Approved
No redactions required

THE COURT OF APPEAL

CIVIL

Record No 2021/165

Neutral Citation: [2023] IECA 132

The President

Collins J

Faherty J

BETWEEN

COLM CAMPBELL

Plaintiff/Appellant

AND

COUNTY SLIGO GOLF CLUB, THE GOLFING UNION OF IRELAND NATIONAL COACHING ACADEMY LTD AND KEVIN LE BLANC

Defendants/Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on 25 May 2023

1. This is Mr Campbell's appeal from the judgment and order of the High Court (O' Hanlon J) dismissing his claim against the Defendants arising from an injury sustained by him on 28 March 2016 as a result of being struck by a golf ball while spectating at the West of Ireland Amateur Golf Championship at the County Sligo Golf Club at Rosses Point, Co. Sligo. Mr Campbell had sued the County Sligo Golf Club (described in the Personal Injuries Summons as the "*owners and operators*" and "*occupier*" of the Rosses Point course) and the Golfing Union of Ireland (said in the Personal Injuries Summons to have been responsible for the administration of amateur golf in Ireland)[1] as well as Mr Le Blanc, who was a competitor in the West of Ireland Championship and whose golf ball had struck Mr Campbell as he played his second shot into the 11th green during his quarter-final match.

2. The Court heard the appeal and reserved its judgment. In due course, the Court finalised its judgment, the appeal was listed for judgment for 12 May 2023 and the parties notified accordingly. At that point, Mr Campbell's solicitors (with the consent of the other parties) wrote to the Court informing it that all issues had been resolved between the parties, that Mr Campbell was unconditionally withdrawing his appeal and that the only orders required from the Court was an order vacating all costs orders made in the High Court, with no order to be made as to costs in this Court. In the circumstances, the Court was requested not to deliver its judgment.

[1] The title of the proceedings erroneously refers to the Golfing Union of Ireland National Coaching Academy Limited.

3. Where an appeal has been fully argued – as was the case here – this Court is, as a matter of principle, entitled to proceed to give judgment, notwithstanding that the appeal has been settled and that the parties do not wish that judgment be delivered. So much is clear from *McDonagh v Sunday Newspapers* [2017] IESC 59, [2018] 2 IR 79, in which the Supreme Court gave judgment on an appeal though asked not to do so in circumstances where the case had been settled (though they agreed not to indicate the specific amounts they would have substituted for the damages awarded by the jury). As McKechnie J explained at the start of his judgment:

> *"[124] Immediately prior to the intended delivery of this judgment, the court was informed that all matters had been compromised between the parties and that a final settlement of this litigation had been reached. As part of this compromise it was agreed between the parties that the court would be asked not to deliver judgment, and so an application to that effect was made. <u>However, because the judgments which were about to be delivered dealt with matters which are of general public importance, the court decided to proceed as originally planned,</u> subject only to an agreement by those who intended to nominate a specific damages figure, not to do so."* (my emphasis).

4. The entitlement of a court – whether an appellate court or a court of first instance - to give judgment in such circumstances is also well-established in England and Wales: see (*inter alia*) *Barclays Bank PLC v Nylon Capital LLP* [2011] EWCA Civ 826, [2012] 1 All ER (Comm) 912 and the recent decision of the Queen's Bench in *Jabbar v Aviva*

Insurance UK Ltd [2022] 4 WLR 68 which surveys the authorities. In his judgment in *Barclays Bank PLC v Nylon Capital LLP*, Lord Neuberger MR put the position thus:

> *"[74] Where a case has been fully argued, whether at first instance or on appeal, and it then settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment. Where the case raises a point which it is in the public interest to ventilate in a judgment, that would be a powerful reason for proceeding to give judgment despite the matter having been disposed of between the parties. Obvious examples of such cases are where the case raises a point of law of some potential general interest, where an appellate court is differing from the court below, where some wrongdoing or other activity should be exposed, or where the case has attracted some other legitimate public interest.*
>
> *[75] It will also be relevant in most cases to consider how far the preparation of any judgment had got by the time of the request. In the absence of good reason to the contrary, it would be a highly questionable use of judicial time to prepare a judgment on an issue which was no longer live between the parties to the case. On the other hand, where the judgment is complete, it could be said (perhaps with rather less force) that it would be a retrospective waste of judicial time and effort if the judgment was not given.*
>
> *[76] The concerns of the parties to the litigation are obviously also relevant and sometimes very important. If, for their own legitimate interests, they do not wish*

(or one of them does not wish) a judgment to be given, that request should certainly be given weight by the court. (Of course, in some cases, the parties may request a judgment notwithstanding the fact that there is no longer an issue between them.)

[77] Where there are competing arguments each way, the court will have to weigh up those arguments: in that connection, the reasons for any desire to avoid a judgment will be highly relevant when deciding what weight to give to that desire."

The Court of Appeal proceeded to give judgment in *Barclays Bank PLC v Nylon Capital LLP* despite being requested not to do so, for the reasons set out by the Master of the Rolls at para 78, including the fact that the court's judgment had been substantially completed by the time the court was notified of the settlement and that a number of issues dealt with in the judgment were of general significance. The fact that it was a purely commercial dispute appears also to have been a factor.

