Neutral Citation: [2016] IEHC 268

THE HIGH COURT

Record No. 2003/13968P

BETWEEN:

(1) MR A

PLAINTIFF

AND

THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND, THE ATTORNEY GENERAL, MICHAEL MURRAY, GARY CREEVY, JOHN GIBSON, BRENDAN McNICHOLAS AND BY ORDER NOEL SHEEHAN

DEFENDANTS

(2) MR L

PLAINTIFF

AND

JAMES BREHONY, DAVID GIBSON, THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND, THE ATTORNEY GENERAL AND THE BOARD OF MANAGEMENT OF ST JOSEPH'S CBS

DEFENDANTS

(3) MR M

PLAINTIFF

AND

JOHN KEVIN MULLAN, THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

(4) MR R

PLAINTIFF

AND

ANTHONY MARK MCDONNELL, THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

(5) MR H

PLAINTIFF

AND

DAVID GIBSON, THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2016.

Part 1

Overview

1. The court does not doubt for a moment that at the root of some or all of these several cases and the many lined up behind them are terrible truths. But the difficulty that the plaintiffs in these cases and others like them now face are three-fold:

- first, with the benefit of legal advice and for good consideration they entered into a contract with the State to discontinue certain legal proceedings. In return, the State waived its right to seek the many thousands of pounds or euro of costs that those proceedings had engendered. Those are good contracts at law that cannot lightly be set aside.

- second, the basis on which the plaintiffs seek to set aside those contracts is fundamentally mis-conceived. It is true that the European Court of Human Rights has indicated in the *O'Keeffe* case that Ireland is in breach of the European Convention on Human Rights for failing to provide certain parties who can prove their school-day sexual abuse cases with a remedy at Irish law – and the court must admit to no little surprise that, as was indicated by counsel for the plaintiffs at the hearing, no scheme has yet been put in place to provide redress for others who were failed in a similar manner to Ms O'Keeffe. However, the decision of the European Court of Human Rights does not have the result that the law on negligence or vicarious liability (the law by reference to which the parties entered into their settlement agreements) was incorrectly pronounced upon by the courts in the past, or that it has changed.

- third, the court is bound by binding Supreme Court precedent which has the result that the court must, regretfully, deny the plaintiffs the relief that they now seek.

2. Although the court considers that its judgment is correct as a matter of law, it freely admits to wishing that matters were not so. Some of the claimed facts that underlie the plaintiffs' cases, and which were placed before the court, make for deeply unpleasant reading. That those who claim to be similarly placed to Ms O'Keeffe and who might have proved their cases remain denied a remedy as a matter of Irish law is an injustice for which our State already stands attainted in the international arena by the above-mentioned decision of the European Court of Human Rights. As some of the people behind these as yet unproven claims are now advancing in years, they might be forgiven for wondering if they will live to see the day when such injustice as may have been done to them is finally righted by a foot-dragging State –to the extent, that is, that money can ever be a remedy for certain injuries suffered. Legally – and this is a court of law – the court must find the State to be the victor in these proceedings. But the Irish people, with their great and proper sense of justice, may well conclude that the path of rightness in this matter should lead ultimately to a different

end, regardless of the end reached here today. This Court, as an Irishman, would respectfully agree were they so to conclude.

Part 2

Background

3. Thanks largely to the contentious historical decision by the State, a laic entity, to satisfy the constitutional right to free primary education by funding third-parties, mostly ecclesiastical bodies, to provide that education, the State has escaped liability in various court cases that were concerned with child sexual abuse within the school environment and which alleged vicarious or other liability on the part of the Minister for Education. Examples of such cases include *Delahunty v. South Eastern Health Board* [2003] 4 I.R. 361, *O'C v. McD* [2006] IEHC 261, and *O'Keeffe v. Hickey* [2009] 2 I.R. 302.

4. Given these and similar court' victories' for the State, its lawyers made an offer in the past to a number of plaintiffs in similar such cases, including the plaintiffs now before the court. The offer was this: if a plaintiff discontinued his proceedings against the State, the State would not look for its costs; if he did not discontinue, and the State successfully defended those proceedings, the State would seek its costs. Curiously, this meant that the State's continuing failure to keep civil litigation costs to a reasonable level was effectively deployed by the State to its own advantage. But that is by the by. What matters for the purposes of these proceedings is that the plaintiffs now before the court took independent legal advice and, believing, by reference to the trend in court decisions, that there was no remedy available to them under Irish law, they each decided to accept the State's offer and discontinued their respective proceedings.

