# THE COURT OF APPEAL

# CIVIL

**APPROVED**

**Neutral Citation Number [2021] IECA 20**

**Record No.: 2020/140**

**2020/141**

**2020/142**

**Faherty J.**
**Collins J.**
**Binchy J.**

**BETWEEN/**

**SOLICITORS MUTUAL DEFENCE FUND LIMITED**

**PLAINTIFF/RESPONDENT**

**- AND -**

**PETER COSTIGAN AND OTHERS PRACTISING UNDER THE STYLE AND TITLE OF BLOXHAM**

**DEFENDANTS/APELLANTS**

**AND**

**MORGAN STANLEY & CO. INTERNATIONAL PLC AND OTHERS**

**THIRD PARTIES**

**JUDGMENT of Mr. Justice Binchy delivered on the 1st day of February 2021**

**1.** The respondent was incorporated as a company limited by guarantee for the purpose of providing professional indemnity insurance to solicitors in Ireland. The respondent retained the services of the appellants, who carried on the business of, *inter alia*, providing

investment advisory services. In 2005, upon the advice of the appellants, the respondent invested the sum of €8,400,000.00 in a bond recommended by the appellants. This bond subsequently lost 97% of its value, as a result of which the respondent issued proceedings against the appellants on 1st December 2009, by which they claimed damages for breach of contract, negligence, breach of duty, breach of fiduciary duty and negligent misrepresentation. The proceedings were issued in the Commercial Court, and were listed for hearing on 1st February 2011, before Finlay Geoghegan J. However, on 28th January 2011, the parties entered into a written settlement agreement (the "Settlement Agreement") compromising the proceedings. On 31st January 2011, the parties informed Finlay Geoghegan J. that the proceedings had been settled and, at the request of the parties, the following order was made (the "Order"):

> "By consent IT IS ORDERED that these proceedings be struck out as against the first to fourteenth named defendants with liberty to re-enter.
>
> And by consent IT IS ORDERED that these proceedings be struck out as against the fifteenth named defendant with no order."

**2.** The Order makes no reference to the any settlement or to the Settlement Agreement. The Settlement Agreement envisaged a series of payments being made by those appellants, who were parties to the Settlement Agreement, to the respondent, commencing on 1st March 2011 and ending on 1st March 2016. Payments fell due on 1st October 2011, 1st March 2012, 1st March 2013, 1st March 2014, 1st March 2015 and 1st March 2016. The first three payments were made, but no payment was made on 1st March 2013, or thereafter.

**3.** The Settlement Agreement contains a number of terms relevant to the issues arising on this appeal. At clause 15, it provided that:

> "15. In default of payment of any instalment… within seven days of the due date, SMDF shall be entitled to apply to re-enter these proceedings before the

Commercial Court and obtain Judgment against Bloxham jointly and severally for the sum of €8,400,000.00… less any payments made in accordance with the schedule….”

Clause 17 provided for the confidentiality of the Agreement. Clause 21 provided for the agreed form of Order to be made on foot of the settlement, as follows:

“At the first opportunity after the execution of these Terms of Settlement, the Parties will jointly mention this matter to the Judge of the High Court having charge of the Commercial List for the purpose of obtaining the following orders:

a) These proceedings are to be struck out.

b) No Order as to costs.

c) Liberty to both parties to re-enter.”

**4.** Arising out of the default on the part of the appellants in making payments due under the terms of the Settlement Agreement, the respondent issued a motion dated 25th June 2019, seeking to re-enter the proceedings and an order granting judgment against those appellants who were parties to the Settlement Agreement, in the sum of €4,921,276.59, being the balance claimed by the respondent to be outstanding pursuant to the terms of the Settlement Agreement. That application was opposed by the fifth, eighth, tenth, thirteenth and fourteenth named defendants (the appellants), who argued that the effect of the Order was to dispose of the proceedings, and thus render the court *functus officio*. The appellants contended that the only mechanism available to the respondent to enforce the terms of the Settlement Agreement is the issue of fresh proceedings. On 18th November 2019, the application came before Barniville J., who directed that the question as to whether or not the court was rendered *functus officio* by reason of the terms of the Order should be determined by way of trial of a preliminary issue. The trial of that issue came on before McDonald J. on 4th March 2020, who delivered judgment on 14th May 2020, holding that the court is not

*functus officio*, and has jurisdiction to determine the application of the respondent. It is against that decision that the appellants now appeal.

**Judgment of McDonald J.**

**5.** Having carefully reviewed the authorities opened to him, McDonald J. concluded that the authorities demonstrate that it is necessary to construe a court order, made by consent, by reference not just to its terms, but also by reference to the specific context in which the order was made. In support of that approach, he relied on the judgment of Clarke J. (as he then was) in *Ranbaxy Laboratories Limited v. Warner-Lambert Company* [2009] 4 I.R. 584. While noting that that decision was concerned with the interpretation of a patent, nonetheless what Clarke J. had to say was of more general application as regards the interpretation of documents affecting legal rights. The trial judge quotes from para. 37 of the judgment of Clarke J. in *Ranbaxy*, where he stated:

> "However, it seems to me that the overall principle behind the construction of any document which is intended or is likely to affect legal entitlements and obligations is that it must be construed in the context of its purpose and in a manner which those whose rights and obligations are likely to be effected by it, would understand it."

