into their submissions at that point. This is compounded by the reference to said material in replying affidavits. The real reason the Dormers seek to amend their pleadings is that they failed on the breach of contract point and are aware that fraud is their only means to impeach the judgment. It is significant that they were in possession of the material they now say is evidence of fraudulent misrepresentation throughout the interlocutory injunction hearing. The documents show that AIB were happy to approve the refinancing of the Dormers' loan facilities subject to amended terms. There is no evidence of fraud to the extent that the October Heads of Terms were now "meaningless". Rather, they had been amended to take account of valuations received, two new conditions and the appointment of an alternative financial advisor. As such, the new claim was bound to fail at any rate. It is submitted that the Dormers rely solely on an assertion that AIB acted in bad faith and deliberately concealed material information that may have impacted the settlement negotiations. There is no evidence of this mal fides the face of the documents themselves do not allow for such an assertion.

30. The Dormers claim that they were aware of possible fraud, but their legal team id not have time during the proceedings to examine the material in detail so as to put that assertion before the court below. The respondents highlight that nowhere in their affidavits is there the suggestion of fraud. Furthermore, the first time this suggestion came to light was ten days before the appeal was due to be heard at which point lengthy submissions had been prepared and exchanged. There is simply no justification for the delay in putting fraud before the court where significant costs have already been incurred. Any suggestion otherwise is without credibility.

The Relevant Law
31. Order 19, r. 18 provides:

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

32. Order 28, r. 1 states:

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

33. Addressing himself to the parameters of the rule, Lynch J. said n *DPP v Corbett* [1992] I.L.R.M. 674, 678:

> "The day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party. While courts have a discretion as to amendment that discretion must be exercised judicially and where an

amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendment should be made. If there might be prejudice which could be overcome by an adjournment then the amendment should be made and an adjournment also granted to overcome the possible prejudice and if the amendments might put the other party to extra expense that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party shall indemnify the other party against such expenses."

34. In *Donohoe v Browne* [1986] I.R. 90, 99 Gannon J. referred to *res judicata* as:

> "A matter of pleading to prevent as a matter of justice an abuse of the process of the administration of justice. Of its nature it can be raised properly only as against a party by whom or against whom a judgment has been obtained. That is to say the injustice to be avoided is the apparent disclaimer of a binding court order by the party bound by it."

35. In *Ord v. Ord* [1923] 2 K.B. 432 Lush J. stated:

> "The litigant must admit that which has been judicially declared to be the truth with regard to the dispute that he raised. In order to see what the fact is that he must admit the truth of one has always to see what is the precise question, the precise fact that has been disputed and decided. This has constantly been stated to be the law."

36. In *Brunsden v. Humphrey* (1884) 14 Q.B.D. 141) Brett M.R. emphasises that the test for whether a case was *res judicata* was "… whether the same sort of evidence would prove the plaintiff's case in the two actions".

37. In *Reamsbottom v Raferty* [1991] 1 I.R. 531 Johnson J. noting,

> "The issues must be identical. They must have been decided between the same parties, in the same respective interests or capacities or between a privy of each, or between one of them and a privy of the other. The estoppel must be available to and operative in respect of each party, i.e. it must be mutual." [Emphasis added]

38. In *Sweeney v. Bus Átha Cliath* [2004] 1 I.R. 576, Keane CJ. held:

> "[the requirements of the plea of res judicata] are, to use the other name of issue estoppel, firstly, that the same question has been decided, secondly, that the judicial decision which is said to create the estoppel was final and finally, 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. If there was indeed a determination of the same question as has arisen in these proceedings, that is, if there was a judicial determination, then, undoubtedly, the other requirements are met because the judicial decision was final and the parties were the same".

