Neutral Citation Number: [2007] IEHC 194

THE HIGH COURT

[2006 No. 5987 P]

BETWEEN

JOHN MC MAHON AND SHEENA SHARMA

PLAINTIFFS

AND

W.J. LAW AND COMPANY LLP, W J. LAW CASTLEBLAYNEY LIMITED, MARY COMER, PETER COMER, CORRIGAN, COYLE, KENNEDY MC CORMACK AND J.J. KEENAN AND SON

DEFENDANTS

Judgment of Mr. Justice MacMenamin delivered on the 15th day of June, 2007.

1. On the 2nd March, 2007 I delivered a ruling in relation to a motion brought by the first and second named defendants to strike out the proceedings against them on the grounds that they disclosed no reasonable cause of action. A further order was sought that the first named plaintiff be prohibited from instituting legal proceedings against the first and second named defendants without leave of this Court.

2. This ruling deals with motions for the same relief brought by the third and fourth named defendants (represented Mark de Blacam S.C.), the fifth named defendant (represented by Rossa Fanning B.L.), and the sixth named defendant (represented by Paul Fogarty B.L.).

3. The first named plaintiff was represented in this motion by Ms. Angela Heavey B.L. The second named plaintiff was not represented at this hearing although she was made aware that it was to proceed and had indicated at earlier hearings that she intended to take no further part in the proceedings.

4. The background to the application is described in the earlier ruling. In summary this motion brought by the various defendants relates to a plenary summons issued on the 4th December, 2006. It is the fourth proceeding issued by or on behalf of the first named plaintiff relating to lands at Killycard and Bree, Castleblayney, Co. Monaghan (registered under Folio Numbers MN9975 and MN10190). By deed of assignment dated the 15th January, 2007 Mary Comer assigned to W.J. Law (Castleblayney Ltd.) (the second named defendant) "all the benefit and advantages of the Circuit Court proceedings (relating to these lands) together with the costs and all other monies recoverable …". The proceedings are described in more detail below".

5. Mary Comer is the legal person representative of the late Peter Shevlin, a cousin of the first named plaintiff John McMahon. The deceased died in a road traffic accident in Castleblayney, Co. Monaghan on the 21st March, 2002. The first named plaintiff Mr. McMahon, alleges that over the years a relationship or partnership evolved between himself and Mr. Shevlin who was John McMahon's mother's nephew. Mr. McMahon contends that there was a form of agreement or trust arrangement whereby, in return for taking care of the farm, Mr. Shevlin would bequeath the farm to him. At the time of his death, Peter Shevlin had not made a will in favour of Mr. McMahon. He died intestate. The lawful beneficiaries in the intestacy were the third and fourth named defendants who live in the State of New York. They are the nephew and niece of the deceased and therefore his next of kin. In the Circuit Court proceedings brought by Mary Comer on the 16th March, 2004 against the first named plaintiff for vacant possession of the lands, John McMahon counterclaimed seeking a declaration of his entitlement to those lands which he used and occupied. These proceedings were heard on the 26th January, 2006 where an order was made as to the Comers' entitlement and restraining Mr. McMahon from entering onto the lands after the expiration of a period of three months. This was appealed to the High Court. After the matter was part heard the case settled. There was a variation of the order on consent on the 21st February, 2006, to the effect that Mr. McMahon would hand over vacant possession of the lands on or before the 17th March, 2006. A sum of money (€80,000) was to be paid to John McMahon. The first named plaintiff, did not comply with his obligations under the consent order. There were a number of applications for attachment and committal brought against him by the Comers. These came before the Circuit Court. Mr. McMahon was ordered to vacate the lands by the 31st May, 2006 which period of time was subsequently extended to the 11th July, 2006. He did not vacate the lands.

6. Ultimately on the 14th July, 2006 Mr. McMahon was committed to Castlerea Prison in Co. Roscommon for seven days for contempt of court. On 21st July, 2006 Mr. McMahon was committed for a further six days for continuing contempt of court. He was ultimately released by order of that court on the 27th July, 2006.

