THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 205

Appeal No. 2017/451

McGovern J.
Baker J.
McCarthy J.

BETWEEN/

DAVID COLE

PLAINTIFF/

APPELLANT

AND

LIAM O'MAHONY

PLAINTIFF

- AND -

BERNADETTE CAHILL TRADING UNDER B.N. CAHILL & CO.

DEFENDANT/

RESPONDENT

JUDGMENT of Ms Justice Baker delivered on the 22nd day of July, 2019

1. This is the appeal from the decision and order of O'Connor J. made on 19 July 2017, following the delivery of an *ex tempore* judgment by which he dismissed the claim of the plaintiffs pursuant to the inherent jurisdiction of the court arising from the inordinate and inexcusable delay of the plaintiffs in the initiation and prosecution of the proceedings.

2. The appeal is made by the first named plaintiff only, David Cole. Liam O'Mahony, the second named plaintiff, did not lodge a notice of appeal and took no part in the hearing of the appeal. He and the appellant were represented by the same solicitors at the High Court hearing.

3. The background facts may be briefly stated. The plaintiffs claim that they, along with another person with whom they were in a commercial partnership, contracted with the defendant that she would act as solicitor for them in the purchase of a quarry in the County of Waterford in or around the month of November 2006. The plaintiffs claimed that the defendant failed to perform the normal obligations of a conveyancing solicitor in the raising of requisitions and the making of preliminary enquiries concerning the planning status of the quarry then being operated on the lands to be purchased. The plenary summons was issued on 22 May 2012 and seeks damages for negligence and breach of contract. The statement of claim was delivered thereafter on 31 August 2015.

4. The statement of claim pleads that an unidentified third party and each of the two named plaintiffs discharged one third each of the deposit and one third of the balance of the purchase price on completion.

5. The defence delivered on 26 February 2016 contains a preliminary objection that the two plaintiffs could not maintain the claim as they were just two of a partnership of three purchasers and the balance of the defence is without prejudice to those pleas.

6. No reply to defence was served.

7. The matter first came on before O'Connor J. pursuant to a motion brought by the defendant that the proceedings be struck out on account of the failure of the plaintiffs to make discovery in accordance with an order of Cross J. on 24 October 2016. O'Connor J. made an order on 7 July 2017 that the defendant be at liberty to amend the motion to include a plea for an order dismissing the proceedings in the inherent jurisdiction of the court arising from an alleged inordinate and inexcusable delay of the plaintiffs in initiating and prosecuting the proceedings.

8. Thereupon, affidavits were sworn on 17 July 2017 by Dennis Healy, the solicitor on record for both plaintiffs, in which he explained the reason why the order for discovery which had been sworn by the first plaintiff on 22 March 2017 was incomplete.

9. At the hearing of the motion, the plaintiffs argued that the delay in prosecuting the proceedings was not culpable delay as they were awaiting further documentation from AIB who had financed the purchase of the lands in question. The plaintiffs also argued that the High Court judge had erred in permitting the defendant to amend the motion to include a plea that the proceedings be struck out for delay. No formal appeal of the making of the amendment to the motion is brought by the plaintiffs, and accordingly, it is not appropriate that this Court would pronounce upon that argument.

10. Counsel for the appellant made arguments regarding the proper exercise of the jurisdiction of the court to strike out proceedings for delay but counsel for the respondent made a preliminary objection regarding the appeal which, for reasons that will now appear, it is appropriate to first consider.

Preliminary objection: One appellant alone may not maintain the appeal

11. The proceedings seeks damages for alleged professional negligence in the provision by the defendant of legal services for a partnership in a property transaction. The claim of the second plaintiff has been dismissed and he has not appealed the order, the effect of which is that he may no longer maintain the proceedings.

12. Counsel for the defendant argues that once the judgment of O'Connor J. had dismissed the proceedings by one partner in respect of the partnership claim, the partners being joint contractors, that judgment binds the other partners.

13. Counsel for the appellant argues that the defendants may not, as a matter of good practice and in the light of the jurisprudence of the courts, make an argument now not made in the High Court. This is to miss the point, namely that the fact that one only of the two plaintiffs has appealed the judgment in respect of a joint claim is fatal to the appeal. The point arises on the appeal only. The point was well flagged before the appeal came on for oral hearing, and is a reflection of, albeit a different argument from, the principle stated in the preliminary objection made in the defence to the proceedings I have outlined above. There is no question of the appellant being surprised by the argument, and accordingly, no argument that it is unfair or wrong, as a matter of due process, that the appeal be defeated on this procedural ground.