39. In *Citywide Leisure Limited v. IBRC* [2012] IEHC 220, McGovern J. summarised the factors to which the Court should have regard when considering an application for leave to amend as follows:

> "I accept the following summary of the principles established by the authorities which have been set out by the defendant:
>
> (i) A party who applies for an order allowing it to amend its pleadings must furnish reasons as to why the court should exercise its discretion in its favor.
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> (ii) The court is entitled to look at those reasons and the evidence adduced there from to inform the exercise of its discretion.
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> (iii) Fundamentally, the exercise of that discretion involves an analysis as to whether the new claim involved the real issues in controversy between the parties.
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> (iv) The court is entitled to look at other factors.
>
> (v) The court can enquire if the new claim or new plea is bound to fail.
>
> (vi) The inquiry by the court as to whether the new claim is or is not bound to fail can involve analysis by reference to either or both of the tests set out in Order 19, rule 28 or the court's inherent jurisdiction.
>
> (vii) If the new claim fails to meet both these tests, then it is not one of the real issues in controversy between the parties.
>
> (viii) If the new claim was bound the fail, the amendment will not be allowed."

40. In *Cuttle v. ACC Bank Plc* [2012] IEHC 105, Kelly J. emphasised the liberal application of leave to amend stating (at para 7):

> "7. In *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383 at 401, Geoghegan J. described this as a 'liberal rule'. The notion behind it is that justice is best served if the real matters in dispute between litigants are brought before the court and determined by it. This is clear from another passage from the judgment of Geoghegan J. in the same case where he said:-
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> 'While undoubtedly there is a discretion in the court as to whether to make the order or not and other factors may come into play, the primary consideration of the court must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation'.
>
> 8. On an application of this sort, it is not the task of the court to adjudicate on the merits of the proposed amendments or to speculate on the likelihood of their success at trial. In Cornhill v. Minister for Agriculture [1998] IEHC 47; O'Sullivan J. in dealing with an application for leave to amend a statement of claim was confronted by two opposing approaches to that issue. The defendants argued that there was an onus on the plaintiffs to establish by credible evidence that the proposed amendments raised a real issue between the parties and that the plaintiffs had failed to do so. The plaintiffs argued that the appropriate test was whether the proposed plea, if part of the original statement of claim, would have

survived an application to strike out in limine on the basis of having no reasonable prospect of success. O'Sullivan J. clearly preferred the submission of the plaintiffs and expressed the view that:

'An amendment of the pleadings should he allowed if it would have been appropriate in the original pleadings and would have withstood an attack under Order 19, rule 28'.

9. In the present case, the parties have agreed that the approach of O'Sullivan J. is the one which I ought to adopt. So the net question is, if these amendments are permitted will they survive an application that they be struck out under the inherent jurisdiction of the court? That jurisdiction allows the court to stop cases with no reasonable prospect of success in their tracks and not permit them to go to trial.

10. This approach of the parties in the present case is consistent with various judicial dicta on amendment of pleadings and in particular with the observations of Clarke J. in *Woori Bank v. KDB Ireland Limited* [2006] IEHC 156. That judge was of opinion that the court should lean in favour of allowing an amendment unless it is clear that the issue sought in the amended pleading must fail. This is not to say that the court ought to enter into the merits of the issues sought to be raised save to the extent of asking itself whether the party seeking the amendment will necessarily fail on the issue which will require to be tried as a result of the amended pleading."

Discussion/Analysis

41. I think that in order to understand this case we have to go back to the beginning. The bank brought its summary summons proceedings against the Dormers. On 30th January 2014, the hearing of the application for judgment was adjourned to enable the parties to negotiate. They reached agreement, whereby the three bank officials dealing with the case were to apply to the Area Credit Committee of the bank for sanction of the facility in the October 2013, Terms of Offer and the Dormers agreed to take other steps which were dependent on the loan being available. At that point, there was no longer a summary summons application for judgment before the court; the settlement was a contract between the parties which superseded the proceedings. The summons, however, remained in existence but only for the purpose of the settlement and in accordance with its terms.

