Neutral Citation Number: [2005] IEHC 102

THE HIGH COURT

[Record No. 2003/6559P]

BETWEEN

STEPHEN MITCHELL

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

Judgment of Mr. Justice Hanna delivered on the 18th day of March, 2005

1. The above entitled proceedings commenced by way of plenary summons on 30th May, 2003. The plaintiff seeks to challenge the constitutionality of s. 62 of the Offences Against the Person Act, 1861. Since the issue of proceedings, pleadings have been exchanged, including an amended statement of claim and defence. During the course of the proceedings the plaintiff's legal representation changed and a notice of change of solicitor was served on 11th December, 2003. By the end of November, 2004, the President of the High Court was informed by both parties that the case was ready for hearing.

2. Notwithstanding the foregoing, the defendants, very late in the day, brought a motion in the proceedings dated 8th February, 2005, seeking, *inter alia*, to dismiss these proceedings as an abuse of process. The parties have agreed that I should deal with this motion as a preliminary issue. Accordingly, I will not comment upon the substance of the plaintiff's case or of the defence thereto.

3. It will be necessary to outline the essential background facts of the case. The plaintiff, a retired school teacher, was, at all material times, a member of the Christian Brothers congregation. Between the months of August, 1967 and August, 1974, he was a member of the staff at St. Joseph's residential school in Galway. Between March, 1995 and January, 1996, a number of persons, six in all, made complaints to An Garda Síochana of alleged indecent assaults perpetrated upon them by the plaintiff while they were pupils at the said school. It should be stressed that the plaintiff denies these and subsequent allegations to which I will shortly refer. The plaintiff was interviewed on two occasions by An Garda Síochana and, ultimately, twenty five charges were preferred against him, twenty three of which were brought under s. 62 of the Offences against the Person Act, 1861.

4. Two further complainants made allegations of a similar nature against the plaintiff in June and July, 1997. These in turn led to an additional eight charges being preferred against him all of which were brought under s. 62 aforesaid. Two books of evidence were served, one in November, 1997, dealing with the first tranche of charges relating to allegations made up to 2nd January, 1996 and a second book served on 3rd February, 1999, dealing with the second tranche of allegations made in June and July, 1997. The latter book of evidence was served on 3rd February, 1999. All of the charges, now 33 in number, including 31 involving s. 62 aforesaid have been consolidated and are the subject of the one return for trial dated 28th February, 2000. As is evident, there has been a considerable delay in processing this matter largely due, it would seem, to the case becoming bogged down in applications for discovery and transfer to Dublin and related matters.

5. On 16th February, 1998, the plaintiff sought and was given leave to apply for judicial review by way of prohibition against the Director of Public Prosecutions in respect of the criminal proceedings which were founded on the first tranche of allegations. Prior to this, the plaintiff had been interviewed by the Gardaí in relation to the second tranche of allegations and, during the currency of the judicial review proceedings, he was charged and served with a book of evidence in relation to these latter charges. The judicial review came on before Mrs. Justice McGuinness on 20th December, 1999. The plaintiff was refused the relief he sought and thereby failed in his attempt to stop the trial.

6. Counsel for the defendants, Mr. Coffey S.C., contends that the present proceedings are an abuse of process in that they raise issues which could and ought to have been raised in the judicial review proceedings. He complains that the plaintiff offers no tenable argument as to why the constitutional challenge was not litigated either in the judicial review proceedings or in tandem with them. He argues that the court must weigh heavily the public interest in coming to a view as to whether or not the current proceedings constitute an abuse of process.

7. For the plaintiff, Mr. Hogan S.C. complains of delay on the part of the State in bringing this application. He contends that the issue raised in these proceedings could not properly have been raised in the judicial review proceedings. He says that it is a discrete constitutional issue of major importance which, he candidly admits, had not occurred to the plaintiff's then legal representatives. He further points out that the judicial review proceedings were concerned only with the first tranche of charges. The second tranche of charges were not argued or dealt with before Mrs. Justice McGuinness.