**6.** Following on from that, at para. 55 of his judgment, McDonald J. held:

> "In circumstances where, by reference to the language used in the order, there is doubt as to its meaning and effect, it must be construed against the backdrop of the settlement agreement that was entered into on 28th January, 2011."

**7.** McDonald J. then proceeded to consider the language used in the Order. He noted that while the strike out of proceedings would ordinarily mean that they are thereby terminated, with the consequence that the court would thereafter be *functus officio,* in this case the Order provides, in the same sentence, and by consent, that there is to be liberty to re-enter the

proceedings. He stated that the Order must be read as a whole. The provision for the re-entry of the proceedings signalled that the court was to have a future role.

**8.** While acknowledging that the words "liberty to re-enter" would ordinarily mean that there is liberty, at some point in the future, to litigate the original action, in this case those words had to be viewed against the background that the hearing of the action had been fixed to commence on the following day, 1st February 2011, before Finlay Geoghegan J. in the Commercial Court. She would have read the papers in advance and had been aware of the likely length of the time allocated for a hearing. In those circumstances, McDonald J. agreed with the submissions of counsel for the respondent that it would be "unthinkable" that Finlay Geoghegan J. would have contemplated that the original claim could be litigated at some point in the future. She would certainly not have contemplated such a course without a convincing and comprehensive explanation. Since there is no evidence of such an explanation, McDonald J. considered it unlikely that, in this case, the purpose of providing "liberty to re-enter" was to permit the original claim to be litigated at some point in the future.

**9.** Accordingly, McDonald J. concluded that the court can only have proceeded on the basis that liberty to re-enter was given for some other purpose. In considering this other purpose, he was of the opinion that he was entitled to have regard to the terms of the Settlement Agreement. He drew support for this from the authorities referred to him including *Ascough v. Roe* (Unreported, High Court, 21st May 1982)*, O'Mahony (a Minor) v. Minister for Education and Science and Ors.* [2005] IEHC 211 and the more recent decision of O'Connor J. in the case of *Carthy v. Boylan* [2020] IEHC 166. I discuss these authorities below. McDonald J. also considered that this approach is consistent with the general principles relating to interpretation of documents having legal effect, as discussed by Clarke J. in *Ranbaxy.*

**10.** Having so concluded, McDonald J. then examined the terms of the Settlement Agreement, and further concluded that there could be no doubt about what was meant by the words "liberty to re-enter" as used in the Order. He held, at para. 58(d) that:

> "They are plainly there to give effect to the provisions of clause 15 of the settlement agreement where, in clear and unmistakable terms, each of the parties to that agreement agreed that, in default of payment of any instalment within seven days of the due date, the plaintiff should be at liberty to apply to re-enter the proceedings before the Commercial Court and obtain judgment for the amount then outstanding. It is clear from clause 15 that the parties did not intend that the original claim should be re-entered for hearing but, instead, they intended that the re-entry would be for the much more limited purpose set out in that clause."

**11.** Consequent upon that conclusion, he held, at para. 58(e):

> "Thus, it seems to me that, when one reads its terms as a whole and in context, the order of 31st January, 2011 was not intended to render the court *functus officio* for all purposes but was, instead, intended to permit the re-entry of proceedings for the limited purpose set out in Clause 15."

## Submissions

### Submissions of the appellants

**12.** For convenience, save where I indicate otherwise, I will deal with the submissions of all appellants as one. The appellants submit that there is an inconsistency in the Order. They maintain that it is clear from the authorities that once proceedings have been struck out they are at an end. In those circumstances, the additional part of the Order providing for "liberty to re-enter" is of no effect. If the parties intended the court to have a role in the enforcement of the Order, then it was necessary for them to request the court to make a Tomlin or similar order, making clear the role of the court.

**13.** The appellants argue that the terms of the Settlement Agreement form no part of the Order, and there is nothing to indicate that the Settlement Agreement was handed into the court, or that the judge was made aware of the contents of the same. On the contrary, the affidavit evidence of the parties on this application strongly suggest otherwise. Accordingly, they submit that the Order must be interpreted on its own terms, from the perspective of the court, and not that of the parties.

**14.** In the absence of a Tomlin order, or an equivalent order that clearly provides for an on-going role for the court, the terms of the Settlement Agreement constitute a new agreement between the parties, enforcement of which requires the issue of fresh proceedings, the existing proceedings being at an end.

**15.** Once the proceedings were struck out, the court had no jurisdiction to re-enter the same. In order for the court to have jurisdiction in the enforcement of the settlement, it was necessary to structure the terms of settlement and the Order appropriately. Moreover, even if the proceedings were to be re-entered, ordinarily this refers to the re-entry of the original proceedings. Indeed the trial judge accepted this at para. 57 of his judgment, but nonetheless sought to identify a different role for the court, and erred in doing so. It is submitted that however unattractive it may be, the fact is that the Order contains no mechanism providing a role for the court in the enforcement of the settlement entered into between the parties. Insofar as the Order contains two statements that are irreconcilable, the striking out of the proceedings is effective, and what follows is superfluous.