During that time John McMahon initiated an enquiry under Article 40.4 of the Constitution challenging his detention for contempt of court. This was superseded by order of the Circuit Court made on the 27th July, 2006 releasing him and did not proceed.

7. On the 8th August, 2006 the first named plaintiff instituted a further set of High Court plenary proceedings against Mary Comer and Peter Comer seeking damages for negligence, breach of duty and misrepresentation against them. A motion for interlocutory injunctive relief which came on for hearing on the 23rd October, 2006 in that proceeding was struck out.

8. On the 1st November, 2006 the first named plaintiff issued yet a further set of proceedings by way of special summons (No. 544SP/2006). These proceedings sought essentially the same reliefs, asserting the right of Mr. McMahon to the lands and denying the entitlements of the Comers. These proceedings, specifically, included a number of allegations against solicitors (engaged by the Comers) alleging gross professional and fiduciary negligence and also putting in question whether Peter and Mary Comer were in fact related to the late Mr. Shevlin, a fact not in anyway questioned earlier. Upon the return date of the special summons dated the 23rd November, 2006 the Master of the High Court indicated that the proceedings had been incorrectly initiated by way of special summons and suggested to the first named plaintiff that should he wish to proceed further it should be done by way of plenary summons.

9. No appeal was brought against the order of the Master of the High Court which included an offer for costs which has not been discharged.

The instant proceedings-by plenary summons

10. The proceedings which are the subject matter of these applications were issued on the 4th December, 2006. They relate to the same subject matter. The plaintiffs sought a total of forty six reliefs including declarations that the first named plaintiff was the true and lawful owner of the lands the subject matter of the Circuit Court proceedings, as appealed and already dealt with in the earlier proceedings.

11. Any analysis of the essential reliefs sought in this plenary summons shows quite plainly it is again an attempt to re-litigate the issues which arose in the Circuit Court, the High Court on appeal and afterwards the subsequent High Court proceedings before the

Master by way of special summons. Mr. McMahon now alleges that he was pressurised into entering the settlement (he was advised and represented by Senior and Junior counsel at the Circuit Appeal) and alleges that he felt threatened that if the proceedings were to proceed he ran the risk of losing his house in legal costs.

In the first ruling herein on the 2nd March, 2007 I refrained from expressing any view on the validity of this advice. Any subsequent material adduced before this court does nothing other than establish, that the effect if not the manner of advice given to Mr. McMahon and his wife, was correct. The most important point in this entire affair, at risk of further reiteration, is that, (unfortunately from his point of view), Mr. McMahon has established no claim at all on the lands, the subject of these proceedings.

12. Further evidential material adduced now in these motions persuades me that Mr. McMahon has, unfortunately a total mental bloc on this issue and has acquired a fixed and unalterable notion that he is entitled to the lands in the face of all or any evidence. This is despite the fact that the court has been shown a family tree drawn up by the sixth named defendant (who acted as Mr. McMahon's solicitor in the Circuit Court and the High Court) which quite clearly establishes the nature of the relationship between himself, Peter Shevlin and the Comers. It is undisputed this was drawn up on the instructions of the first named plaintiff.

13. More remarkably there is now exhibited material from an application for planning permission submitted to the local authority on the 15th June, 2006 for re-zoning of the lands. This was at a date *after* the completion of the High Court proceedings, where Mr. McMahon had consented to vacate the lands in the consent signed by himself and his wife. This planning application was made in the name of John McMahon at a time when he acknowledged he was no entitled to the land. No explanation for this has been furnished to this Court. As in the case of the family tree it has simply been ignored by the plaintiff and his advisors.

14. These applications therefore are brought by the Comers, Messrs Corrigan, Coyle, Kennedy and McCormack, former solicitors to the deceased Peter Shevlin and who acted for the brother and sister Mary Comer and Peter Comer (Peter Shevlin's next of kin), and J.J. Keenan and Son who were Mr. Mahon's own solicitors and who he also wishes to sue.