8. This court has an inherent jurisdiction to police proceedings before it and to deal appropriately with any proceedings which it perceives to be an abuse of process. This is well described by Costello J. (as he then was) in *Barry v. Buckley* [1981] I.R. 306 where he says at p. 308:-

> "But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see Wylie's Judicature Acts (1906) at pp. 34-37 and The Supreme Court Practice (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L.J. in *Goodson v. Grierson* at p. 765."

9. It is, of course, desirable that all issues such as arise on this application be dealt with at the earliest reasonable stage of proceedings. From the point of view both of the parties and the courts such issues should be processed, where possible, at an early point in proceedings rather than let matters trundle onwards with inevitable time and costs implications. Nevertheless, it seems to me that once a potential abuse of process has been identified, it is, in my view, incumbent upon the court to assess the situation and act accordingly and I cannot see that any delay on the part of the party bringing an alleged abuse to the attention of the court could or should weigh heavily or, indeed, at all, with the court. Accordingly, the undoubtedly significant delay in raising the issue of abuse of process in this case is not, in my view, a factor of any real materiality in addressing this particular issue.

10. The next question that arises is whether it would have been possible to litigate the constitutional issue raised in these proceedings within the framework of the judicial review proceedings. It was contended on behalf of the plaintiff that the constitutional challenge in question could not have been so accommodated. Reliance was placed upon the dictum of Barrington J. in

Riordan v. An Taoiseach (No. 2) [1999] 4 I.R. 343 at pp. 350 to 351. In that case, a lay litigant had brought judicial review proceedings challenging, *inter alia*, the constitutionality of the 19th amendment of the Constitution Bill, 1998. Mr. Justice Barrington said as follows:-

> "This Court accepts that the system of judicial review referred to in O. 84 of the Rules of the Superior Courts, 1986, is a very useful jurisdiction. It recognises also that an application for judicial review commencing with an attack on a particular order or administrative decision, may, as the proceedings unfold, raise constitutional issues and develop into an attack on a particular Act of the Oireachtas. Clearly the issue ought to be disposed of in the quickest way possible and the quickest way to do this may be to decide it in the judicial review proceedings, see the comments of Walsh J. in *The State (Lynch) v. Cooney* [1982] I.R. 337 at page 373. No rigid rule should be laid down on the matter. But when the primary relief claimed by an applicant for judicial review is the validity of an Act or the repugnancy of a Bill, having regard to the Constitution, this Court considers that the case is not an appropriate one for judicial review, and that the applicant ought to be left to claim relief, if any, in plenary action.

11. In The *State (Lynch) v. Cooney* [1982] I.R. 337 at p. 373 Mr. Justice Walsh said as follows:-

> "It has been suggested in the course of the argument before this Court that certiorari is not an appropriate procedure for challenging the validity of an Act of the Oireachtas having regard to the provisions of the Constitution. It is not possible to lay down any hard or fast rule in this matter. The Court has often indicated that the quicker the procedure available the better for everyone. This Court has had many unfortunate examples of matters being held up for very long periods because the parties chose, as a matter of tactics, to initiate plenary proceedings rather than other speedier procedure to challenge the validity of an Act of the Oireachtas. The result has been that, on a number of occasions, proceedings in courts all over the country (particularly in the District Court) have been held up not only for months but for years pending the final resolution of the long drawn plenary proceedings. In matters which will have a very wide impact if the challenge to the validity of an Act should succeed, it is desirable that the proceedings should be initiated and determined in the quickest possible manner."