**16.** From a substantive point of view, it is submitted that if the Court holds with the respondent and dismisses the appeal, the effect of that is to deprive the appellants of their entitlement to rely upon the Statute of Limitations Act, 1957 (the "Statute") in their defence of the respondent's application for judgment. This will work an unfairness on the appellants in circumstances where the respondent took no action on foot of the Settlement Agreement

for a period of more than six years following the first event of alleged default on the part of the appellants. In fact, in those circumstances there would be no time limit at all because it would be open to the respondent to bring an application for judgment at any time within the framework of the existing proceedings, without having to be concerned about the Statute. More widely, this would be a seismic shift in relation to the current understanding as to the principles applicable to settlement agreements, and the interaction of such agreements with the Statute. It would also be open to abuse and would create the possibility of litigation being re-opened many years after it has been settled.

**17.** Insofar as McDonald J. placed reliance upon the decision of the High Court of England and Wales in the case of *Bostani v. Pieper* [2009] EWHC 547 as authority for the proposition that the appellants would not in these circumstances be precluded from relying upon the Statute in their defence to the application for judgment against them, the appellants submit that it is far from clear whether or not *Bostani* represents the law in this jurisdiction, or that if it does, it would apply in the circumstances of this case. It is unnecessary however to consider this issue further in light of a significant concession made by the respondent in the course of these proceedings, which I explain below.

**18.** In making these submissions, the appellants place particular reliance on *Green v. Rozen* [1955] 1 WLR 741, *Ascough v. Roe* and *O'Mahony v. Minister for Education and Science and Ors*. In *Ascough v. Roe*, Barron J. was required to consider the effect of an order of the Circuit Court, which stated, *inter alia*: "[t]he proceedings herein shall be struck out by consent with no order as to costs save as herein provided …. Liberty to both parties to apply at any Court on the Eastern Circuit". In the course of his judgment, in a passage much relied upon by the appellants, Barron J. held that:

> "Strike-out is a form of order which disposes of the case. It does not merely take it out of the list. It is not the same as adjourned generally with liberty to re-enter."

**19.** In arriving at his conclusions in *Ascough*, Barron J. placed some reliance on *Green v. Rozen.* In that case, proceedings had been stayed on terms endorsed on counsels' briefs. No order of any kind was made by the court, but Slade J. held that in such circumstances the agreement compromising the action between the parties completely superseded the original cause of action, and that the court had no further jurisdiction in respect of the matter.

**20.** In *O'Mahony (a Minor) v. Minister for Education and Science & Ors.,* following settlement of the proceedings, the settlement was approved by the court. The order of the court having so recorded, it then proceeded as follows:

> "By consent it is hereby ordered that the respondent should pay the applicant the costs of the proceedings herein when taxed and ascertained, and that the said proceedings do stand adjourned generally with liberty to re-enter."

**21.** The proceedings were concerned with the alleged breach of the plaintiff's constitutional rights by the defendants, in failing to provide an appropriate primary education to the plaintiff, who suffered from autism. The settlement required the defendants to provide certain supports to the plaintiff, such as psychology and speech therapy support, as well as payment of the sum of £20,000 IR. The sum was paid, as was the amount payable in respect of the plaintiff's costs, but the plaintiff sought to re-enter the proceedings on account of the alleged failure on the part of the defendants to honour their commitments to provide the support services referred to in the settlement.

**22.** In the course of his judgment, O'Neill J. had regard to the terms of the settlement. O'Neill J. also noted that, for the reasons given in his decision, it had been conceded that the mandatory relief of the kind originally claimed by the plaintiff in the proceedings was no longer possible. The plaintiff was therefore seeking to re-enter the proceedings in order to claim declaratory relief.

**23.** On the application for re-entry of the proceedings, the defendants submitted, *inter alia*, that if the plaintiff had any remedy, it would be by way of a new action suing for breach of the settlement and not by way of re-entry of the original proceedings.

**24.** It is clear that the court in this case looked in some detail at the terms of settlement, and in doing so O'Neill J. came to the conclusion that the defendants had not entered into the kind of contractual obligation contended for by the plaintiff. Having reached that conclusion, O'Neill J. then asked what were the consequences, and he held:

> "In my view the phrase 'liberty to re-enter' coupled with 'adjourned generally' in this context can only mean that in the event of a failure to fulfil the commitments made by the Respondent [the defendant] that the Applicant [the plaintiff] would have the right to litigate the original claims in that [*sic*] proceedings unless it could be said that the proceedings had been brought to termination by a settlement, which was approved by the Court…"

**25.** The latter was in fact the case because the applicant was a minor at the time. Moreover, O'Neill J. found that in circumstances where no injunctive relief was available, and no further damages would be recoverable, it would be an idle exercise of the jurisdiction of the court to re-enter the proceedings. The appellants rely on this case as authority in support of their argument that where the phrase "liberty to re-enter" is used, it refers to the re-entry of the proceedings for the purpose of litigating the claims made originally in the proceedings.