15. In the course of the affidavits sworn in these motions further evidence has been adduced which should be seen in the context of the findings in the earlier ruling.

16. Mr. Paul McCormack, a partner in the fifth named defendants, states that subsequent to the death of Peter Shevlin, Mr. McMahon made enquiries of him as to whether the deceased had signed a contract agreeing to sell the lands to Mr. McMahon for a sum of €200,000. Mr. McCormack's firm confirmed that no such contract had been signed and that no such instructions had ever been received. Even allowing for appreciation in value this must now be seen in light of the fact that the lands were ultimately sold by the Comers on the 4th August, 2006 for €10 million. If the late Mr. Peter Shevlin who was both elderly and frail, had signed a contract for the sale of the lands to Mr. McMahon for €200,000 it would surely have been a highly improvident transaction.

17. For completeness it should be mentioned that Mr. McMahon years previously had, on occasion retained the fifth named defendant (who afterwards acted for the Comers) on what were termed a number of "historical matters" including conveyance of the site upon which his house is built. But no evidence of any conflict of interest has been adduced.

18. This court has now been made aware that in the settlement of the proceedings reached on the 21st February, 2006, Mr. McMahon was to be paid the sum of €80,000 inclusive of costs in consideration of the assistance that he had given to the deceased during his lifetime. This was a settlement reached in the course of the hearing before the High Court. It contained terms that he was to vacate the lands which he failed to do. It is impossible to avoid the conclusion that Mr. McMahon has, quite simply, reneged on the settlement which he entered into on legal advice. The fact that the advice was unpalatable did not diminish its strength. It is perhaps a measure of the counter-productive stance later taken by Mr. McMahon that ultimately his own solicitor returned the cheque for €80,000 to the Comers' solicitors and that now, as a result of various costs and expenses incurred in bringing about clear and vacant possession of the land, this sum has itself been significantly diminished.

19. The sixth named defendant Mr. Keenan (Mr. Mahon's own solicitor in the substantive proceedings) in the course of his affidavit states that he has become aware since the swearing of his first affidavit on the 9th February, 2007 that various affidavits sworn by the first named plaintiff in his own right, and, allegedly in conjunction with a Mr. John Gill are exhibited or linked to a web site entitled "Victims of the Legal Profession Society". As Mr. Gill is not a party to these proceedings the Court will not refrain from further comment.

20. Mr Keenan also deposes in affidavit as to the circumstances of the settlement in the context of the plaintiff's allegation that he was placed under "intolerable pressure" to sign the settlement. The first named plaintiff had been in attendance for the entire of the Circuit Court proceedings on the 26th January, 2006 (where he was legally represented). He was in the process of giving evidence in the High Court appeal on the 21st February, 2007 when Mr. Justice Fennelly indicated that he would rise to allow the parties time to discuss settlement. Mr. Keenan states that John McMahon was in an ideal position to see how his case was proceeding and had the benefit of experienced Junior and Senior Counsel at all stages. It is deposed that the first named plaintiff was advised that any evidence adduced on his behalf did not support the alleged oral agreement that he maintained existed and that there was a significant risk of him losing the High Court appeal. It was in those circumstances an award of costs could be made against him.

21. On the 14th May, 2007, Mr. McMahon swore a further affidavit in this motion. As outlined in the earlier ruling, Mr. McMahon had, when the matter first came before this Court had been unrepresented. However, the second named plaintiff Ms. Sharma subsequently attended, on an adjourned hearing, and it emerged that her purported status in the proceedings was as a "McKenzie friend". No information has been vouchsafed to this Court as to whether Ms. Sharma has any legal or professional qualification. It is clear however, that she had no entitlement to be joined as a party to the proceedings as a "McKenzie Friend" or upon any other basis. Mr. McMahon's affidavit contains a number of highly remarkable averments, the more so as this was apparently drawn up with the benefit of the advice of the solicitor and counsel.

