THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 361

Peart J.
Irvine J.
Hogan J.

Record No. 2014/1222

Record No. 2014/1223

Record No. 2014/1224

Between:

Mario Cafolla

Plaintiff/Appellant

And

Leo O'Reilly and Sean Brady

Defendants/Respondents

Between:

Ciara Fusco

Plaintiff/Appellant

And

Leo O'Reilly and Sean Brady

Defendants/Respondents

Between:

Marie Cafolla

Plaintiff/Appellant

And

Leo O'Reilly and Sean Brady

Defendants/Respondents

JUDGMENT of Mr Justice Peart delivered on the 12th day of November 2015:

1. In his judgment delivered on the 28th February 2014, Kearns P. determined a preliminary issue set down for hearing pursuant to order dated 16th December 2013, that issue being whether the claims now brought by each appellant against the first named respondent have been the subject of a prior accord and satisfaction. The second named respondent was not party to the issue so directed and is not a party to the present appeal.

2. The President concluded that the three separate proceedings commenced in the High Court by each appellant should be struck out as against the first named respondent because previous proceedings commenced by each in Northern Ireland in 1996 had been the subject of a prior accord and satisfaction in 1998. He concluded that those proceedings were in respect of both the same cause of action and the same damage. They have each appealed to this Court against that judgment and the order made by the President dated 6th March 2014.

3. The claims in the Northern Ireland proceedings were for damages for sexual abuse perpetrated upon them in the 1970s by the late Fr. Brendan Smyth while the appellants were very young children. Mario and Marie Cafolla are brother and sister, and Ciara Fusco is their first cousin.

4. The defendants named in those proceedings were "His Eminence Cardinal Cahal Daly Archbishop of Armagh, Primate of All-Ireland on behalf of the Roman Catholic Church in Ireland and the Council of Bishops, Marcel Van de Ven on behalf of the Norbertine Canons, Reverend Gerard Cusack, Administrator of the Norbertine Abbey at Kilnacrott, and Father John Gerard Brendan Smith (sic)".

5. In 1998 and 1999 each of the appellants signed a document (there may be a very small variation in one of the documents signed, but none that is relevant for present purposes) containing agreed terms of settlement of their proceedings in Northern Ireland. They were legally advised and represented at the time. The settlement in the case of Mario Cafolla was in the following terms:

> *"I, Mario Cafolla of 10 Gransha Parade in the City of Belfast hereby acknowledge receipt of the sum of Twenty Five Thousand Pounds (£25,000) together with a sum of money in respect of my legal costs from Reverend Gerard Cusack, Administrator of Holy Trinity Abbey, Kilnacrott, Ballyjamesduff, County Cavan which sum is paid by the said Reverend Gerard Cusack without any admission of liability and accepted by me in full and final settlement and discharge of each and every claim or demand of whatsoever nature or kind and howsoever arising against the defendants herein and each of them and/or against any third party in connection with each and every one of the complaints made by me in relation*

to Reverend John Gerard Brendan Smith (sic) deceased. I hereby confirm and agree that each and every one of my complaints in respect of the said Reverend John Gerard Brendan Smith (sic), and in respect of each and every one of the alleged acts or matters by him concerning me are now fully and finally disposed of and will not be re-opened by me or any one on my behalf at any time in the future against the within named defendants or by any of them or against any third party."

6. The present proceedings were commenced by each appellant notwithstanding the express and clear terms of settlement whereby in consideration of a payment of damages to them they each agreed that they would never in the future bring any further proceedings not only against the particular defendants named in those proceedings but also "against any third party" arising from the alleged acts of Father Brendan Smyth.

