THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 295

Ryan P.
Finlay Geoghegan J.
Whelan J.

Appeal Number 2016 99

BETWEEN

DOMINIC CARNEY

PLAINTIFF/APPELLANT

AND

BANK OF SCOTLAND PLC (FORMERLY BANK OF SCOTLAND (IRELAND) LIMITED)

DEFENDANT

AND

GEAROID COSTELLOE

DEFENDANT/RESPONDENT

JUDGMENT (ex tempore) delivered on the 24th day of October 2017 by Ms. Justice Finlay Geoghegan

1. This is an appeal brought by Mr. Carney, who is the plaintiff, against an order made in the High Court by Binchy J. on 12th January, 2016 in which he dismissed Mr. Carney's claim against the second named defendant, Mr. Costelloe. Mr. Costelloe is a receiver who was appointed by Bank of Scotland in one of its guises. It is not relevant to the issues on this appeal to determine which precise company within the Bank of Scotland group appointed Mr. Costelloe. He was the receiver appointed over property which was owned by a company, Philisview Properties Limited, pursuant to a deed of mortgage and charge which had been granted. The basis of the application to the High Court to dismiss the claim was on the grounds that the plaintiff's cause of action in these proceedings against Mr. Costelloe was *res judicata*. I want to be very careful using terminology in this decision, and the term *res judicata* in particular, because it is used by the courts in a strict sense, and it is sometimes also used in a broader sense in a manner which I will explain in a moment. It appears that the basis of the application to the High Court was on the grounds that what had happened in certain Circuit Court proceedings, to which I will refer below, was such that the plaintiff's claim against Mr. Costelloe was *res judicata* in the strict sense, and also in the broader sense in accordance with what is normally termed "the rule in *Henderson v. Henderson*".

2. The High Court judge, Binchy J., acceded to the application, and in his *ex tempore* judgment he set out, at p. 43 of the transcript that we have been given, the essential reason for which he determined that when the Circuit Court made a decision to grant final orders in the Circuit Court proceedings, it rendered the matter *res judicata*. And he stated:

> "The question here is a somewhat different question and it's whether or not the decision of the Circuit Court taken when granting the final orders renders the matter *res judicata*, and in that context in order to grant the relief sought by the receiver, which the Court did grant, the Court would have to have been satisfied that the mortgage and charge was valid, that the appointment of the receiver was valid and there was no other reason why the relief sought could not be granted, such as intervening leases. And I am quite satisfied that, having had the benefit of receiving very comprehensive submissions and evidence on affidavit in relation to these matters at interlocutory stage, the Circuit Court was well positioned to make a decision on those matters for the purpose of granting the orders that he did upon the hearing of the second motion for judgment. And so for that reason, therefore, I consider that the decision of Judge Riordan on the 19th of May 2015 has indeed rendered the issues raised by Mr Carney's proceedings of 4th July 2014 *res judicata*."

3. Mr. Carney has appealed against that judgment to this Court today, and he has opened a number of authorities to us which demonstrate the strictness of approach taken by the courts to what I would call a determination that a matter is *res judicata* in the strict sense. For reasons that I will come to in a moment, it does not appear to me necessary to consider whether or not the trial judge was correct in determining that the judgment given in the Circuit Court on 19th May, 2015, on what was an application for judgment in default of defence, did mean that all the issues which Mr. Carney seeks to pursue by way of his claim in the High Court are *res judicata*. The reason for which I have considered it not necessary is because of the second ground upon which the order was sought in the High Court and was, as appears from the written submissions to this Court on behalf of Mr. Costelloe, also pursued before this Court. And that ground is that Mr. Carney is precluded by what is termed "the rule in Henderson v Henderson" from now pursuing claims in the High Court against Mr. Costelloe which he could or should have pursued by way of a defence and counterclaim in the Circuit Court to the proceedings which Mr. Costelloe had brought against him in that court. The rule in *Henderson v. Henderson* was considered by this Court in a judgment which I gave, with which my colleagues agreed, in the case of *Vico Limited & ors. v. The Bank of Ireland* [2016] IECA 273. It is a judgment to which we have been referred in the written submissions of the respondents, and which is before the Court today. And there, at para. 25 of that judgment, I explained, by reference to prior decisions, the essence of the rule in *Henderson v. Henderson*,:

"25. The rule in *Henderson v. Henderson*, as it is commonly known deriving from the decision in *Henderson v. Henderson* (1843) 3 Hare 100 is a rule to prevent abuse of process. The underlying principle is similar to that in *res judicata* namely the public interest in those who resort to litigation obtaining a final and conclusive determination of their disputes.