22. At para. 3 of that affidavit it is deposed:-

> "In relation to the matters before the Court, I deny the substance and relevance of each and all of the statements made on affidavit by each and all of the defendants herein as if same were set out herein and traversed seriatim – except to state that I acknowledge and agree with such statements made by each and all which set out and refer to substantive issues which are the material of previous litigations and which are indeed *res judicata* at law." (sic)

23. I find it difficult to understand the meaning of this paragraph. It would appear that Mr. McMahon denies the substance and relevance of what is deposed in affidavit, thereafter agrees with what was sworn against him in relation to the substantive issues and then accepts that they are *res judicata*.

24. In another paragraph Mr. McMahon alleges wrongful, concerted and orchestrated conduct of the defendant parties (by implication a form of conspiracy) and also seeks the deletion of the contents of the endorsement of claim of the proceedings in suit and the substitution therefor for "complaints" of what are termed as

(i) breaches of fiduciary duty,

(ii) breaches of professional duty,

(iii) unlawfulness as to equitable estoppels,

(iv) breaches of ordinary honesty,

(v) breaches of constitutional and human rights,

(vi) misleading of courts and other public offices,

(vii) abuses of the process of the court,

(viii) breaches of legitimate expectation.

25. A number of allegations are made against Mary Comer, phrased by opaque reference to legal terminology. These include suggestions that there was a failure on Ms. Comer's part to make reference to a "clog" or "burden" surrounding what is stated to be a "stale claim to repossess these lands by herself as an estranged alleged closest member of the family who re-appeared after almost fifty years" *(sic)*. A number of other generalised allegations are made. The applicant points to inconsistencies in correspondence. None of these are material to the issues herein and are only now apparently raised, after the substantive proceedings were complete and settled.

26. Legal submissions were made on behalf of Mr. McMahon at the hearing of these motions alleging conduct by the applicants which if true would constitute criminal and corrupt activity. None of these was borne out by any evidence. Regrettably this did not inhibit the making of these allegations in affidavit form and their repetition in submissions before this Court, unsupported by facts. No particulars of misconduct have been furnished in reply to a notice for particulars requesting such detail. No such detail was furnished by reference to evidence in the affidavit sworn by Mr. McMahon despite the fact that there was ample opportunity, over a number of weeks to obtain and adduce such evidence, if it was obtainable.

27. One point relied upon was the fact that the first set of proceedings were initiated by the Comers in the Circuit Court. It has been suggested that the fact that the jurisdiction of that court was invoked had, in some way undervalued the purported market value of the lands. The jurisdictional limitation on the Circuit Court by the rateable valuation of the lands has no such significance or effect.

28. At the conclusion of the previous ruling herein, I had urged upon the parties the possibility of considering compromise or mediation. This was prior to this Court having been informed as to the full nature of the compromise of the proceedings on the Circuit Appeal and also in the absence of additional evidence set out earlier in this judgment. Clearly in the light of what has now transpired the proposal is redundant.

Jurisdiction of the court to strike out proceedings and make an "Isaac Wunder" Order
29. In the course of the previous ruling herein reference was made to a number of authorities relevant in this area. These include *Fay v. Tegral Pipes and Others* [2005] 2 I.R. 261, *Barry v Buckley* [1981] 306 and also O. 19, r. 28 of the Rules of the Superior Courts. The observations and application of the principles made in the earlier ruling are as relevant here.

30. Reference was also made in the context of an "Isaac Wunder" order to the judgment of Ó Caoimh J. in *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463 and in particular six features therein identified justifying the making of such an order.

(1) Persistent litigation
31. There is evidence before this Court in these motions of the habitual or persistent institution of vexatious or frivolous proceedings against parties to earlier proceedings. This conclusion is not affected by the joinder of any additional parties. No reasonable cause of action has been disclosed against any party, including the sixth named defendant.

(2) Earlier history
32. The earlier history of the matter recited in this judgment and that of the 2nd March, 2007. A submission now made by counsel for the plaintiff is that it is now intended to strike out the entirety of the material contained in the indorsement of claim of the plenary summons in suit and to substitute generalised claims (see paragraph 24 of this judgment) not been in any way particularised, and clearly a rehearsal of earlier complaints under a new guise.