14. The point is well established and is found in the judgment of Parke B. in *King v.Hoare* (1844-1845) 13 M&W 494 where judgment had been recovered against one defendant alone and was unsatisfied. A separate action commenced against another defendant in respect of the same contract was held inadmissible. At p. 504 the proposition was stated in general terms as follows:

> "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, "transit in rem judicatam," – the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two."

15. The point was considered to apply in respect of a joint tort as well as a joint contract. The proposition is that the cause of action "merges" in the record of judgment.

16. That decision was later considered by the House of Lords in *Kendall v. Hamilton* (1878-1879) 4 App Cas 504 and the language used was that the contract had "passed into" the judgment. The debate between the members of that Court regarding the effect of the Judicature Act and the merger of remedies in law and equity do not fall for consideration in the present case as the point came for discussion in regard to the question of whether the partners had a joint or several liability. I will return to that point later in this judgment.

17. The decision of Parke B was followed by Vaughan Williams L.J. giving one of two concurring judgments of the Divisional Court of Queen's Bench in Hammond v. Schofield [1891] 1 QB 457. There, the plaintiff had obtained a consent judgment against one defendant and was later informed that the named defendant was a partner and part proprietor of the business with which he had contracted. The application to set aside the judgment and join the other party as co-defendant was ultimately refused on appeal on the grounds that a co-contractor may defend an action on the contract on the well-established rule that "there shall not be more than one judgment on one entire contract".

18. A more recent application is found in the judgment of the Court of Appeal for England and Wales in the old case of *Pirie v. Richardson* [1927] 1 KB 448. There, the plaintiff had sued the defendant for damages for breach of a contract entered into by the plaintiff with a firm of which Richardson, at that time, was a partner. The partnership had been dissolved before the writ was issued and the former partners were subsequently added as defendants and each put in a separate defence. The action against one of the three partners was dismissed on account of non-performance of a condition in the contract. Judgment was then entered against the other two defendants, who then appealed.

19. The two defendants argued that the contract sued upon was a joint contract under which all three partners were jointly liable and that if one partner had been held not to be liable it was not possible in law to give effect as against the remaining partners to a contract which had already been held to create no liability against one of them.

20. Hanworth M.R., at p. 451, referred to *King v. Hoare* and *Kendall v. Hamilton* to state the principle that "where there is a joint contract there is but one cause of action" and considered that the plaintiff was relying on a joint contract and not on several liability. He allowed the appeal and entered judgment for all of the defendants taking the view, at p. 454, that "the judgment as against all three defendants ought to be the same."

21. In his concurring judgment in *Pirie v. Richardson*, at p. 454, Scrutton L.J. described the point as "curious" and one on which there was little authority. He did, however, at p. 455, express the view that:

> "The question of joint contractors is wrapped up with a technical rule of law, but one which is far too well established to be interfered with."

22. He too relied, at p. 455, on *King v. Hoare* and *Kendall v. Hamilton* to the effect that:

> "you can only have one judgment on a joint contract on grounds which apply to the whole contract. Consequently, if A. has got judgment against B., then judgment against C. and D. is merged. A. cannot sue C. and D. because there is no contract to sue on".

23. I am persuaded by that argument and also by the argument relied on by Scrutton L.J., at p. 455. He went on as follows:

> "The foundation of that rule is that you can only have one judgment on a joint contract unless it relates to some matter peculiar to one of the parties, in which event you may have a judgment where D. is not liable, while B. and C. are liable. There is very little authority on the point whether you can have contradictory judgments on a joint contract. Lord Selborne in *Smith v. Cropper* [10 App Cas 249, at 259] uses the picturesque language: 'This order is felo de se, it is inconsistent with itself.'"

24. In his concurring judgment in *Pirie v. Richardson*, at pp. 456-457, Romer J. stated the simple but correct proposition that:

> "[I]t is the ordinary case of there being one cause of action and one only. If, therefore, there was no cause of action against Palmer, as Greer J. has held, there was no cause of action against the other two defendants."

