Neutral Citation No. [2011] NIQB 10 | *Ref:* **GIL8062**

Judgment: approved by the Court for handing down | *Delivered:* **14/01/11**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

CHRISTOPHER HANNON

Plaintiff;

-and-

PAUL ANTHONY TENNYSON
and
CONOR TENNYSON

Defendants.

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GILLEN J

Introduction

[1] This is an appeal ("the current proceedings") from His Honour Judge McFarland who dismissed the second defendant's application to stay or strike out a claim by the plaintiff on the grounds that his Civil Bill claim for damages was in breach of the doctrine of cause action estoppel and/or constituted an abuse of process.

Background facts

[2] The matter arises out of a road traffic accident which occurred on 15 September 2005. The first defendant was the driver of a vehicle owned by the second named defendant who collided with a vehicle owned and driven by the plaintiff.

[3] The second named defendant issued a Civil Bill on 8 May 2008 against the plaintiff for damages in respect of the damage caused to his vehicle in the collision concerned. His Honour Judge Grant dismissed the Civil Bill on 3 April 2009 ("the initial proceedings").

[4] The second named defendant did not pursue an appeal within the time prescribed which expired on 26 April 2009. Thereafter solicitors for the plaintiff wrote to the second named defendant's solicitors on 27 April 2009 seeking recovery of the plaintiff's insurance policy excess and repair costs of his vehicle. This claim was brought by the plaintiff's solicitors by way of subrogation on behalf of the plaintiff's insurers.

[5] Upon receipt of the plaintiff's solicitor's letter of 27 April 2009, the second named defendant applied to the Master to extend time for an appeal against the decision in the initial proceedings but the application was refused by Master Bell on 22 June 2009.

[6] By letters dated 8 March 2010 the plaintiff's solicitor wrote to the first and second named defendants requesting payment of the repair costs and outlays. No such payment was made and a Civil Bill was issued by the plaintiff for recovery of the insurers outlays on 15 April 2010.

[7] The second named defendant brought an application to stay or strike out the proceedings which was heard by Judge McFarland on 25 June 2010. The judge dismissed the application in the course of a written judgment ("the subsequent proceedings").

[8] The current proceedings before this court arise as a result of a notice of appeal dated 26 July 2010 in respect of the subsequent proceedings.

[9] It was clear from the papers that there is at least one substantial matter of factual dispute between the parties. The plaintiff asserts that at the hearing before Judge McFarland the first named defendant accepted that he was aware that he had caused damage to the plaintiff's car and that he offered to pay several hundred pounds to the plaintiff at the scene for the damage. It was also alleged that at the hearing the first named defendant accepted that when his father, the second named defendant, arrived on the scene shortly after the incident the second named defendant also offered to pay for the damage to the plaintiff's vehicle. The plaintiff further contends that it was evident to the first and second defendants at the scene that the plaintiff's vehicle had been extensively damaged in the subject incident. Consequently it is contended that the second named defendant was always at risk to financial exposure if he was unsuccessful or partly successful in the initial proceedings.

[10] It is the first named defendant's contention that he was only aware of hitting the tow bar of the plaintiff's vehicle and was not aware at any time of extensive damage to the plaintiff's vehicle. The second defendant adopts a similar stance. They contend that in reply to a question from Constable Russell upon arrival of the police after the accident, the first defendant had

stated "It wasn't my fault, the boy in the other car pulled out right in front of me, but I had nowhere to go and ended up in your woman's garden. It's not my fault – but I am in bother – I've got no insurance".

[11] I do note however that no challenge is made to the plaintiff's assertion that the first named defendant accepted that at the material time he had consumed alcohol to the extent that he was over the legal limit for the purposes of driving, the same being confirmed in a breath test performed by police shortly after the incident. I also note that the police report records damage to both vehicles and in particular records of the plaintiff's vehicle "Damage to rear body of vehicle and possible damage to chassis."

The second named defendant's/appellant's case

[12] This defendant asserts that he pursued an action in the County Court against the plaintiff without receiving any indication from the plaintiff that he intended to make a claim for his own damage.

[13] Consequently the appellant contends that it is an abuse of process under the doctrine of cause of action estoppel to bring fresh proceedings on behalf of the plaintiff for damage to his vehicle. It is argued that there is no reason as to why the plaintiff did not raise a counterclaim for the damage to his vehicle at the initial hearing and that the subsequent proceedings constituted unnecessary duplication of costs and time.

[14] It is the appellants' assertion that, in the absence of any indication from the plaintiff that such a claim would be forthcoming, he was induced to make an economic assessment that on balance it was not financially astute to appeal against the decision of Judge Grant. It is also contended that if the second defendant had known the nature of the negligence alleged by the plaintiff together with the measure and location of the damage to the plaintiff's car, he could have assessed and presented his case more effectively at the initial hearing.

The plaintiff's / respondent's case

[15] The respondent contends that at all material times the second named defendant knew that the first named defendant was to blame for the accident especially in light of the consumption of alcohol and was aware of the damage to the plaintiff's vehicle.