(3) Action must fail
33. The third feature identified the bringing on of yet a further proceeding to determine matters already determined by a court of competent jurisdiction when it is obvious that such action cannot succeed, would lead to no possible good, and where no reasonable person could expect to obtain relief.

(4) Improper purpose
34. A fourth feature is the initiation of an action for an improper purpose, including the oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights.

(5) Rolling forward issues into subsequent actions
35. A fifth feature identified in *Riordan* is the "rolling forward" of issues into a subsequent action and repeated and supplemented often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings.

(6) Failure to pay costs
36. The sixth feature is that there has been a failure on the part of the plaintiff to pay costs of earlier proceedings. The cost of the proceedings before the Master are not discharged.

All six features identified in *Riordan* are present here.

37. On the 2nd March, I refrained from expressing any final conclusion on the issue of an Isaac Wunder order; as to do so then might have had the effect of debarring the plaintiff as moving party or respondent from dealing with motions he had brought herein or restrict his right to defend the balance of the motions which were brought against him by the moving parties herein, the other defendants. The court has now heard all the evidence and the submissions in each of the motions and is no longer so restricted.

38. In *Riordan v. Ireland (No. 4)* [2001] 3 I.R. at p. 365. Keane C.J. observed:-

> "… there is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to re-open litigation or to pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This court would be failing in its duty, as with the High Court, if it allowed its processes to be repeatedly invoked in order to re-open issues already determined or to pursue groundless and vexatious litigation."

39. The observations of Keane C.J. are as apposite in the instant case as they were in *Riordan* although the parties enjoined are not public officials.

Issues not raised in earlier proceedings

40. Finally, it is necessary to refer to *Carroll v. Ryan and Others* [2003] 1 I.R. at p. 309, one of the instances wherein reference has recently been made to the judgment of Wigram V.C. in *Henderson v. Henderson* [1843] 3 Hare 100 who observed:-

> "I believe I state the rule of the court correctly when I say that, 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 the litigation to bring forth 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 and context, 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, even in special cases, not only on the points upon which the court was actually required by the parties to form an opinion and put down as a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising a reasonable diligence might have brought forward at that time." No special circumstances has been established here.

41. In *Johnson v. Gore Wood and Company* [2002] 2 A.C. 1 at p. 32, Lord Bingham noted that an important purpose of the rule in *Henderson* was to protect against the harassment involved in repeated actions concerning the same subject matter. He observed, appositely to this case:

> "This harassment, in my view may arise whether or not a set of proceedings is pursued to judgment or settlement."

Further authorities cited in the course of the judgment of Hardiman J. in *Carroll* which show that as a matter of public policy it is desirable in the general interest, as well as that of the parties themselves, that litigation should not drag on forever, that a defendant should not be oppressed by successive suits where one would do, and in the absence of special circumstances, parties should bring their whole case before the court, in a single set of proceedings.

42. In the ruling of the 2nd March, I stated:-

> "An honourable compromise in any case is far preferable to a futile stand on principle". This general statement remains as applicable now as it was then. It is clear however that attempts at compromise in this case failed. Matters have gone beyond redemption.

Serious imputations and assertions have been made unsupported by evidence.

43. Allegations of fraud or impropriety should be made only in circumstances where there is a sufficient evidential basis for them. It is not appropriate that submissions be made with extravagant claims asserted of misconduct without substantive factual basis. (See the judgment of Peart J. in *Sheehy v. Ryan and Another* (Unreported, High Court, 14th December, 2005) and Denham J. in *Connolly v. Casey* [2000] 1 I.R. p. 45). No evidential basis for such allegations has been established here.

44. The court will grant the reliefs sought by the applicants herein striking out these proceedings as being frivolous or vexatious. The court will also now grant an order prohibiting the first named plaintiff from instituting legal proceedings of whatever nature against any of the defendants named herein without the leave of this Honourable Court. These are powers which should be exercised sparingly. Unfortunately they must be invoked here.