25. That judgment is of some authority and is based on the authorities of some antiquity I have mentioned above, and, in my view, provides a persuasive authority to answer to the present case and means that the remaining plaintiff, Mr Cole, must be bound by the judgment delivered by O'Connor J. against Mr. O'Mahony who has not appealed that order and which is now final and determinative of the issue. The claim is made in respect of a contract to purchase land entered into by a partnership. While it might have been possible for the plaintiff to have sought to join the third partner in the proceedings before the High Court and, thus, to have saved the action, and while it might theoretically be possible to argue that they were suing in a representative capacity on behalf of all three partners, the position is different once judgment has been entered that is conclusive and final against one of the three partners, as has occurred in the present case. That judgment by which the proceedings were dismissed is determinative for all three partners, to use the language of Scrutton L.J. in *Pirie v. Richardson*, and the claim in negligence has merged in the judgment by which the proceedings have been dismissed.

26. I should add, however, that the matter is not merely one which is procedural and technical, but one which goes to the very basis of what might, in general, be called an issue estoppel or *res judicata*. It is a well-established principle that the rule of law does not and cannot tolerate there being two judgments of the same competent court regarding the same cause of action. This theoretical and principled reason why the appeal must fail is not, as counsel argued, a mere technicality but a matter fundamental to the principles of certainty and finality in litigation.

Joint or several claim?

27. Counsel for the appellant argues that it is possible to characterise the claim as being one made severally and that the statement of claim is not properly to be characterised as a claim by a partnership. An examination of the statement of claim shows that this assertion is not correct. In the first place, the claim is made on foot of a contract made with the defendant that she would provide conveyancing services to the plaintiffs jointly. Whilst in the early part of the statement of claim there is no reference to the third person who was party to that agreement, he is mentioned at the final paragraph of the statement of claim as been one of the three parties who equally discharged the purchase price. It is clear too from the affidavits exchanged in the proceedings that the claim was made by the plaintiffs as two of three partners in a business venture.

28. Quite apart from the partnership aspect of the case, the plaintiffs sue on foot of liability owed by the defendant to each of them jointly. Paragraph 5 of the statement of claim sets out the express or implied terms of the contract, and pleads that the defendant acted as solicitor for the plaintiffs, and the plural is used. Paragraph 6, which pleads the particulars of negligence, also identifies the plaintiffs in the plural as does paragraph 7, which identifies the alleged breach of the duty of care and breaches of contract.

29. The sole basis on which the appellant might seek to argue is that the contract is to be treated as giving rise to several and not joint obligations by the defendant to the three purchasers is contained in para. 9 of the statement of claim which I will repeat in full:

> "The plaintiffs, each of them, and also a third party on foot of the agreement discharged the sum of €23,666.66 for balance of deposit (€15,000 having already been paid) on or about the 7th day of December 2006 and on or about the 12th March 2007 each discharged a sum of €258,000 being the balance of the purchase price due on completion."

30. In my view, that is not a plea of several liability, nor is it a plea that the plaintiffs were acting in a several and not joint way in the purchase of the lands. It matters not that they seemed to have purchased the lands as tenants-in-common, and the central question is whether they contracted together and jointly with the defendant for the provision of professional services for the purchase by them jointly of development land.

31. I cannot, for these reasons, accept the argument of the appellant that the claim as constituted may be interpreted as one made by each of the plaintiffs severally and that the pleas may be read as implying that the defendant owed each of the plaintiffs a separate duty, and the claim as pleaded is that the duty was owed to the plaintiffs jointly.

Can the defect be cured?

32. The appellant argues that the matter is unduly technical and that he was always entitled to sue in respect of his share in the alleged partnership losses. Quite apart from the argument from principle regarding the conclusiveness of the order of O'Connor J., the respondent argues from the principles of partnership law and the correct manner in which a claim by a partnership is maintained.

33. Counsel for the respondent relies on a proposition stated in *Twomey, Twomey on Partnership* (2nd ed., Bloomsbury, 2019) at para. 12.06, that:

> "a partner has authority to bring proceedings on behalf of the firm or to defend proceedings on behalf of his firm, since these actions are within the implied authority of a partner". He goes on, at para. 12.53, to say that:
>
> "it is always possible for proceedings to be commenced in the partners' own names, but in such a case, all the partners should be made defendants or plaintiffs."

34. Twomey then, at para 12.54, states the proposition that:

> "Whether proceedings are taken in the firm name or not, some general observations may be made about the different types of proceedings. An action in contract, where the firm is the principal to the contract, or an action in tort, where the firm has suffered joint damage or causes damage (in which case the partners are jointly and severally liable for that damage) is usually taken by, or against all the partners in the firm."