**26.** The appellants also rely on academic commentary on the issues. In *Delany and McGrath on Civil Procedure* ($4^{th}$ edn, 2018), chapter 20, the authors give consideration to the various ways in which to give effect to terms of settlement of disputes. In para. 20-21, the authors state:

> "Perhaps the simplest course and one which is frequently adopted in practice is for the proceedings to be struck out, either simpliciter or on the basis of terms agreed

between the parties. This course may be attractive where the parties wish to keep the terms of the settlement confidential, but it does suffer from the marked disadvantage that the compromise retains its contractual character and cannot be enforced without the issue of fresh proceedings."

The authors cite, as authority for this proposition, *Green v. Rozen* and *Ascough v. Roe.*

**27.** The appellants also rely on the views expressed by Mr. David Hardiman SC in an article written by him in 1998 in the Commercial Law Practitioner [1998] 5(10) 247-254. In this comprehensive review of the authorities as they stood at the time, the author concludes as follows:

> "The weight of authority indicates that it is at least unsafe, and probably useless, to conclude an action with the order 'strike out' if any value is to be obtained from the expression 'liberty to apply'. If an action is to be disposed of by consent on terms of any complexity which the court is asked to observe but not directly order, and such terms are to be received and made a 'rule of court' the action must be stayed and not struck out if the parties want to do anything further with it."

**28.** In his article, Mr. Hardiman identifies three categories of procedure for enforcement of settlements. These are endorsed in another publication, also relied upon by the appellants, namely Collins, *Enforcement of Judgments* (2nd edn, 2019) and are as follows:

(1) Where proceedings are struck out or are subject to an unqualified stay (with the terms of settlement unrevealed but possibly referred to), fresh proceedings are required to enforce the compromise;

(2) Specific orders reiterating terms of settlement, which provide immediate enforcement of the compromise and,

(3) A stay of the proceedings on scheduled terms, or terms made a rule of court with liberty to re-enter, in which circumstances the compromise is enforceable after

a preliminary application to have an order made in the relevant terms i.e. a Tomlin order.

**29.** The appellants further rely on *Foskett on Compromise* ($9^{th}$ edn, 2019). At para. 9.24 thereof, the author states:

> "Regular use has been made of the Tomlin form of order for many years. The structure of the Tomlin order itself represents something of a compromise between competing legal and practical considerations. It is well established that once a compromise has been concluded a new legal relationship between the parties comes into existence replacing the previous relationship of disputation. In the event of a failure by one of the parties to honour the agreement, the position in law is that the innocent party would have a cause of action represented by an action for damages, for specific performance or for an injunction or other relief depending upon the circumstances. In the ordinary way, a cause of action is pursued procedurally by means of a new action. However, it would be something of a perversion of the whole idea of compromise if the full procedural panoply arising from the institution of new proceedings was necessary in this situation. New proceedings in the form of a fresh action would be cumbersome and would, in most cases, result in unjustified delay in the implementation of the agreement. But for the machinery afforded by a Tomlin order, parties to an agreement containing provisions which could not be made the subject of direct provision within a consent order would be forced to institute fresh proceedings for the purposes of enforcement."

**Submissions of respondent**

**30.** It is submitted on behalf of the respondent that there is no authority for the proposition, advanced by the appellants, that the court cannot strike out proceedings whilst at the same time reserving onto itself the right to re-enter the same. In fact the opposite is the case. This

was precisely what the court did in *Tomkin v. Tomkin* (Unreported, High Court, 8th July 2003) and in *MM v. RR* [2012] IEHC 171 and, most recently, in *Carthy v. Boylan.* I address these authorities below.

**31.** It is submitted that in construing the Order, and the role of the court thereby reserved, it is necessary to look at the Settlement Agreement in order to identify the intention of the parties. This is what O'Neill J. did in *O'Mahony*, and Barron J. did in *Ascough*. At p. 12 of his judgment, Barron J. stated:

> "The rights of the parties depend upon the intention of the parties as expressed by the words used. Whether or not the parties intend the construction of the agreement towards enforceability or any other matter relating to it to be controlled by the Court depends upon the terms of the contract itself and, insofar as any of these terms are embodied in a court order, by the terms of such order."

**32.** While Barron J. went on to state that if the parties required the court to be involved in the enforcement of the settlement, then the order sought should have been in the form of a Tomlin order, the problem in that case, as stated by Barron J., was that the agreement between the parties did not expressly provide for the involvement of the court. In this case, however, the parties spelt out in very clear terms the role of the court in the enforcement of the Settlement Agreement. In particular, clause 15 of the Settlement Agreement expressly enables the respondent to re-enter the proceedings (consistent with the Order) for the purposes of obtaining judgment, in the event of a default on the part of the appellants, for the balance then outstanding under the terms of the Settlement Agreement.