42. The Dormers' case is in essence a claim for relief for misrepresentation and breach of contract in respect of the settlement agreement of the 30th January 2014. Their case is that the bank officials did not make application to the credit committee in accordance with the terms of the agreement. When the matter came before the High Court on 4th March 2014, the bank's summary proceedings had now been superseded by the settlement. The only matter before the court was the settlement. The Dormers had agreed that if certain specified events had not occurred they would consent to judgment. On this occasion, they were not consenting to judgment but were seeking an adjournment of the proceedings so that they could pursue their investigation or complaint about the bank's compliance with its obligations under the settlement. The court was satisfied that the terms were clear and it was beyond dispute that the specified events had not happened and so in the circumstances the court held that the bank was entitled to judgment.

43. I do not think it can be said that the issues raised by the Dormers' plenary summons and statement of claim were decided by the High Court on 4th March 2014. It is true that on that occasion, the Dormers were seeking an adjournment for the purpose of advancing a claim – to put it as neutrally as possible – of some form of misrepresentation by the bank or breach of its contractual obligations in regard to the presentation to the Area Credit Committee of the bank. It seems to me, however, that the High Court had decided something quite different, namely, that in the circumstances as they existed at the time there was no answer to the bank's entitlement to judgment in accordance with the settlement agreement. It is something different to say that while the terms of the agreement were clear and that the specified events had not happened, the bank was nevertheless in breach of its obligations and was not therefore lawfully entitled to insist on the enforcement of the contract terms. The contract was indeed clear and the specified events had not come to pass. Prima facie, therefore, the bank was entitled to the remedy agreed in the settlement. The bank's summary summons proceedings continued to have life only in accordance with the settlement.

44. At that point, the relationship between the parties was governed entirely at this point by the terms of the settlement. The Dormers had agreed that they would consent to judgment if the nominated events had not happened and they had not happened. It followed, therefore, that AIB was claiming entitlement to judgment in accordance with the agreement. The Dormers were protesting that the agreement had not been fully or properly performed by the bank officials. The true question, therefore, as it seems to me that arose on 4th March 2014 was whether the Dormers were in breach of contract by withholding their consent to judgment in the terms of the summary summons. In reality, the bank now had a different claim which was a claim for breach of the settlement agreement by failure on the part of the Dormers to consent to judgment and the Dormers were asserting in turn that they had good reason to withhold their consent because of the bank's failure to comply with the contract of settlement. My view is that the summary summons proceedings were extinguished by the settlement, except for the continued existence of the claim to judgment as a term of the compromise of the proceedings.

45. What, then, was before the court on 4th March 2014? We may exclude on the above reasoning the bank's summary claim. The bank submitted that, on the terms of the settlement it was entitled to judgment. On the face of it, the claim was irresistible. But on a closer analysis it seems to me that the situation is somewhat more complex. The settlement was that the Dormers would consent to judgment in the specified circumstances. The central point that I am identifying is the altered legal relationship between the parties. If I am correct, it was not open to the bank to demand judgment on the original debt claim contained in the summary summons because it was restricted to a claim under the contract of settlement, based on the allegedly wrongful withholding of consent to judgment by the Dormers. The latter would no doubt defend and counterclaim that alleged breach of contract by alleging misrepresentation and breach of contract by the bank. That, however, did not happen. The bank claimed to be entitled to judgment and the High Court was satisfied that the circumstances as provided for in the settlement were such as to justify the order sought.

46. The High Court decided that the objective circumstances gave the bank the right to obtain judgment. There was however no determination of the Dormers' complaint about the bank's alleged breach of contract. The court rejected the application for an adjournment to enable the Dormers to advance such a case, but that is a different thing from a decision or determination of the claim itself. My conclusion as to the nature of the proceedings on 4th March 2014 is first and fundamentally that the claim by the Dormers as to misrepresentation and breach of contract by the bank was not before the High Court and was not heard or determined or adjudicated upon. I think that point stands irrespective of whether my analysis of the changing relationship between the parties is correct or not. The court never embarked on a hearing of the Dormers' allegations; it simply refused an adjournment to enable them to put that forward. On my understanding, as explained above, AIB was not actually entitled to judgment under the terms of the settlement agreement; the most it had was a claim for specific performance and/or judgment in accordance with the terms of the settlement and/or damages for breach of contract by the Dormers.

