THE COURT OF APPEAL

Kelly J.
Irvine J.
Mahon J.

Neutral Citation Number: [2015] IECA 35
Appeal No.: 2014/119

Anthony Murphy

Plaintiff/Appellant

and
Cement Roadstone Limited

First Named Defendant

and
Patrick Flynn

Second Named defendant

Judgment of the Court (Kelly J., Irvine J. and Mahon J.) delivered on the 19th day of February 2015

Introduction
1. This is an appeal by the plaintiff, Anthony Murphy, ("Mr. Murphy") against an order made by the High Court (De Valera J.) on 30th June, 2008. On that date the learned High Court judge dismissed Mr. Murphy's claim against the second named defendant in the proceedings ("Mr. Flynn") on the ground that the issue between those parties *was res judicata.*

2. According to the agreed note of the judgment, the decision of the trial judge was based upon the circumstances in which Mr. Flynn, as plaintiff in Circuit Court proceedings (record number 2003/03270) had, on 16th July 2004, obtained judgment as against Mr. Murphy who was the second named defendant to those proceedings

3. Given that it is submitted on this appeal that the trial judge erred in law in determining that the plaintiffs claim should be struck out by reason of *res judicata*, it is necessary to set out in some detail the factual background as it pertained at the time the Order the subject matter of this appeal was made.

The Facts
4. Mr. Murphy, who is a lorry driver, was injured on 6th May, 2000 when driving a truck the property of his employer, Philip Doyle, through an underpass beneath the Naas Dual Carriageway. At the time, Mr. Doyle was carrying out certain haulage works for the first named defendant, Cement Roadstone Limited ("CRH"). Mr. Murphy contends that his vehicle was caused to collide with a truck driven by Mr. Flynn and that the very severe injuries which he sustained, comprising multiple leg fractures requiring surgical intervention, were the result of negligence on the part of CRH and/or Mr Flynn..

5. A plenary summons was issued on 1st March, 2001 by Mr. Murphy's solicitors, O'Meara and Company. Shortly thereafter a statement of claim was delivered outlining his claims against both defendants.

6. As to the negligence alleged against CRH, Mr. Murphy maintained that he had not been provided with a safe place of work, in that the under pass through which he was travelling at the time of the collision had a dangerously sharp bend and an excessively steep slope. He further maintained that its design provided him with insufficient site distance to allow him navigate it safely.

7. As to the negligence alleged against Mr. Flynn, Mr. Murphy maintained that he had stopped his vehicle in a dangerous location thus obstructing the roadway and causing the collision.

8. A defence was delivered on Mr. Flynn's behalf on 24th June, 2002, wherein he denied all allegations of negligence. He pleaded that the collision occurred due to the plaintiff's negligence or contributory negligence in driving too close to his vehicle as a result of which he had run into the back of his truck.

9. CRH in its defence of 26th August, 2002 denied all allegations of negligence, pleaded contributory negligence as against the plaintiff and in the alternative alleged negligence on the part of the second named defendant.

The Circuit Court Action
10. In March 2003, Mr. Flynn issued Circuit Court proceedings against Philip Doyle and Mr. Murphy in which he claimed damages for personal injuries, loss and other damage sustained by him in the collision the subject matter of the proceedings which were then pending before the High Court.

11. The civil bill was served on Mr. Doyle and Mr. Murphy. Neither entered an appearance. Consequently, on the 16th July, 2004, Mr. Flynn obtained judgment in default of appearance against both of them. The Circuit Court judge on that date also made an order that the MIBI be joined to the proceedings as a co-defendant.

12. On 8th February, 2005, Mr. Flynn amended his defence in the High Court proceedings to plead that the issues as between himself and Mr. Murphy were res judicata by reason of the Circuit Court order of 16th July, 2004.

13. On a date subsequent to 16th July, 2004, but before 15th May, 2006, O'Meara's, the solicitors on record for Mr. Murphy and his High Court action belatedly came on record on his behalf in the Circuit Court proceedings.

14. On 15th May, 2006 the Circuit Court, at a hearing at which Mr. Murphy was represented by his solicitor, assessed the damages to which the plaintiff was entitled on foot of the earlier court order and duly granted judgment against all three defendants in the sum of €18,245.00.

The High Court Motion
15. By motion dated 16th June, 2008, Mr. Flynn applied to the High Court seeking to dismiss Mr. Murphy's claim on the following basis-

(i) that he had been guilty of inordinate and inexcusable delay in the pursuit of his action, and/or

(ii) on the grounds that the judgment in the Circuit Court rendered his claim *res judicata* as against the interests of Mr. Flynn.