**33.** It is submitted that the appellants are inviting the Court to interpret the Order in a manner that contravenes the express written intention of the parties. It is further submitted that the trial judge was correct in holding that, in all likelihood, Finlay Geoghegan J. would, prior to making the Order, have read the papers and would have been aware of the likely

length of the hearing. McDonald J. was, accordingly, entitled to conclude, as he did at para. 57 of his judgment, that "it is unthinkable that Finlay Geoghegan J. would, in those circumstances, have contemplated that the original claim could be litigated at some point in the future." Likewise, he was correct to conclude that the court would not have permitted the parties to abandon the hearing date, while reserving the right to re-litigate the matter in the future, in the absence of a convincing and comprehensive explanation for such an order. Since there is no evidence of such an explanation having been given to the court, and nor was it argued that such an explanation was provided, the court below was correct to look to the Settlement Agreement for guidance as to the intent behind the making of the Order.

**34.** For all of these reasons, not only may the Court rely upon the intention of the parties in interpreting the Order, but it should do so. In this regard, the respondent also relies upon para. 7 of the affidavit of the eighth named defendant (Mr. Angus McDonnell) sworn herein on 18th December 2019, wherein he confirms that:

> "The order of Ms. Justice Finlay Geoghegan reflects the intention of the parties in respect of the Court's role in the settlement."

Mr. McDonnell does say however, in the following paragraph of his affidavit that the court had no knowledge of the terms of settlement and that they were not provided to the court.

**35.** In a similar vein, the respondent relies upon a letter of AMOSS solicitors for the first to fifth named defendants, and also the eleventh named defendant, dated 23rd February 2013 in which it is acknowledged that there has been a breach of the terms of the Settlement Agreement such as to entitle the respondent to have the proceedings re-entered in the commercial list and to seek judgment against those appellants.

**<u>Discussion</u>**

**36.** In the course of an exchange with the Court, counsel for the fifth and fourteenth named defendants/appellants accepted that the real issue of concern for the appellants on this

application is the possibility that the respondent may escape the consequences of the Statute if it is permitted to re-enter the proceedings and apply for judgment in accordance with clause 15 of the Settlement Agreement. All of the appellants were concerned that it is far from clear whether or not the decision of the High Court of England and Wales in *Bostani v. Pieper* [2019] EWHC 547, upon which the trial judge placed reliance, would be followed in this jurisdiction. Accordingly, it is unclear whether or not *Bostani* would avail the appellants in resisting an application for judgment on the grounds that recovery of some or all of the sum claimed is barred by reason of the Statute. However, this concern was put to rest in the course of the proceedings when counsel for the respondent unequivocally accepted that its application for judgment against the appellants would be subject to the provisions of the Statute in the ordinary way and that the Statute could not be circumvented by an argument to the effect that the application for judgment is brought within the existing proceedings. This concession was, in my opinion, sensibly and properly made. It clearly could never be the case that the applicable limitation periods set out in the Statute could be avoided because the proceedings have been issued *before* the obligations giving rise to the application for judgment have been created in the first place, not least because those very obligations arose from the settlement of the proceedings. There appears to be a further issue as to whether time began to run on the first missed payment or whether the respondent had six years from the date of the final instalment to seek judgment but that is an issue that would arise regardless of the form of the proceedings and is obviously for adjudication on another day.

**37.** It follows from this acknowledgment on the part of the respondent that if the proceedings are permitted to be re-entered for the purposes of enforcing the Settlement Agreement, the appellants can suffer no prejudice under this heading, and will be able to rely on the Statute in defence of the application for judgment in the same way that they would do

in the face of proceedings issued by way of a summary summons or a plenary summons on the same date as the application was made for re-entry of the proceedings.

**38.** Before leaving this point, I might add that the appellants' concerns as regards prejudice under this heading would also arise if the Order had been made in the terms now contended for by the appellants as being appropriate, i.e. in the form of a Tomlin order or an order adjourning the proceedings with liberty to apply for the purpose of enforcing any terms Settlement Agreement. Indeed, *Bostani* arose out of an application to enforce a Tomlin order.

**39.** There is no authority expressly dealing with the legal effect of the form of words used in the Order. In *Ascough v. Roe,* the terms of the order provided that the proceedings should be struck out, with liberty to apply. Implementation of the settlement between the parties broke down, and the plaintiff exercised the liberty to apply. The application then made to the court was not, as might have been expected, one for the purpose of enforcing the settlement or a term thereof, but rather to set the settlement aside on the grounds that its terms could not be implemented. The defendant (the prosecutor in the proceedings before Barron J.) opposed that application, arguing that there was a binding settlement. The Circuit Judge, the respondent in the proceedings, held with the plaintiff and accepted jurisdiction to hear the original proceedings. On the facts, that was quite clearly an error. The Circuit Judge then proceeded to find for the plaintiff, and the defendant sought an order to quash the decision of the Circuit Judge on the grounds that he was *functus officio*, having made an order striking out the proceedings. As to the effect of the order striking out the proceedings, with liberty to apply, as noted earlier at para. 18 above, Barron J. stated:

> "Strike-out is a form of order which disposes of the case. It does not merely take it out of the list. It is not the same as adjourned generally with liberty to re-enter. In

the latter case, the matter is taken out of the list, but can be replaced in the list on the application of either party ….”