47. The High Court ruled that the Dormers were bound by the clear terms of the settlement as it related to their undertakings. It did not decide whether the bank was in breach of its obligations under the agreement, which is the very case which is made by the

appellants in their proceedings. Res judicata arises in two modes, namely, cause of action estoppel which prevents the entire case proceeding in the latter action, and issue estoppel which prevents a particular question that has previously been decided from being re-litigated. Neither would apply by reason of that judgment.

48. I find myself in disagreement with the High Court in this case in its interpretation of what happened on 4th March 2014. It is not a case of *res judicata* because the issue in question (namely, alleged breach of the settlement) was not actually decided. Neither is it a matter of issue estoppel because, again, the issue was not decided. I cannot see that the refusal of an adjournment to enable a party to make a case or to put forward a case is necessarily a determination of the case. It is not necessary to formulate a general rule on this; I do not wish to rule out the possibility of that happening, but I am satisfied that it cannot be said to have happened in this case. In summary, therefore, on my interpretation it is clear that the High Court could not have determined the breach of contract issue that arose. Independently of that view, I do not think on the facts of this case that the Dormers' claims of misfeasance by the bank were actually decided by the High Court.

49. The High Court did not determine any issue between the Dormers and the bank on 4th March 2014. Kelly J. refused an adjournment and proceeded to give judgment for the bank. But that left undetermined any question of the bank's compliance with its obligations under the settlement agreement. The Dormers issued their proceedings in December 2014, claiming that the bank was in breach of the terms of the agreement of 30th January 2014, because of the way in which the three officials made the application to the Area Credit Committee. The plaintiffs alleged that a refusal of the credit sought was either inevitable or highly likely in the circumstances. They had obtained the relevant documents under the Data Protection Acts and were pursuing a claim of misrepresentation. They did not, however, plead fraudulent misrepresentation.

50. Although different headings of claim were included in the plenary summons and statement of claim, the essence of the Dormers' case was breach of contract and misrepresentation in and about the settlement agreement and the implementation by the bank of its undertaking in accordance with it. Such compliance was a condition precedent to the bank's entitlement to judgment pursuant to the agreement, as it was claimed. It followed, therefore, that if the Dormers were able to establish misrepresentation and breach of contract as they alleged, they would be entitled to have the judgment set aside. It had been obtained on the basis of an agreement and if that bank had been in breach of that agreement, the Dormers could have it vacated.

51. The Dormers' proceedings came before the High Court in February 2015 on their application for an interlocutory injunction to continue until trial the order that they had previously obtained to restrain execution of the judgment. The general rule that was applied by McGovern J. in his judgment on the interlocutory application is that it is not possible to revisit and reopen a decision of the High Court for the purpose of setting it aside, unless there is an allegation of fraud. What this means is that the judgment is final for all practical purposes and in almost all circumstances. Specifically, a party cannot go back to court because new evidence has come to light that would or might affect the original decision. There has to be finality to litigation. Even if apparently compelling new evidence emerges, that is not a basis for applying to the court for reconsideration of the decision. If such a situation arises, a party may apply to an appellate court for liberty to adduce additional evidence for consideration on the appeal, subject to the jurisprudence as to when that facility might be extended. The position is different if a party alleges that the judgment in the court below was obtained by reason of fraud. It is not a question whether the proceedings before the court include a claim for fraud because that does not make the action different. However, when a party asserts that the court was misled into giving judgment by dishonest behaviour, then that is obviously a different matter. A person making such a claim can go back to the court of trial.