> 26. I would adopt the explanation of the rule given by Cooke J in the High Court in *Re:Vantive Holdings & Others and the Companies Acts 1963-2006* [2009] IEHC 408, para. 32-33. and cited on appeal by Murray C.J. in *Re. Vantive Holdings* [2010] 2 I.R. 118, at p. 124:-
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> > 'The rule in *Henderson v. Henderson* is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of

> *res judicata* applies not only to issues actually decided but to every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate.'"

4. That quotation, as I already indicated, appears to me to set out the essence of the rule which is, in a sense, a form of *res judicata*. In the *Vico* judgment, I also referred to the restatement of the abuse of process rule by Bingham L.J. in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1 at p. 31 approved of in this jurisdiction by the Supreme Court in a number of cases including *Re Vantive Holdings*:

> ". . . But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

5. That quotation emphasises the public interest in the finality of the conduct of litigation and the test being whether the claim or defence should have been raised in earlier proceedings if it is to be raised at all. It also makes clear that this, as Mr. Carney submitted to us in reliance upon the judgment of the late Hardiman J. in *Ahmed v. The Medical Council* [2003] IESC 70, is a rule which is not to be applied in an automatic or unconsidered fashion. As Hardiman J. stated at para. 18:

> "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."

6. They are the principles which I propose applying to the facts which were before the High Court, and which are before us on appeal. Those facts start with the granting of a mortgage by the company Philisview Properties Limited as security for facilities to the Bank; proceed to a situation where unfortunately that company was unable to meet its liabilities to the Bank pursuant to the terms of a series of loans and the mortgage; demand was made, and ultimately a receiver was appointed over the property of Philisview Properties Limited at Washington Street in Cork City. Mr. Carney is a director of the company. The receiver was appointed on 20th November, 2013. On 11th March, 2014 the receiver entered the mortgaged property and his contention was that he had secured possession of the property peaceably. Thereafter, Mr. Carney, accompanied by some other persons, re-entered the property, it is contended by the use of force. On 14th March, 2014, proceedings were issued in the Circuit Court arising out of the receiver's difficulty in securing the property. Those proceedings were brought by Mr. Costelloe against both Mr. Carney and his sister, and on the indorsement of claim on the Equity Civil Bill, Mr. Costelloe sought an injunction requiring the defendants and their servants or agents to cease forthwith the occupation of the property and, if necessary, an injunction restraining them from entering upon or watching or besetting the property or from interfering with the carrying on of any business therein, and certain other consequential reliefs.

7. An interim injunction was granted that day. Thereafter an application was brought for an interlocutory injunction. At this point Mr. Carney was represented by solicitor and counsel and affidavits were sworn by both parties. A significant interlocutory application hearing proceeded before the Circuit judge, and on 7th April, 2014, the Circuit judge made an interlocutory order in similar terms. Mr. Carney appealed that interlocutory order, but ultimately that appeal was never heard and determined before it became moot by reason of subsequent steps in the Circuit proceedings. During 2014 (and in to 2015) there were a number of further applications before the Circuit Court. At some point Mr. Carney was no longer represented but he made applications for discovery and he also made an application for interrogatories. The plaintiff in the Circuit Court, Mr. Costelloe, also brought a motion for judgment in default of defence as Mr. Carney had not put in a defence. Initially, before the County Registrar, Mr. Carney was given a further period of nine weeks to lodge a defence. Nevertheless he still, notwithstanding bringing the other applications, did not file a defence, or indeed a counterclaim, as he could have done if he had wished to do so. On 4th July, 2014 he issued a plenary summons in the High Court whilst the Circuit Court proceedings were pending, but does not appear to have taken any further steps in the High Court until 16th March, 2015 when he delivered a statement of claim. In the meantime, the plaintiff in the Circuit Court issued a second motion for judgment in default of defence and that was ultimately heard and determined by the Circuit judge on 19th May, 2015. It is perhaps of some importance to note that in April in advance of that date, (we were informed, four weeks prior to the hearing on 19th May) Mr. Carney had been notified of the fact that the loans for which the mortgage was given as security had been sold and transferred, and there was now a new owner of the loans in question .