**40.** Later on in his consideration of the matter, Barron J. had regard to the terms of the settlement agreement in that case:

> “As regards the agreement, it is like any other contract. The rights of the parties depend upon the intention of the parties as expressed by the words used. Whether or not the parties intend the construction of the agreement towards enforceability or any other matter relating to it to be controlled by the Court depends upon the terms of the contract itself and, in so far as any of these terms are embodied in a Court order, by the terms of such order. The various forms of order which may be made following a consent between the parties were fully discussed by Slade J., in Greene [*sic*] v. Rozen, 1955, 2 All E.R. 797. If the Court is intended to be involved in the enforcement of the Consent, then the order should be sought and made in the form known as a Tomlin order. Such an Order reserves jurisdiction to the Court in so far as it may be required to give effect to the terms of the order.
>
> In the present case, the parties did not do this. The rights of the parties were then governed by the consent. If a problem arose as to the implementation of the Consent, this was a matter for further agreement between the parties, if possible, and, if not, for either party to take such legal steps as might be appropriate based on his rights as contained in the agreement. This meant that the Respondent had no function in relation to the implementation of the agreement. Accordingly, there was no basis upon which he could have dealt with the matter on the 23rd February 1981.”

The decision in *Ascough v. Roe* did not ultimately turn on the niceties of the order made by the Circuit Judge. The problem was the plaintiff sought to revive his claim in circumstances where that claim had been settled. The settlement was an insuperable barrier to any attempt

to litigate the original claim, however the plaintiff might have sought to do so. The settlement agreement would have precluded the plaintiff from bringing fresh proceedings in the same way as it precluded him from seeking to invoke the liberty to apply to litigate his original claim.

**41.** In *Green v. Rozen* terms of settlement had been endorsed on counsels' briefs. The terms provided for payment to the plaintiff of a sum of money by instalments on specific dates, and if any instalment was in arrear, the whole debt and costs became due and payable at once. The terms also provided that, by consent, all proceedings were stayed, with liberty to either side to apply.

**42.** Subsequently, and following default on the part of the defendant in making payment of one of the instalments provided for in the terms of settlement, the plaintiff applied for judgment of the balance due pursuant to the terms of settlement. Slade J. held that since the court had made no order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the court had no further jurisdiction in respect of that cause of action. In the course of his judgment, he noted that there are various ways in which an action can be disposed of when terms of settlement are arrived at, and he stated that he himself had experience of at least five methods of disposing of an action in such circumstances, and he further noted that those five methods are not exhaustive (that is also accepted by the parties in these proceedings). He concluded his judgment by stating:

> "If I am asked for it, and if it is necessary, as to which I express no opinion, I shall give leave to appeal. The point is by no means an easy one."

**43.** As is apparent from the above, the trial court had made no order at all in that case, which is a significant distinguishing factor from the facts of this case. The dictum of Barron J. in *Ascough* as regards the effect of an order striking out the proceedings appears clear and

uncompromising, but the words deployed in those proceedings were not in conjunction with the words "liberty to re-enter" but rather in conjunction with the words "liberty to apply at any Court on the Eastern Circuit".

**44.** Barron J. went on to state that in the case before him, the term "liberty to apply" could not be used to re-enter the proceedings in circumstances where the proceedings had been struck out. But he drew a clear distinction between an order striking out the proceedings with liberty to apply on the one hand, and an order adjourning the proceedings generally, with liberty to re-enter on the other.

**45.** In this case the Court is faced with neither of these orders, but instead has to consider the meaning and effect of an order striking out the proceedings, with liberty to re-enter. The submissions of the appellants, if accepted, render the words "with liberty to re-enter" entirely redundant. Not only do these words represent the agreement made between the parties, this is the form of order that the court chose to make, and in my opinion this Court, in considering the effect of the Order should be very slow to construe it in such a manner as to declare any part of the Order meaningless or ineffective.

**46.** The Court has been referred to three cases in which an order striking out the proceedings with liberty to re-enter was made, and which proceedings were subsequently re-entered. The first of these in time is a decision of Smyth J. in the High Court in the case of *Tomkin v. Tomkin* (Unreported, High Court, 8th July 2003). In that case an order had been made striking out the proceedings, with liberty to any party thereto to re-enter and apply for the purpose of enforcing the settlement. The judgment does not record any argument about the effect of the order striking out the proceedings, and, having found that there was a default on the part of the defendant in complying with the terms of settlement, Smyth J. proceeded to make such orders as he considered appropriate in the circumstances of the case.