5. Following these discontinuations, the European Court of Human Rights decided in *O'Keeffe v. Ireland* (App. No. 35810/09; Judgment, 28th January, 2014) that Ireland was (it still is) in breach of its obligations under Art.3 of the European Convention on Human Rights for failing to provide an effective domestic remedy against the State as regards the State's failure to protect Ms O'Keeffe. The decision of the European Court is, of course, a decision by an international court that Ireland is in breach of its international obligations. Even so, the plaintiffs invoke that decision in seeking to have their previous notices of discontinuance set aside. Their principal ground for seeking this set-aside is that(a) Ireland's obligation (and failure) to provide an effective domestic remedy, in compliance with its obligation under the European Convention on Human Rights, was not understood at the time the compromise arrangements that led to service of the notices of discontinuance was agreed, and(b) this was a mutual or common mistake as to the law which is sufficient to justify those notices of discontinuance now being set aside.

Part 3

Withdrawing a Notice of Discontinuance

A. Overview.

6. Order 26 of the Rules of the Superior Courts 1986, as amended, provides for service of a notice of discontinuance by a plaintiff to an action. Order 26 does not provide for the withdrawal of a notice of discontinuance by a plaintiff who has served same. The principles applicable to such withdrawals are to be found in case-law and, for obvious reasons, overlap to some extent with the law concerning compromises. As a result, the court has been referred by counsel to a number of leading cases from Ireland and abroad concerning notices of discontinuance and/or the law pertaining to compromises, viz.*Cusack v. Garden City Press Ltd* (1978) O.R. (2d) 126, *Adam v. Insurance Corporation of British Columbia* (1985) 66 B.C.L.R. 164, *Fitzsimons v. O'Hanlon* (Unreported, High Court, Budd J., 29th June, 1999), *Kleinwort Benson Ltd v. Lincoln Council* [1999] 2 A.C. 349, *Brennan v. Bolt Burden and London Borough of Islington* [2004] EWCA Civ. 1017, *J.B. v. Southern Health Board and Ors* [2007] IEHC 291, *Smyth v. Tunney* [2009] 3 I.R. 322, *Cafolla v. O'Reilly* [2014] IEHC 85, and *Flynn v. Desmond* [2015] IECA 34. Of these cases, the leading decision in Ireland at this time is the decision of the Supreme Court in Smyth. In Section B below the court attempts a synthesis of applicable principle by reference to the foregoing cases.

B. An Attempted Synthesis of Applicable Principle.

7. By reference to the cases aforesaid it appears to the court that the following principles are applicable to the withdrawal of a notice of discontinuance.

I

General Effect of Notice absent Abuse of Process

[1] Traditionally, service of a notice of discontinuance puts an end to an action but (a) without prejudice to the right of a plaintiff to institute fresh proceedings on the same grounds, and (b) subject to an exception where a notice of discontinuance involves an abuse of process (in which case the discontinuance can be set aside on application by the other party to the cause). (Smyth, 329, 331).[a]

> *[a]This principle is drawn from the Supreme Court's analysis of English law in Smyth. However, it is not suggested by the Supreme Court that Irish law is different in this regard.In fact the Supreme Court's uncritical analysis of Castanho v. Browne & Root [1981] A.C. 557 and Ernest & Young v. Butte Mining plc [1996] 1 WLR 1605 suggests that the English approach found favour with the Supreme Court. In Castanho, a plaintiff who was, to borrow a phrase,'too clever by half', discontinued his personal injuries proceedings in the English courts because he thought he could win greater damages in the U.S. courts. His ostensibly legitimate discontinuance was found in the circumstances to be an abuse of process. In Ernest & Young, some sharp lawyering saw negotiations protracted by the plaintiff's solicitor on one basis but really so that a tactical discontinuance could later be served at a time which best suited the plaintiff. Again, this ostensibly legitimate discontinuance was found in the circumstances to be an abuse of process – though, as the Supreme Court notes, it was in truth closer to being an example of equitable fraud. No plaintiff behaviour akin to that which presented in Castanho and Ernest & Youngpresents in the present application.*

[2] Abuse of process in this context means the inherent power of the court to prevent misuse of its procedure in a way which although not inconsistent with the literal application of its procedural rules would nevertheless be manifestly unfair to a party to the

litigation or would otherwise bring the administration of justice into disrepute. (Smyth, 331).