8. When the matter came before the Circuit Court, Mr. Carney still chose not to put in a defence, and did not apply to the Circuit judge to put in a defence and counterclaim , and the Circuit judge ultimately, having heard both counsel for the plaintiff and Mr. Carney in person, made what was a final order in the Circuit Court in which he firstly granted an injunction restraining Mr. Carney, the first named defendant, and his servants or agents from entering upon or watching or besetting the mortgaged property at Washington Street West, or from interfering with or carrying on any business on the property. He then granted liberty to the plaintiff to re-enter the proceedings if it wished to pursue a claim for damages, and dealt with costs. That order, we have been informed, was subsequently appealed, but the appeal was heard and determined after the application to the High Court which is the subject matter

of this appeal, and I simply record that the Court has been informed that there was in the High Court a further hearing on affidavit, because it was an appeal from an order made on a motion on affidavit in the Circuit Court, but that Mr. Carney was given the opportunity of putting in a further affidavit in the High Court before that appeal was heard, and was given an opportunity of raising issues in that replying affidavit as the matter was fully heard by Noonan J. in the High Court, and subject to any constitutional issue, in accordance with the Courts of Justice Act 1936, the decision of the High Court on appeal from the Circuit Court is a final order. Mr. Carney informed the Court that he has lodged an application for leave to appeal to the Supreme Court on some jurisdictional issue relating to the rateable valuation of the property, but that is not of concern to us on this appeal.

9. It is the case, having regard to the proceedings in the Circuit Court and the final determination of those proceedings, albeit on a motion for judgment in default of defence at a time when Mr. Carney appeared in person and opted not to put in a defence or a defence and counterclaim as he could have, that this Court has to determine whether or not the issues that he now seeks to litigate in the High Court as plaintiff, with Mr. Costelloe as defendant, are issues which, in accordance with the principles that I have already adverted to, could or should have been raised by Mr. Carney by way of defence or counterclaim in the Circuit proceedings.

10. The issues which he seeks to litigate in the High Court, as appears from the plenary summons and the statement of claim, may be essentially divided into five issues. The first is that he challenges the validity of the mortgage. Second, he challenges the validity of the appointment of the receiver. Third, he asserts that there were certain leases which he and his sister held which were valid leases and which in substance entitled them to remain in possession notwithstanding the mortgage and the appointment of the receiver. Fourth, he makes a claim for damages in relation to certain alleged wrongful acts of the receiver. And fifth, he makes a claim for the return of certain personal property which he contends is property which belongs to him and his sister, albeit that she is not a plaintiff, and which he says remains on the premises and which the receiver has not returned to him or permitted him to take back.

11. Now, in my view, applying the principles to which I have referred, all of those are claims which, at the time of the Circuit Court proceedings, Mr. Carney could and should have raised by way of defence. Mr. Carney today has submitted to us that his belief was that all that was being sought in the Circuit Court were orders restraining him from entering the premises or from interfering with the carrying on of business on the premises, and he says that he believed that these were not proceedings dealing with the validity of the mortgage, the charge, or the leases that he alleged he held. I cannot accept that submission. It is clear from the indorsement of claim to the Civil Bill that the receiver maintained his entitlement to enter into possession of the premises and to exclude Mr. Carney and his sister from possession of the premises in reliance upon, as is pleaded on the deed of mortgage and charge of 3rd June, 2005; the fact that there were payments which were not met; the fact that the mortgage provided for the appointment of a receiver; the fact that the power of sale and entitlement to appoint a receiver had come into being, and that the Bank had appointed the plaintiff as receiver over the mortgaged property. Further, it was pleaded expressly that the first and second defendants, that is to say Mr. Carney and his sister, were continuing to trespass on the property, and all of those were matters which were essential, effectively, to the trial judge determining in the final order made that the receiver was entitled to the orders which he had sought. If Mr. Carney wanted to resist and defend the receiver's entitlement to the orders claimed and made he could have done so because he contended the deed of mortgage was not valid, the receiver was not validly appointed, that he and his sister held leases which entitled them to remain in possession of the property, notwithstanding the appointment of a receiver, or that he was not trespassing for any other reason, or indeed that he should not be prevented from going into the property because there were still personal items belonging to him which he was entitled to recover. These were all matters which he both could have and should have raised by way of a defence, or some of them possibly by way of counterclaim, in the Circuit Court. He opted not to do that and yet, then, sought to pursue those matters through fresh litigation in the High Court. These are precisely the circumstances in which the courts have determined that further proceedings will be considered to be an abuse of process by reason of the same policy considerations in relation to the finality of litigation which underpin the principles of *res judicata*.