7. Apart from placing reliance on the precise and comprehensive terms of settlement signed by each of the appellants, the respondents have referred to the provisions of sections 16 and 17 of the Civil Liability Act, 1961 which provide:

> *"16(1) Where damage is suffered by any person as a result of concurrent wrongs, satisfaction by any wrongdoer shall discharge the others whether such wrongdoers have been sued to judgment or not.*
>
> *(2) Satisfaction means payment of damages, whether after judgment or by way of accord and satisfaction, or the rendering of any agreed substitution therefor.*
>
> *(3) If the payment is of damages, it must be of the full damages agreed by the injured person or adjudged by the court as the damages due to him in respect of the wrong; otherwise it shall operate only as partial satisfaction.*
>
> *(4) An injured person who has accepted satisfaction from one alleged to be a wrongdoer, whether under a judgment or otherwise, shall, in any subsequent proceeding against another wrongdoer in respect of the same damage, be estopped from denying that the person who made the satisfaction was liable to him; and the liability of such person shall be conclusively assumed for the purpose of the said proceeding; but the injured person may litigate in the said proceeding any question of law or fact relative to the liability of the defendant to such proceeding, other than the question whether or not the said satisfaction was made by one liable to the injured person."*
>
> *17(1) The release of or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are discharged.*
>
> *(2). If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35, and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total sum shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest.*
>
> *(3) For the purpose of this Part, the taking of money out of court that has been paid in by a defendant shall be deemed to be an accord and satisfaction with him."*

8. The appellants contend that the present proceedings are a separate cause of action in respect of different damage which they allege they suffered, subsequent to the settlements signed by them, when they learnt in January 2012 through a journalist that in 1975 the predecessor of the first named defendant, Bishop Francis McKiernan, had convened two meetings arising out of complaints made to him that two children had been abused by Fr Brendan Smyth. It is pleaded that after those meetings a new duty of care was owed by Bishop McKiernan to members of the public generally, and particularly to those children such as the plaintiffs to whom subsequently Fr Brendan Smyth had access, and who were subsequently sexually abused by him, to prevent such access in order to prevent such sexual abuse occurring. It is further pleaded that Bishop McKiernan owed a specific duty of care to the plaintiffs in circumstances where one of the children who was interviewed actually identified one of Ciara Fusco's cousins as being a potential victim of Fr Brendan Smyth and indeed provided his then address. In this way, the plaintiffs contend that the present proceedings stand outside the settlement agreements referred to, and that the new cause of action in respect of new and different damage can be maintained despite the settlements reached in the Northern Ireland proceedings in 1998.

9. The alleged new injuries are set forth in the pleadings and in the affidavit evidence before the High Court, but can be conveniently summarised by reference what is contained in the appellants' written submissions. Mario has stated that the revelation that one of the persons interviewed in 1975 had actually identified him as being a potential victim of Fr Brendan Smyth, and that further abuse of him could have been avoided, came as a shock to him and gave rise to further injury which was entirely foreseeable. In the case of Marie Cafolla it is stated that the revelations brought about a moderately severe adjustment disorder which was directly related to the revelations and to the previous experience of abuse by Fr Smyth which potentially could have been avoided. She had reported symptoms of post-traumatic stress disorder related to the experience of sexual abuse, and it appears that while these complaints had settled in so far as they ever can, and she had reached a level of closure, they revived after the revelations in 2012. In the case of Ciara Fusco these revelations are said to have been catastrophic for her, and triggered a recurrence of depression, and a severe worsening of her post-traumatic stress disorder symptoms, including feelings of anger, distress and bitterness, and a desire to self-harm. In addition, each appellant claims aggravated damages on the basis that the information that came to light in 2012 had been deliberately concealed by the defendants, thus enabling further abuse to occur.

10. In the High Court, having set forth a history of events and the submissions of the parties on the application by the first named respondent to strike out the plaintiffs' claims, Kearns P. correctly identified the real question to be addressed on the application as being *"whether as contended for by the plaintiff, the revelation or discovery of the meeting in 1975 constitutes a fresh cause of action and a new and separate injury which was not addressed by the accord and satisfaction".*

11. In so far as the plaintiffs in the High Court contended that the parties to the present proceedings are not the same as those in the previous Northern Ireland proceedings, and that therefore these proceedings are different proceedings which arise from different wrongs by different wrongdoers, the President said he was satisfied that *"the first named defendant in these proceedings, who is sued as an institutional defendant, was sued in the same institutional capacity as the first named defendant in the Northern Ireland proceedings …… and the Court sees no meaningful distinction deriving from the somewhat different nomenclature adopted in the*

legal proceedings in the different jurisdictions". I respectfully agree that there is no distinction, and I respectfully agree also that in any event the terms of settlement discharged not only the named defendants but also *"any third party in connection with each and every one of the complaints made".*