52. When the Dormers issued their proceedings, they did not include a claim for fraud and the case was as stated above. I do not consider that the rule concerning the setting aside of a judgment, restricting it to the circumstance where fraud in obtaining the judgment is the claim applies in this case. The Dormers are not claiming that the bank misled the High Court into giving judgment; their case is, rather, that the bank did not comply with the agreement of settlement of the summary summons proceedings and, as a result, the bank was not entitled to obtain the judgment that was granted by Kelly J. In my judgment, if it is a term of a settlement that one party will consent to judgment on the happening or non-happening of events and judgment is duly given on a basis of fact, it is open to an aggrieved party to complain that the other engaged in conduct amounting to misrepresentation or breach of contract which vitiated that party's contractual entitlement to the judgment under the terms of the settlement agreement. Obviously, that will be a very unusual set of circumstances. But I do not understand how the aggrieved party is deprived of the entitlement to claim to have the judgment set aside unless fraud is pleaded. It would not be a satisfactory outcome for the innocent party to succeed in separate proceedings in which he claimed compensation or other orders but left the original judgment standing. That is not the rule in law, as I understand the position. I would not propose a new general rule but would rather merely declare that in the circumstances as they obtain in this case the Dormers were not shut out of the remedy they sought, namely, vacation of the High Court order. The fact that the Dormers did not allege fraud in the pleadings or did not make the case that the judgment was actually obtained by fraud does not in itself represent a bar to the relief they claimed in the very unusual and particular circumstances in which the judgment that was given by the court was a term of the contract between the parties. It was not that the court resolved a dispute and gave a judgment; the parties agreed between themselves that on the happening or non-happening of certain events judgment would ensue.

53. The alternative view, namely that absent fraud or a claim in the proceedings for fraud a party could not return to the court of judgment in a subsequent action, would give rise to a potentially serious injustice. Notwithstanding that the wronged party established breach of the contract whereby judgment resulted by agreement, it would be shut out from having the judgment set aside. It would be restricted to its right to claim damages or other orders, but would still be subject to the opprobrium of having had judgment given against it. It is true that an appeal would be open, but it is difficult to see how in disputed circumstances of allegations of breach of contract the matter could be satisfactorily resolved in appellate proceedings. I think that logic as well as legal principle supports the view I take.

54. On the question of *res judicata* in respect of the decision by McGovern J., it is important to keep in mind the decision that the court had actually to make in February 2015. The order was to refuse to continue the injunction. It cannot be the case therefore that the court proceedings on that occasion, considered by reference to the matter that was in issue and the order actually made, could be a bar to the further progress of the claim. *Res judicata* applies in circumstances where the order previously made by the court is binding on the subsequent proceeding. The question then arises whether there was issue estoppel or whether the rule in Henderson v Henderson applies. In my view, neither of these principles governs the case.

55. The matter for hearing and decision in the High Court in February 2015 was whether the injunction obtained by the Dormers restraining enforcement of the order of Kelly J. of 4th March 2014, should be continued. The court went beyond what was necessary for the resolution of the dispute presented by the application, which is not to deny the entitlement of the learned judge to make such observations as he thought fit. It does, however, mean that the findings in the judgment which are not the subject of the court's order and which went above and beyond what was required do not constitute binding legal rulings. They are not beyond question subsequently, notwithstanding the decision by the Dormers to withdraw their appeal.