16. For the purposes of that application the parties each swore affidavits setting out the facts that they considered material to the relief sought. From those affidavits a number of additional material facts emerged, which I will briefly summarise.

17. Mr. O'Meara advised that the plaintiff had given him a copy of the ordinary civil bill after it had been served on him in 2003. His said that his client had led him to believe that his employer, Mr. Doyle, who was the first named defendant in the Circuit Court proceedings, had insurance cover in respect of his driving of the truck and that he would be looking after his interests in the proceedings.

18. Mr. O'Meara stated that it was his understanding that Mr. Doyle's solicitors would come on record on behalf of Mr. Murphy and that it was for this reason he sent the civil bill to Kevin O'Gorman, solicitor, whom he understood was representing Mr. Doyle's interests, by letter dated 14th January, 2004.

19. On 8th March, 2004, Mr. Doyle's insurers, AXA, sent him an accident report form which was duly passed to Mr. Murphy for his completion on 23rd March, 2004. From its contents, Mr. O'Meara maintained it was clear that Mr. Murphy was not accepting responsibility for Mr. Flynn's injuries.

20. Mr. O'Meara was later made aware of the fact that AXA had refused to indemnify Mr. Doyle but this fact was not made known to him until after judgment had been obtained against Mr. Murphy. At that stage he was of the opinion that there was nothing he could do about the judgment which had been entered against his client. Accordingly, he then entered an appearance to the Circuit Court proceedings and later attended Court to represent Mr. Murphy at the assessment of damages hearing on 15th May, 2006.

Decision of DeValera J.
21. In finding in favour of the relief sought by Mr. Flynn on the issue of *res judicata* the learned trial judge, according to the agreed note of counsel, concluded as follow:-

> "The current state of the law is to the effect that the doctrine of *res judicata* dictates that a party should not be allowed to re-litigate a matter once he or she has had the opportunity of litigating it before another court. The plaintiff here did have such an opportunity and for whatever reason did not avail of it.
>
> No steps were taken by the plaintiff to set aside or appeal the judgment which had been obtained in default of appearance in the Circuit Court action nor did the plaintiff take any steps to engage in the assessment of damages hearing before the Circuit Court."

22. It is accepted by the parties on the present appeal that the last finding of the learned High Court judge was incorrect in that Mr Murphy did indeed engage with the assessment of damages hearing in the Circuit Court.

Submissions of the Appellants
23. Counsel on Mr. Murphy's behalf, submitted that there was a particular unfairness in allowing a default judgment defeat a claim on the grounds of *res judicata*. He maintained that where the judgment giving rise to such a plea was a default judgment rather than one obtained following a hearing on the merits that special rules apply. In this regard he relied upon the decision in *Irish Land Commission v. Ryan* [1900] 2 IR.565.

24. Counsel submitted that a balance had to be struck between Mr. Murphy's constitutional right of access to the courts to pursue his claim and the right of Mr. Flynn to be protected from a multiplicity of suits as was advised by Lavan J. in *Foley .v. Smith* [2004] I.R. 538. That balance had not been fairly struck in the instant case as the consequence of the decision of the High Court was that his client has been denied the opportunity of ever having a hearing as to the circumstances in which he had sustained such severe injuries.

25. Another factor to be borne in mind, counsel submitted, was the fact that significant prejudice had already been visited upon Mr. Murphy as a result of the judgment insofar as Mr. Flynn had obtained a decree against him for a sum in excess of €18,000. On the other hand, if the decision of the High Court was to be set aside, Mr. Flynn would not find himself having to defend his case, so to speak, for the second time given that he had obtained his judgment in default of any challenge to his claim in the Circuit Court.

26. As to a default judgment which forms the basis of a subsequent plea of estoppel, Counsel referred to the decision of the House of Lords in *Koh Hoong v. Leong Cheong Kweng Mines Ltd* [1964] A.C. 993 and to the warning sounded therein as to the grave danger of permitting such a judgment preclude the parties thereto from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues had been involved in the judgment obtained by default. He referred to the comparison drawn by Viscount Radcliffe at p.1010 between a judgment in default which had been obtained with the consent or acquiescence of the parties from *"another judgment which by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference has suffered judgment to go against him in the particular suit in question."*

27. Counsel maintained that Mr. Murphy had not consented or acquiesced in the judgment that had been obtained against him by Mr. Flynn. He accepted that Mr. O'Meara, once he was made aware of Mr. Flynn's claim, should have entered an appearance on behalf of Mr. Murphy and ought to have applied to stay the Circuit Court proceedings pending the determination of the liability issue in the High Court. Further, once aware of the fact that judgment in default of appearance had been obtained against Mr. Murphy he ought to have moved to set aside that judgment. Neither did Counsel seek to defend Mr. O'Meara's approbation of the judgment by going on record in the proceedings and representing Mr. Murphy at the assessment of damages.