35. I pause here to reflect that the author states not that proceedings must be taken by all of the partners in the firm, but the general proposition regarding an action by or against partners derives from the general nature of a partnership. Again, counsel for the respondent relies on a proposition stated in *Twomey on Partnership*, at para. 3.02:

> "Perhaps the most important characteristic of a partnership is the fact that it is not a separate legal entity, rather it is an aggregate of its members. Indeed, many of the other characteristics of a partnership […] can be traced back to the aggregate nature of the firm, eg, that a firm cannot employ a partner, that a partner cannot be the firm's debtor or creditor, that a partner cannot sue his own firm, etc."

36. Reliance is also put on the judgment of Silber J. for the High Court for England and Wales in *Watson Farley & Williams (A Firm) v.*

Ostrovizky [2014] EWHC 160, later affirmed on a different point by the Court of Appeal [2015] EWCA Civ 457. The defendant had brought a counterclaim seeking damages for alleged negligence and breach of duty of a partner in the Athens office of his former solicitor, the plaintiff firm in the proceedings. The case made by the defendant in the counterclaim identified a Greek lawyer as the partner who had acted on their behalf. The counterclaim arose in an action brought by the firm for outstanding fees and the claim for fees had resulted in an order for summary judgment of the High Court which had been paid in full by the defendant pending determination of the counterclaim. Having found that there was a partnership between the defendant and another identified person with whom an agreement existed to share profits, Silber J. considered the question of whether the proceedings were properly constituted, as only one of the two partners had made the counterclaim. In the circumstances where no separate legal personality could be said to exist for the partnership or the joint venture between the defendant and his identified partner, he concluded, at para. 370, that:

> "for both partners to recover, they should both be parties to counterclaim."

37. Silber J. relied on the joined cases of *Sedgworth v. Overend* (1796-1798) 7 TR 279. Addison and Sedgworth jointly owned a ship as partners. Addison had sued and recovered what was described by Kenyon L.J. as "full satisfaction of all the damage that he had sustained to his share of the ship". Sedgworth then sued Overend and the Court had to determine whether Addison should have been joined as co-claimant. The Court permitted recovery by Sedgworth and, in essence, allowed each partner to recover the share that each of them owned.

38. Silber J. relied also on a general rule formulated by Lindley L.J. and quoted from Banks, *Lindley & Banks on Partnership* (19th ed., Sweet & Maxwell, 2010), at para. 14.35, which cited *Cabell v. Vaughan* (1669) 1 Wms Saund 291m, that:

> "Where a claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court orders otherwise."

39. Silber J. held that, as the defendant had not made the claim in a representative capacity, he could not make a claim for the full amount but only that as he would be entitled to under the partnership.

40. He noted that the civil procedure rules in that jurisdiction followed that approach.

41. A similar observation may be made in regard to the Rules of the Superior Courts in this jurisdiction, O. 15, r. 13 of which provides that a claim against or by a partnership cannot be defeated "by reason of the misjoinder or non-joinder of parties" to the proceedings.

42. This analysis concerns the procedural manner in which a partnership claim is to be constituted. It must be seen against the general backdrop of the power of the court to amend pleadings or to add or remove parties to proceedings in the interest of justice. Taken alone, the argument regarding a proper constitution of the proceedings might not have justified striking out the action and I will leave the point to another case where it neds to be decided.

43. The matter raided on the present appeal is more than a procedural one and raises the question of whether the dismissal of the claim against one of two parties is determinative of the partnership claim.

44. As noted above, the defence raised the plea regarding the standing of two of the three partners to make the claim and it may have been possible, at that point in time, for the two then plaintiffs to have reconstituted the proceedings to deal with that procedural objection. It might, in the alternative, had been possible for them to sue in respect of their partnership share and to amend the pleadings to reflect that claim. However, that was not done and it is too late to make that alteration and amendment now in the light of the binding and conclusive determination by O'Connor J. that the claim of one of the two plaintiffs is to be struck out for delay. That order binds both plaintiffs in respect of this action which both of them bring jointly and it is not now possible to isolate a separate ground of appeal which may be maintained by one of those two plaintiffs.

45. I would therefore dismiss the appeal on that basis.