12. The appellants submit that the President was wrong to conclude that the injuries for which they now seek to be compensated are an exacerbation of the same damage as that for which they were compensated under the settlements in 1998, albeit arising from the later discovery that the 1975 meetings had taken place as described above. They say that the President erred in concluding that those revelations do not alter the substance or nature of the damage. The respondent on the other hand refers to the fact that Ciara Fusco and Marie Cafolla have pleaded in their Reply to Defence that the revelations about the meetings in 1975 triggered a significant exacerbation of their previous psychological injuries, and that these constitute a separate injury in the nature of nervous shock arising from separate wrongs on the part of the respondent. Mario Cafolla makes similar pleas.

13. However, the respondent submits that the appellants misunderstand what they must demonstrate before they can be permitted to bring new proceedings, and that what they must show is that they have suffered different damage, and not simply the same damage or an exacerbation of the same damage, or even an unforeseen complication in relation to same. They also submit that the appellants have misunderstood the nature of a nervous shock claim in tort, and submit that such a claim can only be grounded in the actual or apprehended physical injury referable to the actual abuse suffered, and that therefore it is inevitably covered by the terms of settlement signed by each appellant.

14. While I extend the greatest sympathy towards the plaintiffs for the additional suffering which they say that they have been caused and have had to endure, I am satisfied that the President was correct in his conclusion that what they have endured must be considered to be an exacerbation of the injuries suffered by them as a result of the abuse itself, and which was the subject of the earlier proceedings in Northern Ireland. There has been no evidence adduced from which a different conclusion might be reached. I am fortified in my conclusion in this regard, as was the President in his judgment, by what is stated by *Walton et al, Charlesworth & Percy on Negligence* (12th ed. Sweet & Maxwell, 2010) at page 333 as follows:

> *"Where the claimant in a negligence action reaches, on a proper construction of an agreement, a full and final settlement of all claims arising from his cause of action, he cannot commence another action at some later date arising from the same matter even where some damage has arisen, for instance in an accident claim, some complication of injury, the possibility of which was not foreseen at the time of settlement".*

15. This is also underscored by a decision of this Court from earlier this year: see *Flynn v. Desmond* [2015] IECA 34. In that case a personal litigant settled a personal injuries claim for a relatively small sum, although he was also advised that he should seek independent legal advice. There were, however, difficulties with liability and the Court was not satisfied that the settlement was in some way improvident. What is important so far as the present case is concerned is that Mahon J. stressed the importance of the finality of settlements. As he put it, there was a "considerable public interest in upholding the finality of settlements" and "courts have been traditionally wary of permitting any litigant to undo any such settlement."

16. Applying these principles to the present case, the evidence shows that what happened to each appellant after they became aware that the meetings had taken place in 1975 and that no action was taken to prevent the appalling abuse which the appellants and others later suffered, was that the wounds which had been so painfully inflicted, and from which they suffered so severely, and for which they accepted compensation under the terms of settlement, were re-opened, causing the suffering which they had previously endured to revive. In my view it is pain and suffering which, while completely understandable and of a kind which no human being should ever have to endure, is nevertheless directly related back to the original acts of abuse by Fr. Brendan Smyth which were the subject of the previous Northern Ireland proceedings.

17. The President went on to emphasise the importance of the principle of finality of litigation, and that *"settlements must, in the interests of the proper administration of justice, achieve finality of disputes".* In so concluding, he is unquestionably correct. As Mahon J. indicated in *Flynn* it could only be in the clearest and most exceptional circumstances that a party could be permitted to litigate again in relation to matters which have already been litigated to a conclusion, or in respect of which he or she has already reached a settlement.