12. It is clear from the decision of Mr. Justice Barrington that he does not intend to lay down any hard and fast rule and this, indeed, reflects the spirit of what Mr. Justice Walsh says in *The State (Lynch) v. Cooney* [1982] I.R. 337. It is clear that a "stand alone" challenge to the constitutionality of any statute should be brought in a plenary action. But the reason why the issue raised in the present proceedings was not ventilated in 1998 and 1999 was, as has been noted, because it had not occurred to the plaintiff's then lawyers. Accepting that as fact and leaving aside for the moment the issue of whether an abuse of process has occurred, it seems to me that there was nothing to prevent the plaintiff litigating the issue raised in these proceedings in 1998 and 1999 had it occurred to his then lawyers so to do. The primary objective of the judicial review proceedings, lawfully and properly, was to stop the prosecution of the charges against the plaintiff. Striking down that section of the legislation under which all but two of the charges had been preferred against him must have been an avenue to be explored either in or in tandem with the judicial review proceedings. In fairness, Mr. Justice Barrington's judgment in *Riordan v. An Taoiseach (No. 2)* [1999] 4 I.R. was delivered during the currency of the judicial review proceedings. Therefore, insofar as the plaintiff's lawyers might have viewed that decision as a bar to the inclusion of the constitutional action in the judicial review proceedings, it certainly did not exist when the judicial review proceedings were first launched. Even if *Riordan v. An Taoiseach (No. 2)*were to be viewed as prohibiting inclusion of such constitutional challenge as is envisaged here in the judicial review proceedings, it is, in my view, inconceivable that the courts would not have facilitated the hearing and determination of parallel plenary proceedings. However, I feel it is not necessary that I go thus far. In my view, given that the issue raised in these proceedings would clearly have been viewed as one of two attacks upon the prosecution of these charges it could properly have been accommodated within the framework of the judicial review proceedings. The question, therefore, arises as to whether the current proceedings, in all the circumstances, amount to an abuse of process.

13. The defendants seek to rely upon what is often referred to as the rule in *Henderson v. Henderson* (1843) 3 Hare 100. The origin of this rule and some of the judicial instances of its application are set out in the following extract from the judgment of Hardiman J. in *Carroll v. Ryan* [2003] 1 I.R. 309 at p. 317:-

> "There is a well established rule of law whereby a litigant may not make the same contention, in legal proceedings, which might have been but was not brought forward in previous litigation. This rule is often traced to the judgment of Wigram V.C. in *Henderson v. Henderson* (1843) 3 Hare 100. The learned Vice-Chancellor spoke as follows at pp. 114 and 115:-
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> > '…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 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.'
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> A number of decisions affirming this approach were opened to us. Two of these were Irish cases. In *Russell v. Waterford and Limerick Railway Co.* (1885) 16 L.R. Ir. 314, Dowse B. said at p. 321, quoting from the decision of Willes J. in *Nelson v. Couch* 15 C.B. (N.S.) 99 at p. 108 of that report, that:-
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> > 'Where the cause of action is the same, and the Plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action.'
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> Similarly in *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345, Palles C.B. held at p. 372, that a party to a previous litigation was bound 'not only [by] any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein'. In the judgment of Kelly J. in the instant case, he also referred to *Barrow v. Bankside Ltd.* [1996] 1 W.L.R. 257 and to *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1. The first of these cases speaks in terms of issues that might 'sensibly' have been brought forward in previous litigation and also suggests that the rule of what is sometimes referred to as 'estoppel by omission' is not in fact based on res judicata in the strict sense but it is an independent rule of public policy. Lord Bingham held that the court must take the need for efficiency in the conduct of litigation into account.

In *Woodhouse v. Consigna* [2002] 1 W.R.L. 2558, Brooke L.J. referred to this public interest and continued at p. 2575:-

> 'But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in *Henderson v. Henderson* (1843) 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever, and that a defendant should not be oppressed by successive suits where one would do…'

This seems quite consistent with what Lord Bingham said in *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1 at page 31 when he urged that the court should arrive at:-

> '…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, focussing 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.'"

14. The Supreme Court revisited this topic in a case of *A.A. v. The Medical Council and Another* [2003] 4 I.R. 302. Referring to the rule in *Henderson v. Henderson*, Hardiman J. states as follows at p. 316 et seq.:-