II

Jurisdiction

[3] If and to the extent that there is an inherent jurisdiction to set aside, it does not fall to be exercised in circumstances where (i) the decision to serve the notice of discontinuance is a conscious and advised one, and (ii) the withdrawal of the notice of discontinuance would likely deprive a defendant of the defence of the Statute of Limitations. (*Smyth*, 331).

III

Public Policy

[4] While a fundamental mistaken assumption can nullify consent so as to make a contract void, this rule is confined within very narrow limits. (*Fitzsimons*).

[5] It is a matter of the utmost importance that the integrity of settlements, once arrived at with the benefit of proper legal advice, be upheld. No claim could ever be regarded as finalised and concluded if it could be set aside in circumstances where a newly discovered complication were to come to light in the aftermath of a settlement. Settlements must, in the interests of the proper administration of justice, achieve finality of disputes. (*Cafolla*, 15, *Fitzsimons,Flynn*, 8, Brennan, para.22, J.B., 11).

IV

Inadvertence and Misapprehension

[6] If and to the extent that there is an inherent jurisdiction to set aside, it may be open to the court in proper circumstances to relieve against an act done either by way of inadvertence or misapprehension (in *Cusack*, misapprehension by the lawyer who filed and served as to his instructions) and this is particularly so where no real prejudice to the other side is demonstrated by the setting aside of the notice of discontinuance. (*Cusack*).[a]

> *[a] Finnegan J. states in Smyth, at 328, that "The present case falls outside the very limited sphere in which the inherent jurisdiction envisaged by Esson J.A.[in Adam (by reference to Cusack)] would operate". So the logic of Cusack does not seem to be'jettisoned' by Finnegan J., who just sees the case before him as being outside the scope of Cusack and who later goes on, at 331, to acknowledge the potential for an inherent jurisdiction (such as that identified in Cusack) to exist.*

V

Prejudice

[7] If and to the extent that there is an inherent jurisdiction to set aside, in deciding whether to set aside, regard may be had to the fact that setting aside would prejudice a defendant and allow a claim otherwise statute-barred. (*Adam*).

VI

Contract Law and 'Give and Take'

[8] A compromise in civil litigation is a contract and it does not cease to be so when it is enshrined in a consent order, which is a 'mere creature' of the contract. (*Brennan*, para.11).

[9] To establish a valid compromise, it must be shown that there has been an agreement (accord) which is complete and certain in its terms, and that consideration (satisfaction) has been given or promised in return for the promised or actual forbearance to pursue the claim. The question of whether there has been accord and satisfaction is a question of fact. (*Cafolla*, 13, 14).

[10] Where a claimant in a negligence action reaches, on a proper construction of an agreement, a full and final settlement of all claims arising from his cause of action, he cannot commence another action at some later date arising from the same matter even where some damage has arisen, for instance in an accident claim, some complication of injury, the possibility of which was not foreseen at the time of settlement. (*Cafolla*, 14, 15).

[11] While a general release executed in a prospective or nascent dispute requires clear language to justify an intention to surrender rights of which the releasor was unaware and could not have been aware, different considerations arise in relation to the compromise of litigation which the parties have agreed to settle on a 'give and take' basis. (*Brennan*, para.17).

[12] The fact that the consideration on each side was not of equal value does not necessarily mean that the contract of compromise was not one of 'give and take'. (*Brennan*, para.21).

VII

Fundamental Mistakes and Impossibility of Performance

[13] A fundamental mistake may now render a contract void even though the mistake is one of law. But for a common mistake of fact or law to vitiate a contract of any kind, it must render the performance of the contract impossible. (*Brennan*, paras.10,17).

[14] It is initially a question of construction as to whether the alleged mistake has effect of vitiating a compromise or consent order. (*Brennan*, para.17).

[15] There is a real difference between the situation where a compromise is agreed (a) in ignorance of significant facts and the law which would be applicable to them, and (b) the situation in which the compromise is agreed with no misapprehension of facts, just as to law. This is not to reintroduce the distinction between mistake of fact and mistake of law. It is merely to require that where a party wishes to reserve his rights in the event of subsequent judicial decision in a future case to which he is not party, it is he who should seek and secure a term to that effect. (*Brennan*, para.22).