56. On an application to strike out proceedings, the court considers not only the case as pleaded but also on the basis of any amendments that might reasonably be anticipated. It is true that the amended claim is different and inconsistent with the submissions made by counsel for the Dormers at the interlocutory injunction hearing. Clearly, they have changed their minds and wish to make this case now. It may well be that they were disappointed that the outcome of the injunction application and the reasoning in the court's judgment, specifically the reliance on the fact that fraud was not pleaded. Instead of proceeding with their appeal, they may have calculated that a more fruitful approach would simply be to introduce and supply what was missing by pleading fraud. That essentially is what the High Court inferred when saying that the application was attempting to overcome a legal impediment. However that may be, the question remains as to whether these parties are entitled to the amendment they seek. In other words, I am not of the view that because the amendment can legitimately be seen as something of a stratagem it follows that it is to be disallowed. Neither is it fatal in my view that the claim is inconsistent with previous submissions or, should I say, it is not necessarily fatal that it is totally at variance. It is in fact just the opposite of what counsel told the court was the case, which was undoubtedly a correct observation having regard to the case as pleaded that that point. And that was no doubt in accordance with the instructions given by the clients. So there was a volte face but it does not seem to me to be fatal to the application to amend. Obviously, it calls for explanation unless the circumstances establish some reasonable ground for the alteration of position.

57. I do not think it is relevant that the Dormers could have amended the statement of claim prior to the delivery of the bank's defence. That is, of course, correct, in accordance with the Rules of the Superior Courts, but it is not a reason why an application to amend should be refused. The application is unnecessary if the amendment is made in time. It is a necessary condition for an application to be made for amendment that the time when it could have been done without leave has gone past so I do not think that any adverse conclusion can be drawn from that.

58. The Dormers based their application on the new material that they obtained under the Data Protection Acts in relation to the application made by the three bank officials to the Area Credit Committee in February 2014. The High Court held that they were aware of that material at a time prior to the injunction application in February 2015. It would appear that they knew about it in January 2015, but nevertheless proceeded with the interlocutory injunction application on the basis of the case as it then stood. For my part, I am not clear as to why that should necessarily exclude the proposed amendment.

59. The courts generally adopt a generous approach to applications for amendment, following a policy that it is proper and indeed necessary to have all the relevant issues in dispute between the parties brought before the court. In this respect, it seems to me that the rule in Henderson v. Henderson actually supports the Dormers' motion to amend. It would be practically a Catch-22 situation if they were to be defeated on a basis that they had not brought forward their whole case while being denied the means of doing just that. It is not satisfactory to have a claim defeated on a rule of technical pleading. It is also the case that the courts are sympathetic to amendment in circumstances where it will save the proceedings from premature elimination.

60. Rather than acting as an obstacle for the Dormers' application, the rule in Henderson v. Henderson [1843] 3 Hare 100 supports the proposition that the suit at hand should be amended to reflect the full exposition of the plaintiffs' claim.

61. The rule is that:

> "[T]he Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances} permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

62. The amendment sought in this case is grounded in the facts of the case as claimed by the Dormers. This is not to say anything about the merits or the weight to be ascribed to the contention. It is merely to observe that the Dormers are in a position at least to assert on the basis of the revealed material that the bank officials did not make a case to the credit committee in accordance with what was agreed in settlement of the summary proceedings. If such a claim had been made in the original pleading, it could not, in my view, have been struck out on the basis that it was frivolous and vexatious or that it was bound to fail. It may indeed be defeated and even roundly condemned as an unjustified attempt to besmirch the bank officials involved but that will only happen on a consideration of the evidence. Obviously, the Dormers do not have to establish the truth of the allegations they make in their amended pleadings; it is sufficient if they establish that there is a factual basis and I think they have done that. The fact that the case was originally pleaded without that allegation does not make it inadmissible.

63. The period allowed by the Statute of Limitations for the plea now in contention has not expired.

64. The High Court held that AIB would be severely prejudiced if the amendment were granted because they would now have to defend a wholly different case than was originally made. It is true that the claim of fraud is new but the facts on which it is based are the same as those relied upon to establish misrepresentation and breach of contract. I do not think it can be said as a matter of principle that prejudice follows. And as a matter of fact, no actual prejudice has been established. Without a specific case of prejudice made by the bank, I do not think that this is a ground on which the Dormers should be now excluded from advancing.

Conclusions

65. I am, therefore, of the view that this appeal should be allowed in respect of the refusal of the Dormers' application for amendment and as to the striking out of the action.