**47.** The other cases in which similar orders were made, and upon which the respondent relies are the cases of *AS v. MS* [2007] 2 I.R. 412 and *MM v. RR* [2012] IEHC 171. In each case, the orders were made by Finlay Geoghegan J., and were made in the context of applications under the Child Abduction and Enforcement of Custody Orders Act, 1991, which Act gave effect in this jurisdiction to the Hague Convention on the Civil Aspects Of International Child Abduction. In *MM v. RR,* Finlay Geoghegan J. explained the rationale behind the use of such an order. Difficultie*s* were encountered in serving an order of the court on the respondent. Finlay Geoghegan J. was faced with a situation where there was uncertainty as to the location of the children with whom the proceedings were concerned, and in particular, whether or not they remained in this jurisdiction. In the course of the proceedings, she made an order striking out the proceedings with liberty to re-enter. At para. 21 of her decision of 25th April 2012, the learned judge stated:

> "The reason for which I refused to make an order to adjourn generally, with liberty to re-enter and, rather, made an order striking out the proceedings with liberty to re-enter, is that by reason of the obligations on the Court to deal with applications under the Hague Convention and Regulation 2201/2003 in an expeditious manner, it does not appear to me appropriate that proceedings be adjourned generally, and thus remain in being but not under management by the Court. Rather, it appears to me that in such circumstances, the appropriate order is to strike out the proceedings but with liberty to re-enter. The purpose of giving liberty to re-enter is that, if the respondent and children are found to be continuing to reside in Ireland, the proceedings could be re-entered and continued against the respondent."

**48.** Of course it is true that the circumstances giving rise to the order made by Finlay Geoghegan J. in that case were very different to the circumstances giving rise to the making of the same order, by the same judge, in these proceedings. Nevertheless, the fact is Finlay

Geoghegan J. clearly considered that the High Court had the power to make an order striking out proceedings with liberty to re-enter and that, far from rendering the court *functus officio*, that form of order permitted the proceedings to be re-entered and continued. The appellants submit that in *MM v. RR,* the jurisdiction of the court to make such an order was not argued. They also point out that in that case, the *original* proceedings were re-entered. In making this point, counsel for the fifth and fourteenth named defendants/appellants was asked by the Court if he considered that Finlay Geoghegan J. was in error in making the order that she did in that case, and counsel submitted that she was (in error). However, in so far as the appellants rely on this issue not being argued in *MM v. RR* (or, for that matter in *Tomkin v. Tomkin*, although they made no comment at all about that case), it seems to me to be far from clear that the point was argued fully in *Ascough* either.

**49.** More recently, in the case of *Carthy & Ors. v. Boylan & Anor.*, O'Connor J. had to consider the effect of an order whereby the proceedings which had been settled by written agreement entered into between the parties, had been struck out, with no order as to costs. By the same order, the agreement was stated to "be received and filed in court" and the order further stated that there was "liberty to apply to all parties for the purpose of enforcing the said settlement." Having reviewed all the authorities referred to above, O'Connor J. concluded, at para. 30:

> "Any suggestion that fresh proceedings are required to enforce the settlement agreement conveniently ignores the order granting liberty to apply for all parties for the purpose of enforcing the settlement agreement. The above review of the more recent case law in this jurisdiction particularly, reveals the willingness of the courts and practitioners to administer justice effectively, without delay and with a view to minimise expense. Furthermore, the Mediation Act, 2017 underscores the intention of the legislature to facilitate the enforcement of mediated agreements in a cost effective

and efficient manner. It would be pedantic for this Court in the circumstances of this application to require the plaintiffs to issue or amend a notice of motion referring to the Mediation Act, 2017 or the RSC."

**50.** The appellants argue that *Carthy v. Boylan* may be distinguished on the grounds that the order made express reference to the re-entry being for the purpose of enforcing the terms of settlement. In effect, what the appellants are saying is that the Court can draw no such inference from the terms of the Order made by Finlay Geoghegan J. in this case. But that clearly begs the question as to why then those words appear in the Order at all. The appellants argue that in considering this issue, the Court can only have regard to the terms of the Order, and not to the terms of the Settlement Agreement. Put another way, this Court cannot know, and should not guess, as to the intentions of Finlay Geoghegan J. in making the Order, and this Court should only construe the Order on its own terms, and without reference to the terms of the Settlement Agreement. Alternatively, it is submitted that if the court did indeed intend that the proceedings be re-entered, it was not for the purpose of enforcing the terms of settlement, but rather for the purpose of continuing the existing litigation.

**51.** While the decision of Barron J. in *Ascough* and the academic commentaries referred to above point in the direction of the final nature of an order striking out the proceedings on the one hand (though none address orders in the precise terms of the Order here), the cases of *Tomkin, MM v. RR* and *Carthy v. Boylan* all point in the other direction. As Slade J. pointed out in *Green v. Rozen* there is no exhaustive list of ways by which the courts may facilitate enforcement of terms of settlement. Even in *Ascough,* Barron J. noted:

"Whether or not the parties intend the construction of the agreement towards enforceability or any other matter relating to it to be controlled by the Court depends

upon the terms of the contract itself and, in so far as any of these terms are embodied in a Court order, by the terms of such order."