12. As I have indicated, however, in relation to the principles that have been set out in the modern restatements, of the rule in Henderson v Henderson in particular by Bingham L.J. in *Johnson v. Gore Wood & Co.*, (approved of in this jurisdiction), and by Hardiman J. in *Ahmed*, the Court must look at the overall justice of the situation in an application such as this, because on one view it is preventing a right of access to the courts. I have considered very carefully the entire of the claims which Mr. Carney is seeking to pursue in the High Court and do not consider, with one exception, that the justice of the overall situation warrants Mr. Carney being permitted now to pursue the claims against Mr. Costelloe in the High Court proceedings which he could and should have pursued (if he wished to make such claims) in the Circuit Court proceedings. The one exception is insofar as he has included a proprietorial claim for the return of certain property, personal property or chattels, as they are referred to. I want to be very clear, this is not anything to do with the premises, but relates to personal property or chattels, which are clearly capable of being removed from the premises without damage. The justice of the situation does, if necessary, permit Mr. Carney to pursue the claim for the return of the personal property which he contends, and obviously if he can prove it, is, his own personal property. That is a claim which was included at para. 4 of the plenary summons, and in the statement of claim in the prayer for relief. The only part of the prayer for relief which I propose permitting the plaintiff to pursue in the High Court is para. (e) and that is, although it is not put in the same positive terms as it is in para. 4 of the indorsement of claim, an injunction restraining the defendants from disposing of the personal property of the plaintiff and that of his sister contained in the three units referred to herein, and, if necessary, interim interlocutory relief in those terms. I am not permitting the pursuit at this stage of interim or interlocutory relief. It is simply the claim for the final order. The plea which supports that in the body of the statement of claim is at para. 12. However, I wish to make very clear that I refer only to the final sentence of para. 12 which alleges that neither of the defendants have at any time to date, and notwithstanding many requests, ever attempted to account to the plaintiff or his sister for the said business records and personal assets or to allow the plaintiff or his sister access to same.

13. The Court has been made aware today that there were in fact some offers made; there is the letter of 14th November, 2014 written on behalf of the receiver, by his solicitor, to Mr Carney. In permitting this very limited claim to be pursued, I am not in any way determining that Mr. Carney has established any entitlement to the personal property. He is permitted to pursue that claim, but only in relation to those personal assets which he has already identified in an affidavit which he swore in the High Court on 24th June, 2015. At Exhibit E to that affidavit, he set out an inventory of items that he claims, and that is the limit of the claim. What is not permitted to be pursued is any claim for damages for any alleged wrongdoing by the receiver. Those were matters, which, if it was so contended could and should have been raised by way of defence when the receiver pleaded in the Circuit Court proceedings that he had peaceably entered the premises as he was entitled to do so. However it is in the interests of justice that if there remain on the premises personal assets of Mr. Carney to which he is entitled, and which not subject to the mortgage, that he should be permitted to pursue a claim those assets.

14. In conclusion, I would dismiss the greater part of the appeal but would allow so much of the appeal as dismissed the entire of the proceedings against the second named defendant, the receiver. Instead it will be replaced by an order, the precise terms of which will have to be considered, but the essence of which will be to dismiss all the claims against the second named defendant other than an identified claim to the proprietorial items in terms that I have already described.

Note: The President and Whelan J agreed with the above judgment .