5. In *Jabbar v Aviva Insurance UK Ltd* the proceedings settled after the hearing of a strike-out application by a deputy master and as the deputy master was about to circulate her judgment. While the claimants requested that judgment not be handed down, the defendants argued that it should, on the basis that it raised an important point of law (as to whether absolute privilege applied to statements made in response to requests made under the equivalent of Order 39, Rule 59 RSC) and that it was in the public interest. The deputy master proceeded to give judgment, on the basis of the important point (and

previously undecided) issue of law involved and also because allegations of malice and dishonesty had been made by the claimants against the defendants. She also attached importance to the fact that it was not a condition of settlement that judgment would not be handed down so that there was no risk that the settlement would unravel if judgment was given. Her decision was upheld by the High Court (Chamberlain J) on appeal. He rejected the claimants' contention that where the process of handing down judgment had not begun at the time of settlement (a reference to the practice in England and Wales of circulating draft judgments to the parties under embargo prior to being handed down, which has no equivalent here) "*exceptional circumstances*" had to be established before a court could proceed to give judgment.

6. The factors identified in *Barclays Bank PLC v Nylon Capital LLP* are, in my view, relevant to the exercise of the Court's discretion here. Although not determinative, the fact that all of the parties are *ad idem* has to be given significant weight. There is a strong public interest in encouraging the consensual resolution of litigation, however belatedly. As has been often said, a negotiated resolution is generally preferable to one that is judicially-imposed. While it has not been suggested that the settlement reached by the parties is conditional on judgment not being handed down, publication of the Court's judgment may nonetheless undermine the status and value of the settlement from the perspective of one or other of the parties and deter other litigants from pursuing settlement.

7. No allegations of dishonesty or any form of deliberate wrongdoing were made in these proceedings and so that factor has no application here.

8. Nevertheless, the fact is that considerable judicial time – an expensive resource – has been expended in the preparation of judgment. One of the general benefits of settlement is that it saves judicial resources (and the resources of the parties). That is of limited relevance in circumstances where the appeal has been heard and judgment prepared. It has to be said that it is unfortunate that the parties were not in a position to agree a settlement at an earlier point. [2]

9. As to whether the appeal involved any issues of law of general importance, it was common case that the fact that Mr Campbell was struck by Mr Le Blanc's golf ball did not, of itself, warrant a finding of liability being made either against Mr Le Blanc or the First and Second Defendants. Equally, however, it was common case that there is no principle or rule of law that absolutely or even presumptively excludes a finding of liability in such circumstances. All of the authorities cited to the Court in argument stress that each case turns on its particular facts and circumstances.[3] As the Inner House stated in *Phee v Gordon*, "*decisions on liability for common law negligence in relation*

[2] I assume, in favour of the parties, that agreement was only reached when, or immediately before, the parties were notified that the Court was about to give judgment. Obviously, where an appeal is settled after hearing but prior to judgment, the Office ought to be informed without delay. Even in advance of a formal settlement being reached, it may be appropriate for the parties to notify the Office that the parties are in discussion so that the Court can consider whether to pause the preparation of its judgment for a period to allow such discussions to progress.

[3] See *Brennan v Old Conna Golf Course & Trundle* (Unreported, High Court, Peart J, 11 August 2014) (para 7), *Pearson v Lightning* [1998] EWCA Civ 591 (all three judges), *Phee v Gordon* [2013] CSIH 18, 2013 SCLR 687 (paras 23 and 24) and *McMahon v Dear* [2014] CSOH 100, 2014 SCLR 616 (para 208).

to golfing accidents are very fact-specific. It is dangerous to lift dicta from one case and apply them in another." (para 23). That was reflected in the arguments made in this appeal, in which the major focus was on issues of fact, particularly the question of where Mr Campbell was standing relative to the 11th green when he was struck, and the adequacy of the trial judge's analysis and conclusions on those issues. An issue also arose as to the scope and effect of the Occupiers Liability Act 1995 and, in particular, whether and to what extent it applies to risks arising from activities on a premises (as opposed to risks arising from the static condition of the premises). While significant, it cannot be said that that issue is entirely novel.

10. Overall, it appears to me that while the Court's judgment deals with some issues of general significance, its principal focus is on the resolution of the particular issues between the parties, arising on the specific facts presented here.

11. In the circumstances – and not without hesitation – I have concluded that the Court should accede to the request of the parties and therefore should not proceed to give judgment. As I have said, significant weight has to be given to the agreed position of the parties. The litigation has, I am sure, been very stressful for them. They are not commercial entities engaged in a commercial dispute. They have now settled their disputes, on whatever basis. While giving judgment will not formally affect the settlement, it could potentially have some impact on the parties and/or their advisors. In the particular circumstances here, these factors outweigh – just – the undoubted public interest in the publication of the judgment.

12. In many cases the balance is likely to tilt the other way and it is important that litigants should understand that where an appeal has been heard by this Court (and this judgment is concerned only with such appeals), the Court may proceed to give judgment even when the parties request it not to do so.

13. Accordingly, I would, by consent, permit Mr Campbell to withdraw his appeal, vacate all costs orders made in the High Court and make no order as to costs in this Court.

Birmingham P and Faherty J have indicated their agreement with this judgment