**Decision**

**52.** Firstly, I think it would be quite wrong to hold that the words "liberty to re-enter" are otiose on the basis that what precedes them extinguishes the proceedings altogether. It is quite clear from the terms of the Order that the court did not have that intention. If that had been the court's intention, the order made by it would not have made express provision for liberty to re-enter.

**53.** Secondly, such an interpretation would not just be contrary to the intentions of the parties, as clearly expressed in the Settlement Agreement, it would also deny the respondent the very remedy provided for in the Settlement Agreement in the event of a default by the appellants in honouring the financial commitments undertaken by them to the respondent in the Settlement Agreement. I consider this a highly unattractive proposition, not least in circumstances where there was evidence before the Court that strongly suggested that the settlement was structured as it was in order to preserve confidentiality, which would have been of significantly more concern to the appellants than to the respondent.

**54.** Thirdly, while it may well be the case that the phrase "liberty to re-enter" is normally used for the purpose of enabling the original claim to be re-entered and litigated to a conclusion, that does not preclude the re-entry of the proceedings for some other purpose, such as the making of agreed orders as provided for in terms of settlement, as in this case. Moreover, if it is the case that the proceedings can be re-entered, there is no impediment in principle to the court making orders provided for in the Settlement Agreement.

**55.** Insofar as there is any doubt as to the meaning or effect of the Order, it is my view that this doubt should be resolved in such manner as to give effect to the express terms of settlement entered into between the parties. The Order is in terms agreed to by the parties in

the Settlement Agreement, and to the extent that there is any doubt about the purposes for which the proceedings may be re-entered, this is answered in very clear terms in the Settlement Agreement. The courts should not, without very good reason, obstruct the implementation of lawfully concluded settlements. On the contrary, as long as no fundamental principle is offended, and as long as no prejudice is caused to either of the parties, the courts should aid the parties in enforcing the terms of settlement.

**56.** Accordingly, where a court makes an order striking out proceedings, but with liberty to re-enter, and that order was clearly made pursuant to written terms of settlement entered into between the parties, which terms of settlement state in clear and unambiguous terms what is to happen upon the re-entry of the proceedings, the order striking out the proceedings must be interpreted as being subject to the condition that the proceedings may be re-entered for the purposes expressed in the terms of settlement, notwithstanding that the terms of settlement themselves are not referred to in the order of the court. I emphasise, however, that in coming to this conclusion I am placing significant reliance on the fact that in this case the re-entry of the proceedings will not cause any prejudice to either party, and in particular that this interpretation of the Order will be neutral as regards the application of the Statute. The respondent will not be permitted to rely on the date of issue of the proceedings in resisting a defence to the application for judgment grounded on the Statute, and the earliest date that it will be entitled to rely upon in this regard is 25th June 2019, being the date of issue of the motion to re-enter the proceedings.

**57.** In the interests of completeness, I should mention that it was submitted on behalf of the appellants that if Finlay Geoghegan J. ordered that the proceedings could be re-entered for the purpose of enforcing the Settlement Agreement, she would have intended that to relate only to the obligation of the appellants under clause 3 of the Settlement Agreement. That clause provided that the appellants were to provide to the respondent a statement of

affairs within 28 days of the date of the Settlement Agreement. Clause 16 of the Settlement Agreement permitted the respondent to apply to re-enter the proceedings for the purpose of enforcing that obligation. It was submitted that it was much more likely that it was for the purpose of enforcing this obligation, which was tied to an early deadline, that there was liberty given to re-enter the proceedings. I cannot accept this submission. The terms of clause 15 are clear. In the event of default of payment of any instalment provided for in the Settlement Agreement, the respondent was entitled to apply to re-enter the proceedings and obtain judgment in the sum of €8,400,000, less any payments made pursuant to the Settlement Agreement. Thus, it is clear from clauses 15 and 16 of the Settlement Agreement that it was agreed that the respondent could re-enter the proceedings for the purpose of enforcing either obligation.

**58.** Finally, it was also argued on behalf of the appellants that if the decision of the trial judge is allowed to stand, the manner in which settlements may be enforced in the future is open to abuse, and litigation may be re-opened many years after settlements have been concluded. I think that this argument is disposed of by the recognition that applications for judgment following re-entry of proceedings (where permitted) will be subject to the Statute every bit as much as fresh proceedings to enforce the terms of a settlement. Additionally, where this does arise, such applications are not likely to be any more troublesome for parties to proceedings or for the courts than fresh proceedings. If anything, the opposite should be the case. Moreover, the overall benefit to litigants and the courts in facilitating easy and early enforcement of terms of settlement should outweigh any possible drawbacks.

**59.** For all of these reasons, it is my view that the trial judge was correct in his decision and this appeal should be dismissed. As the respondent has been entirely successful in this appeal, my provisional view is that it is entitled to its costs both in this Court and the High Court. If the appellants wish to contend for an alternative form of order, they will have

liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the Court, the appellants may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

**60.** Since this decision is being delivered electronically, Faherty and Collins JJ. have authorised me to record their agreement with the terms of this judgment.