Submissions of the Respondent
28. Counsel on Mr. Flynn's behalf submitted that all of the criteria required to invoke the doctrine of *res judicata* in the context of issue estoppel had been satisfied on the facts of the case. He referred in this context to the decision of Kelly J. in *McConnon v President of Ireland and Zurich Bank and another* [2012] 1 I.R. 449. Those criteria having been satisfied, he submitted that the decision of the trial judge could not be faulted.

29. The default nature of the judgment, Counsel submitted, did not alter the application of the doctrine. In granting judgment on foot of the civil bill in favour of Mr. Flynn the Circuit Court had conclusively and finally determined that liability in respect of the collision that had occurred on 6th May, 2000, rested with Mr. Murphy.

30. While Counsel accepted that the decision in *Foley .v. Smith* [2004] I.R. 538 was material to the court's consideration he drew attention to the facts of the present case for the purposes of contrasting them with those that pertained in *Foley*. He emphasised the fact that Mr. Murphy had been served with the Circuit Court proceedings and had every opportunity to enter an appearance and raise a defence to Mr. Flynn's claim. Further, in the knowledge that judgment had been granted against him, he had taken no steps, as was noted by the trial judge, to seek to set aside or appeal that judgment.

Decision

31. It has long been accepted that the objectives underlying the doctrine of *res judicata* are twofold; the first being that public policy favours the finality and conclusive nature of judicial decisions and the second being the right of an individual to be protected from a vexatious multiplication of suits at the instance of an opponent. See (*Foley .v. Smith* [2004] I.R. 538 at p.542).

32. In *Carl Zeiss Stiftung.v. Rayner & Keeler Ltd* [1967] 1 A.C. 853 at p.935, a decision followed by Keane J. in *McCauley v. McDermot* [1997] 2 I.L.R.M. 496 and Kelly J. in *McConnon v. President of Ireland* [2012] I.R. 449: Lord Guest helpfully summarised the essential features of issue estoppel when he advised that the party seeking to rely upon it must establish: –

> (a) that the same question has been decided in an earlier proceeding;
>
> (b) that the judicial decision which is said to create the estoppel was final; and
>
> (c) 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.

33. It is not contested that the issue which Mr. Murphy seeks to litigate against Mr. Flynn in the High Court is precisely the same issue as was raised for the Circuit Court's determination on the face of the civil bill issued by Mr. Flynn, namely, as between Mr. Flynn and Mr. Murphy, whose driving was responsible for the collision that took place on 6th May, 2000.

34. As to whether there is any frailty in a plea of *res judicata* in circumstances where the judgement relied on as being final and conclusive was obtained by default rather than in the course of a contested hearing, the authorities do not suggest that this is so. In *McConnell .v. Lombard and Ulster Banking Ltd* [1982] NI 203 Gibson LJ pointed out that where judgement is granted in default of appearance or defence, then as between the parties and for the purpose of the action, all allegations in the statement of claim are deemed to have been admitted by the defaulting party and to that extent he will generally be estopped from setting up in any subsequent proceeding any matter of defence which was "necessarily and with complete precision" decided against him by the previous default judgement. He went on however to qualify this statement somewhat when he stated as follows: –

> "The courts will scrutinise such judgements with extreme particularity in order to ascertain the bare essence of what must necessarily have been decided and to avoid implying as having been decided by a judgement in default any more than is necessarily involved by reason of the fact that judgement has been obtained."

35. It is perfectly clear from the face of the civil bill that the only liability issue raised for the determination of the Circuit Court was who, as between the two drivers, was responsible for the collision of 6 May 2000. That issue and that issue alone was what was determined when Mr. Flynn obtained judgement against Mr. Murphy in default of appearance. In this respect it is relevant to note that the claim made in the Circuit Court proceedings against Philip Doyle was one solely based on an assertion that he was vicariously liable for the negligent driving of Mr Murphy and raised no further issue of liability.

36. Accordingly, all of the necessary criteria were present to justify the High Court in making an order determining that the issues between Mr. Murphy and Mr. Flynn were *res judicata* in the High Court.

37. However, this Court accepts that it is important, as was stated by Keane J. in *McCauley v. McDermot* [1997] 2 I.L.R.M. 486, that when considering the operation of the principles of res judicata the court should give weight to the constitutional right of citizens to have access to the courts as per article 40.3.1 of the Constitution. It is essential that the court look to the competing interests of the parties as he said at p. 498 of his judgment:-

> "In cases of this nature, the courts are concerned with achieving a balance between two principles. A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of *res judicata* where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which he or she has no control. *Res judicata* must be applied in all its severity, however, where to do otherwise would be to permit a party bound by an earlier judgment to seek to escape from it, in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled again by a lawsuit which has already been decided."