18. During the course of his judgment, the President concluded also that he was satisfied that the allegedly new or additional facts which the plaintiffs say give rise to separate causes of action and new damage, were already in the public domain by 1998, and that therefore the settlements reached were not reached in ignorance of any fact material to the sum offered. The basis for that statement was a number of newspaper extracts from 1995 and 1997 which had been handed into court by counsel for the first named defendant during the hearing of the preliminary issue. He stated in that regard:

> *"I am in any event satisfied that the "new" or "additional" facts relied upon by the plaintiff were already in the public domain when the proceedings were settled. In the course of the hearing before this Court, counsel on behalf of the first named defendant handed in a number of newspaper reports which made clear that the information relating to the meetings in 1975 had been in the public domain for some time before the settlement had been arrived at in 1998. Reports from the Cork Examiner (Oct 1995), The Irish Times (Oct 1995), Sunday Mirror (August 1997) make this abundantly clear. It follows that the plaintiff and, more particularly his legal advisers were aware, or ought to have been aware, of all material facts prior to entering the accord. It cannot be plausibly maintained that any alleged insufficiency in the sums received was therefore attributable to the ignorance of the potential liability of the defendants herein."*

19. Before addressing the appellants' submissions in relation to this conclusion, it is necessary to refer to the fact that at the commencement of the hearing of the application to strike out, the plaintiffs had apparently objected to the hearing of the preliminary issue at all, since there were facts upon which they would rely which were not "established or agreed facts", and they had wished to adduce oral evidence in relation to same at a full hearing. This Court has seen no transcript of the hearing before the President but it seems clear that while there was no formal order made that this application would be heard on affidavit evidence only, that was the way in which it proceeded. In my view, given that the success or failure of the application to strike out the claims against the first defendant would depend upon the proper construction of the terms of settlement signed by each plaintiff in 1998, no oral extrinsic evidence could assist that determination, and that it was therefore appropriate to deal with the matter on the affidavits filed and by way of legal submissions.

20. However, it is clear from the President's judgment that during the course of the application certain newspaper articles were in fact handed into court in support of the first named defendant's submission that the allegedly new facts and revelations which the plaintiffs said caused the new injuries about which they complain were, or ought to have been known to them or at least by their advisers before or at the time that they signed the settlement agreements. The appellants complain about this, and say that if the

matter was proceeding without oral evidence and was being dealt with on affidavit evidence only, this additional material ought not to have been allowed into court and should not have been relied upon by the President in support of his conclusions. It appears that the plaintiffs objected to these articles being handed into Court, but the President allowed them to be referred to. The appellants submit that this was impermissible, and caused an unfairness in that they were given no notice of the fact that they would be tendered to the Court, and their legal team therefore had no opportunity to take their instructions in relation to their contents, and the appellants' awareness or lack of awareness of their contents.

21. There is no doubt that if these articles had been exhibited in an affidavit grounding the application to strike out, the appellants would have had an opportunity to say anything they might wish to say in relation to their contents or their awareness or lack of awareness of the articles. However, in my view, while a counsel of perfection would be against the handing into Court of these articles in the way that happened, these articles are not central to the conclusion on the central question which the Court had to decide on this preliminary issue. While the President saw fit to refer to them in his judgment, these articles were not decisive for his determination. In my view, whether or not the appellants were aware of the information in these articles, they and their advisers must have anticipated that as time moved on it was likely that further information concerning Fr. Brendan Smyth and those with whom he was associated in the course of his work as a member of the religious community would emerge. If that were not the case there would have been no need to include in the settlement terms an agreement that the plaintiffs would never in the future bring any further proceedings against any of the defendants or any other party. By that clause the appellants were giving up any entitlement to bring any further proceedings against any other party in respect of any matter arising from their complaints against Fr. Brendan Smyth. It was not necessary therefore for the President to place any reliance upon these newspaper articles in his judgment. He would still have been entitled to reach the same conclusions without doing so. While I agree that it might perhaps have been preferable had he not received them informally as he did, it does not render the trial of the preliminary issue unfair such that the appeal should on that account be allowed.