> "Although the principle thus expressed has never been doubted, there has in recent years been a good deal of debate as to its precise legal nature and taxonomy and as to the circumstances in which and rigidity with which it should be applied. Many of these issues are debated in an illuminating article by Handley J., a judge of the Court of Appeal of New South Wales, in 'A closer look at *Henderson v. Henderson'* (2002) 118 L.Q.R. 397. The author cites various recent and not entirely consistent applications of the principle. In particular, he considers too crude and too mechanistic the application of it in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] A.C. 581. In that case, at p. 590, Lord Kilbrandon and his colleagues dismissed as an abuse of process, proceedings which were an attempt to raise matters which 'could and therefore should have been litigated in earlier proceedings'. Handley J. prefers the approach of Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1. He said at p. 31: -
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> '*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 interestes of the parties and the public as a whole. The bringing of a claim of 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 the earlier proceedings it should have been, so as to render the raising of it in a 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, focussing 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.'
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> In *Woodhouse v. Consignia p.l.c.* [2002] 1 W.L.R. 2558, Brooke L.J. referred to the public interest in the efficient conduct of litigation and continued at p. 2575:-
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> 'But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in *Henderson v. Henderson* (1843) 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all, is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits where one would do.'
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> The position is still more succinctly expressed in *Gairy v. Attorney General of Grenada* [2002] 1 A.C. 167, where, speaking of the principle in *Henderson v. Henderson* (1843) 3 Hare 100 and its offshoots, Lord Bingham said at p. 181:-
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> 'these are rules of justice, intended to protect a party (…not necessarily, a defendant) against oppressive and vexatious litigation.'"

15. I am also assisted by the following statement of the circumstances in which what is referred to as estoppel by omission applies:-

> "1. if there was no newly discovered fact;
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> 2. if it was newly discovered only in the sense that the party realised its importance;
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> 3. if the party had actual knowledge of the fact or might with reasonable diligence have acquired such knowledge, or
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> 4. if it was not sufficiently material." (See McDermott, Res Judicata and Double Jeopardy Dublin 1999) (at p.81).

16. As noted above, it is conceded on behalf of the plaintiff that the constitutional issue raised in these proceedings was not raised by the plaintiff's then lawyers because, in effect, it had not occurred to them. As I have concluded above, there was no effective procedural bar to this issue being raised either in or in conjunction with the judicial review proceedings. The purpose of those

proceedings was to halt the criminal proceedings being brought against the plaintiff. The constitutional issue, had it occurred to the plaintiff's then lawyers, would obviously have been germane to what was the clear objective of the plaintiff's earlier litigation. This is clearly an issue which could reasonably have been brought forward before.

17. It is in the interests of the plaintiff, the complainants and, the defendants and the public generally that the criminal charges be processed with the minimum of delay having regard to the fact that the charges relate to a period of time so long ago. As it is, more than six years have elapsed since the commencement of the judicial review proceedings.

18. At all material times, the plaintiff has been legally represented and has had the benefit of what was and is, no doubt, the highest standard of legal advice. Nothing new has emerged nor has there been any alteration in the plaintiff's circumstances. In particular, there is no evidence of any alteration in his financial circumstances insofar as they are material. The only new factor to emerge is that a fresh legal point has occurred to the plaintiff's present legal representatives. In my view, that point could properly and sensibly have been raised in the earlier proceedings.

19. The plaintiff, as is his entitlement, has sought to assert what he perceives to be his rights in the judicial review proceedings. Up to their conclusion, the primary focus of the court was those rights, whether or not they were jeopardized in some fashion and, if so, whether relief could or ought be granted him. At this juncture, however, it seems to me that the court must adopt a somewhat broader overview and take into account the rights of all of the participants in these proceedings and the public in general. Such rights and interests would require the earliest possible prosecution of the charges against the plaintiff. The plaintiff failed in his attempt to prohibit such prosecution. The reason advanced for failure to litigate the issue raised in these proceedings in the judicial review application is not, in my view, tenable.

20. Counsel for the plaintiff, has also urged upon me that the second tranche of charges which were not the subject of the judicial review, in effect, immunises him from the rule in *Henderson v. Henderson* (1843) 3 Hare 100. I think not. It is inconceivable that the later charges would have been proceeded with had the plaintiff succeeded in his earlier proceedings.

21. For the foregoing reasons, I am of the view that the proceedings herein amount to an abuse of process. I would therefore accede to the defendants' application and dismiss them.