

THE HIGH COURT

[2011 No. 4865P]

BETWEEN

MAURICE WALSH AND YVONNE RATTIGAN

PLAINTIFFS

AND

NEWLYN HOMES (PORTUGAL) LIMITED

DEFENDANT

Judgment of Mr. Justice Hedigan delivered on 9th day of November, 2012.

1. In this application the defendant seeks an order pursuant to Order 56, rule 4 of the Rules of the Superior Courts staying the proceedings on the grounds that the dispute is subject to an arbitration agreement. The defendant is an Irish registered company involved in the development of a holiday resort in Portugal. The plaintiffs decided to buy one of the properties in this development and paid a deposit of €7,500 therefor. This deposit was refundable until the signing of an investment agreement.

2. These properties were being sold from plans and prior to the Portuguese equivalent of planning permission. It was not possible at that stage to enter into either a building agreement or a conveyance of the property. The plaintiffs entered into a real estate investment agreement with the defendant for the purchase of one of these properties. They had the services of a Portuguese lawyer to act on their behalf and completed the real estate investment agreement by signing it on the 4th September, 2006 and they paid an additional deposit of €22,500.

3. On 16th October, 2008 the plaintiffs were notified in writing that planning approval had been received for construction of the property. They were forwarded a copy of a promissory contract. Concerns were expressed with the terms of this promissory contract and the details of it were subsequently altered. The plaintiffs ultimately refused to enter the promissory contract and the defendant retained the deposit.

4. The plaintiffs demanded the return of their deposit and upon the failure of the defendant to do this, they issued a plenary summons on the 31st May, 2011. This was served on the 2nd June, 2011. A conditional appearance was entered to contest the jurisdiction on 7th July, 2011. A statement of claim was delivered on 12th July, 2011 and a notice of motion seeking judgment in default was issued on the 8th August, 2011.

5. The defendant issued a notice of motion dated the 15th September, 2011 seeking an order from the Court declining jurisdiction under Articles 23 and 24 of the Council Regulation (EC) No. 44/2001 on the grounds that there was a jurisdiction clause in the real estate investment agreement providing that Portugal be the forum for resolving any disputes.

6. This motion came on for hearing on the 8th and 9th May, 2012. Following hearing the motion, the President of the High Court refused the defendant's application on the grounds that the plaintiffs were a consumer within the meaning of the Brussels Regulations and that a jurisdiction clause could not therefore be enforced against them. The costs of this motion were awarded to the plaintiffs. At the hearing of the motion counsel for the defendant advised the President that if the defendant failed with the application, a motion would be brought to stay the proceedings for arbitration. The President extended the time to deliver the defence by a period of three weeks.

7. I accept the submissions made on behalf of the plaintiffs that this case falls to be decided under the rule in *Henderson v. Henderson* [1843] 3 HARE 100, 114. The doctrines of *res judicata* and abuse of process are concerned with and deal with circumstances where a person seeks to re-litigate a matter that has already been decided by a court of competent jurisdiction. However, a person may also be precluded from litigating an issue that has not previously been decided when it is one that could have been brought forward in previous proceedings. This rule is derived from the authority of the above case where Wigram VC stated as follows:

"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the 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. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

8. The application which was made by the defendant to the President was based upon the very same clause, i.e. Clause 11 as herein. The defendant has itself presented this clause as a jurisdictional/arbitration clause which ousted the jurisdiction of the Irish courts.

9. The defendant argues it could not have raised the case for a stay based upon the arbitration part of Clause 11 at the same time as it argued the jurisdictional part thereof. It argued by doing so would have constituted the taking of a step in the proceedings that would have waived their right to arbitration. No authority was open to me that support such a proposition in the circumstances of this case.

10. The action is apparently a relatively simple one. It is for a sum of €22,500 plus interest bringing the claim to €42,027.75. The issue seems focused upon an interpretation of the real estate investment agreement and whether it is automatically extended or not. There seems little dispute on the facts. The plaintiffs are Irish and based here. The defendant is a company domiciled in Ireland, albeit with a branch in Portugal. This branch is insolvent. The proving of Portuguese law on the narrow point at issue ought not present any

serious problem. It is to be noted that according to the affidavit of Jose Bulha, a Portuguese lawyer, sworn on 26th October, 2012, following a decision on arbitration by the arbitration panel established by the agreement herein, an appeal can be made to competence state court. Were this to happen it appears to me that the jurisdiction of the Portuguese courts could thus be resurrected notwithstanding the decision of the President of the High Court. I further note from this affidavit the details of the arbitration envisaged, in particular, the establishment of an arbitration court of three arbitrators. It seems a somewhat cumbersome arrangement more suited to a claim far larger than exists here.

11. It seems to me that the efficient conduct of legal proceedings is something that should inform this Court in this type of application. Upon that basis there seems an overwhelming case that the proceedings should be resolved in the Irish courts. In my view, it would have been possible and highly desirable that both elements of Clause 11 be argued at the same time before the President. I think it should have been. Therefore, applying the principle in *Henderson v. Henderson*, the issue is *res judicata* and cannot be allowed to vex the plaintiffs again. I note in the case of *Heifer International Inc v. Christiansen & Ors.* [2007] EWHC 3015, which was opened in this case that both an application to determine jurisdiction under the Brussels Convention and an application for a stay on the Arbitration Act were heard together without criticism.

12. For all these reasons I will refuse the motion to stay the proceedings and will make such other orders as are necessary to ensure the speedy resolution of this case.