[16] Once the court determines that unforeseen circumstances have resulted in a contract being impossible of performance, it is next necessary to determine whether, on true construction of the contract one or other party has undertaken responsibility for the subsistence of the assumed state of affairs. This is another way of asking whether one or other party has undertaken the risk that it may not prove possible to perform the contract, and the answer to this question may well be the same as the answer to the question of whether the impossibility of performance is attributable to the fault of one or other of the parties. (*Brennan*, para.22).

[17] 'New' or 'additional' facts are not 'new' or additional' if they were already in the public domain when the proceedings were settled. (*Cafolla*, 16).

VIII

Litigants in Person

[18] That a person is a litigant in person cannot in itself be a reason for allowing a settlement to be undone. Otherwise, no settlement with a litigant in person would ever be final. (*Flynn*, 8).

Part 4

Application of Principle
8. Re.[1]. Discontinuance here is sought by the party who served it; this is not generally permitted.

9. Re.[2]. Not relevant because of conclusion as to [1].

10. Re.[3]. Here the decision to serve each notice of discontinuance was conscious and advised. No difficulty as to limitation periods has been identified as arising.

11. Re.[4]. It does not appear to the court that there was a fundamental mistaken assumption as to the substance of Irish law.

12. Re.[5]. The floodgates are noted.

13. Re.[6]. There would be real prejudice to the State in that, at the very least, it would have to deal, in some way or another, with the continuation of a plethora of cases that presently stand discontinued pursuant to compromise agreements properly reached.

14. Re.[7]. See [3] and [6].

15. Re.[8]. Noted.

16. Re.[9]. The compromises in issue satisfy these criteria.

17. Re.[10]. Noted.

18. Re.[11]. It is the latter that are in issue here.

19. Re.[12]. Noted.

20. Re.[13]. The performance of the compromise agreement is not impossible.

21. Re.[14]. It does not appear that there was any mistake as to the substance of existing Irish law. That Ireland was later found to be in breach of the European Convention on Human Rights does not vitiate the compromises reached here.

22. Re.[15]. Neither (a) nor (b) pertain here. No reservation was included.

23. Re.[16]. See [13].

24. Re. [17] The only 'new fact' that possibly may not have been known at the time of the compromises is the fact that Ms O'Keeffe was to bring an appeal to the European Court of Human Rights. However, it seems to the court that this fact would only be of significance if one assumes that the lawyers who advised the plaintiffs needed to know of the fact of Ms O'Keeffe's appeal before they could see that such an appeal might be brought, or the advantages of 'carving out' the results of such an appeal from the ambit of such a compromise. The court neither believes nor accepts that competent lawyers would need the 'prompt' of Ms O'Keeffe's appeal for them to give proper counsel and/or make such provision as they considered appropriate in the compromise, subject to the State being amenable to such a 'carve out' from the applicable compromise agreement(s).

25. Re. [18] Not relevant.

Part 5

Duress

26. It was contended at the hearing that the resources available to the State and the cash pressures to which the plaintiffs were subject as a result of the costs arising by the time the State approached with its compromise offers meant that the State was guilty of some form of duress. The court does not accept this proposition. It is rarely the case that two parties to a contract have the same bargaining power; and if the court was to start setting aside, on grounds of duress, contracts in which one party is possessed of lots of money and the other party is in want of it, then every bank-loan in the country would have to be set aside tomorrow. As to

the related contention that duress arises where a party asserts that if it is successful in proceedings it will pursue its costs, such an assertion is the stuff of everyday litigation. There is no reason why a person, even a person possessed of great resources, who is acting in good faith and the legitimate pursuit of his self-interest, may not threaten, or otherwise indicate an intention, to do something which is lawful, in order to induce another to come to some agreement with him.

Part 6

Conclusion

27. If one takes as true the statements of claim in the plaintiffs' various proceedings, their suffering has been abominable. And that suffering cannot have been eased if, as counsel for the plaintiffs indicated, little or no steps have been taken by Ireland to remedy the breach of the European Convention on Human Rights identified in *O'Keeffe.* But so far as setting aside the plaintiffs' notices of discontinuance is concerned, the court's hands are tied by precedent, most notably the binding decision of the Supreme Court in *Smyth*. The court, with every respect and no little regret, is therefore coerced as a matter of law into declining to grant the relief now sought of it by the plaintiffs.