22. The appellants have urged that given that this was a preliminary issue, the President should have proceeded on the basis of established or agreed facts, and where facts were in dispute, then on the basis that the plaintiffs' case must be taken at its highest. They say that the President failed to treat certain of the facts alleged by the plaintiffs as being true for the purpose of the preliminary issue, namely facts which they submitted indicated a lack of intention on their part, at the time they signed the settlement agreements, to discharge the defendants from the claims in the present proceedings. In their notice of appeal it is stated that The President erred in that *"[he] failed to hear oral evidence in relation to the issues, including the circumstances of the previous settlement and the 'intention' indicated thereby, the (lack of) actual or constructive knowledge of the plaintiff/appellant regarding the 1975 meetings prior to 2010 and the inadequacy of the quantum of the earlier settlement (and the surrounding circumstances giving rise to that inadequacy)".*

23. The appellants' written submissions set forth a number of facts, which were not agreed facts, which they wished to put forward by way of evidence in support of their contention that the settlement agreements which they signed did not evince an intention on their part to discharge the defendants from the claims made in the present proceedings, as follows:

> (a) The legal advice received by the plaintiffs was to the effect that they had no case against Cardinal Daly, then Archbishop of Armagh, and that neither the Norbertine Order nor Fr Brendan Smyth, against whom they had the strongest case, had funds.
>
> (b) Cardinal Daly informed the plaintiffs, as part of a group, that their claims were not matters for him as the Norbertine Order was not his responsibility and that they should take the matter up with the Norbertine Order.
>
> (c) The amount of the settlement did not represent the full monetary value of the plaintiffs' injuries.
>
> (d) The second named defendant and the first named defendant's predecessor had concealed and/or failed to disclose their wrongs to the plaintiffs as at the dates of the previous settlements.
>
> (e) As a consequence of the concealment or otherwise, the plaintiffs were unaware of the wrongs of the defendants, their predecessors, servants and/or agents at the dates of the previous settlements.
>
> (f) But for these matters, the settlement (if any) of the previous proceedings would have been different and more favourable to the plaintiffs.

24. Bearing in mind that the central issue for determination *was "whether as contended for by the plaintiff, the revelation or discovery of the meeting in 1975 constitutes a fresh cause of action and a new and separate injury which was not addressed by the accord and satisfaction"*, it does not seem to me that the above alleged facts are relevant at all in determining what is essentially a question of construction of the settlement agreements, and in respect of which parole evidence of matters outside the written terms would not, other than in some exceptional circumstance, be permitted. The agreements must be construed by reference to the ordinary sense of the words used therein. The Court was not being asked to set aside the agreements on the grounds of something akin to fraud or even mistake. Nor was the Court asked to determine whether the claims were statute-barred or whether, alternatively, they are saved by s. 71 of the Statute of Limitations Act 1957 on the basis of fraudulent concealment. What is contended for by the appellants is that the agreements were not intended by them to discharge the present defendants from the claims in respect of the injuries now complained of in the present proceedings, and that there was no accord and satisfaction operating to prevent them pursuing the present proceedings.

25. As to the adequacy or otherwise of the amount of damages paid under the settlements, I agree with the President's conclusion in that regard, and his reliance upon the statement of de Valera J. in *J.B. v. Southern Health Board* [2007] IEHC 291 as quoted by him. One needs no evidence to know that every day of the week plaintiffs settle their disputes for less than full value. There can be many reasons for this. It may be because the party accepts advice that they are at risk on liability. It may be that an important witness is unavailable to them. It may be that the party wishes to settle at an early stage rather than wait some years before the case may be heard. There are any number of possible reasons. But what is clear is that after a party has accepted a sum in full and final settlement of his claim, he or she cannot re-open that litigation or commence new proceedings in respect of the same injuries or a further sequela that later emerges, in the light of some new fact, which if he had known it or been able to anticipate it at the time he settled the case, would have caused him not to settle for the amount being offered. A party who settles his case does so, save in some most exceptional of circumstances not present in these proceedings, for all time and regardless of facts or information which later come to light unless a clear intention to the contrary is evident from the terns of settlement signed.

26. In my view the settlement agreements in this case permit of no construction other than one which demonstrates clearly an intention that the settlement in each case was a final settlement, not only as against the named defendants but any other wrongdoer

not so named, and was in respect of any complaints "of whatsoever nature or kind and howsoever arising" from the complaints made against Fr. Brendan Smyth. The claims now being pursued in the present proceedings are captured by the all-embracing nature of these agreements.

Conclusions

27. In my view, the President was correct that these proceedings must be struck out, and for the reasons given I would dismiss these appeals.