38. Neither does this Court depart from the sentiments expressed by Hardiman J. in *A.A. v. Medical Council* [2003] 4 I.R. 302, where at p. 317, when dealing with the issue of *res judicata*, he stated the following:-

> "Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who, on the face of it, is exercising his right of access to the courts for the determination of his civil rights or liabilities."

39. It is important however to consider the context in which the aforementioned statements came to be considered by Lavan J. in *Foley v. Smith* [2004] I.R. 538. In *Foley* the plaintiff had issued proceedings in the High Court against the defendant arising out of a road traffic accident. The defendant later issued proceedings in the District Court against Mr. Foley arising out of the same collision. As a result of an error on the part of Mr. Foley's insurers he was neither represented not present in the District Court when judgment was entered against him.

40. Unfortunately, the facts in so far as they concern Mr. Murphy in the present case are very different from those that pertained in *Foley*. Mr. Foley knew nothing about the proceedings that had been instituted against him in the District Court. He had no opportunity to enter an appearance or a defence to the proceedings. Neither did he have any opportunity to take legal advice as to the consequences of those proceedings for his own High Court action. The fact of the matter is that he was denied the right and opportunity to defend his interests and to access to the District Court for such purpose. He had no, as was spoken about by Keane J. in *McCauley*, "control" over those proceedings. Accordingly, Lavan J., having weighed the fact that Mr. Foley had been denied his right of access to court against Ms. Smith's right to be protected against a second lawsuit, concluded that a clear injustice would be caused to Mr. Foley if the court were to allow the decree of the District Court preclude him from pursuing his High Court proceedings.

41. The facts of the present case are in stark contrast to those which existed in *Foley.* In the present case Mr. Murphy was served with the civil bill and was consequently aware of the fact that Mr. Flynn had issued proceedings against him. Further, he could not but have been aware, assuming as we must that he read the civil bill, that Mr. Flynn was blaming his negligent driving for his injuries.

42. Further, at the time Mr. Murphy was served with the Circuit Court proceedings his own High Court proceedings were in being. He had a solicitor on record in those proceedings who was available to guide him as to the significance of the new proceedings in the context of his High Court action. This is clear from the fact that Mr. Murphy consulted Mr. O'Meara regarding the issue of the Circuit Court proceedings against him. Regrettably, Mr. O'Meara failed to ensure that Mr. Murphy's position was protected by the entry of an appearance. He did not check with the solicitor acting for Mr. Doyle, Mr. Murphy's employer, to ensure that he had entered an appearance on Mr. Murphy's behalf.

43. In addition, and again in contradistinction to the facts in *Foley*, Mr. Murphy was served with a notice of motion advising him that Mr. Flynn was seeking to obtain judgment in default of appearance against him, thus giving Mr. Murphy a second opportunity to engage with the proceedings which he declined to do.

44. Accordingly, this is not a case where this Court can engage favourably with the type of balancing exercise discussed in *Foley and McCauley*. Mr. Murphy was never denied access to a court. On the contrary, he was invited to participate and his failure to do so resulted in judgment being obtained against him. He had every opportunity to control the proceedings instituted against him by Mr. Flynn.

45. There is no basis upon which this Court could, as a matter of law or equity, reverse the decision made by the learned High Court judge. He was entirely correct in the view that he took of the actions of Mr. Murphy when the judgment was obtained against him. On the facts as advised by Mr. O'Meara, and particularly in circumstances where his client had completed an accident report form to assist in the defence of the Circuit Court proceedings, it would have been open to Mr. Murphy to apply to set aside the judgment of that court on the grounds that judgment had been obtained as a result of mistake. However, for whatever reason Mr. O'Meara incorrectly took the view that there was nothing that could be done once judgment had been obtained against Mr. Murphy.

46. Another factor that weighs heavily against Mr Murphy is what happened after Mr Flynn's solicitors delivered an amended defence on 8th February, 2005, pleading that the issue of liability as between Mr. Murphy and Mr. Flynn was *res judicata*. At that stage Mr. Flynn's assessment of damages in the Circuit Court had not taken place. It would still have been open to Mr. Murphy, apprised of the significance of that plea, to seek to set aside the judgment obtained on 16th July 2004. Unfortunately, no such application was made and worse still Mr. Murphy, through his solicitor, later appeared to contest the assessment of damages before the Circuit Court on 15th May, 2006, thus, in the opinion of this Court, fully approbating the judgment earlier obtained.

47. For all of these reasons the Court will dismiss the appeal.