[16] The respondent asserts that he had left the matter in the hands of his insurers. The insurers had allowed the proceedings before Judge Grant to determine the overall liability and relied on that determination to clear up any outstanding matters including the damage to the plaintiff's car. It was an attempt to save the costs of a counterclaim and to ensure proper use of court

resources and time. It is contended that such a practice is regularly used in the County Court in circumstances where counterclaims would result in an increase in legal costs and a waste of court time. In regard to this latter point the appellant asserts such a practice only obtains where the other party has been informed that such a course is being adopted or by agreement

The decision of His Honour Judge McFarland

[17] I have read the decision of the County Court Judge and I regard it as an admirably succinct, careful and cogent judgment.

[18] In short, having reviewed the authorities and the evidence, he concluded:

- It would have been clearly evident to the second named defendant that as a result of the collision damage had been caused to the plaintiff's vehicle and that there was a potential for a claim for the insurance excess at the very least.

- There was no abuse of process and that in circumstances such as this a party such as the plaintiff is entitled to sit back and await the determination of the question of liability given the awareness of the defendants of a potential claim by the plaintiff. He found no prejudice accruing to the defendants when considering the approach to the initial Civil Bill proceedings.

[19] I recognise that this is a rehearing and I have therefore approached this case de novo.

Principles governing this matter

[20] I shall set out certain principles which I believe are settled by decisions of high authority and which did not appear to be materially in dispute before this court.

[21] The doctrine of estoppel in the context of res judicata has two aspects. The first relates to those points actually decided by the original court. This is res judicata in the strictest sense. That is not relevant in this instance.

[22] A second aspect of estoppel in a wider sense arises where there are points which might have been brought forward at the time of the initial proceedings but were not. This second aspect is not a true case of res judicata but rather is grounded on the principle of public policy in preventing a multiplicity of actions, it being in the public interest that there is finality of litigation and a defendant should not be vexed twice over the same matter.

[23] In Johnson v Gore Wood and Co (2002) 2 AC 1("Johnson's case") Lord Bingham of Cornhill said of this aspect at page 32:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be more obviously abusive and there would rarely be a finding of abuse unless the later proceedings involved what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

[24] There is thus no hard and fast rule to be applied. The preferable way to approach the matter is to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. (See Lord Bingham in Johnson's case above.)

[25] In Talbot v Berkshire County Council (1994) QB 290, where a passenger in a road traffic accident sued the driver who in turn made a third party claim against Berkshire County Council (but not for his own injuries at that time) with the result that damages for the plaintiff were apportioned between the driver and the County Council, the court refused to permit the driver to issue subsequent proceedings against the County Council to recover damages for his own injuries.

[26] In the Northern Ireland case of McNally v McWilliams (2001) NI 106, Sheil J refused to find an abuse of process where the plaintiff was a passenger in a motor vehicle driven by her husband who died in a collision with a car driven by the defendant. The first defendant brought an action of negligence against the estate of the plaintiff's late husband for personal injuries and the plaintiff, as personal representative of the estate of her late husband brought an action against the first defendant for negligence confined to damages on behalf of the deceased's estate and on her own behalf as the deceased's sole dependant. The first action was stayed on terms endorsed on counsels' brief and the second settled. It had been appreciated by all parties from early on that the plaintiff had a claim in respect of her own personal injuries but her advisers decided to await the outcome of the first and second actions before commencing proceedings for these injuries. Sheil J invoked in the course of his judgment the reference by Lord Bingham in Johnson's case to the view that " It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive". In the circumstances of the case he found that it was not unreasonable for the plaintiff and her advisers to have awaited the outcome of the earlier proceedings.

Conclusion

[27] I have determined in this case that the decision of His Honour Judge McFarland should be affirmed. Approaching this case on a broad merits based manner, I find nothing unreasonable about the plaintiff on these facts leaving the issues in the hands of his insurers and awaiting the outcome of the initial proceedings before attempting to recover the insurance excess and damage to the car. I discern no attempt on the part of the plaintiff to mislead the court or to act in bad faith. I reject the appellant's contention that it amounted to "a trap being set." In short the appellant has failed to persuade me that the plaintiff was misusing or abusing the process.

[28] I agree with the conclusion of the County Court judge that the second defendant must have been aware, at least given the contents of the police report, that damage had been caused to the plaintiff's vehicle and that there was potential for a claim for the insurance excess if nothing else. It cannot have been a surprise to him in my view that the instant litigation was embarked upon when he refused to pay for the plaintiff's damage to the

vehicle. In short notwithstanding the absence of an express indication that litigation was being contemplated by the plaintiff prior to the initial proceedings, I consider that there is analogy to the situation in McNally's case. Common sense alone would have dictated the likelihood of further proceedings. Thus I do not consider that the later Civil Bill constitutes an "unjust harassment" of the defendants.

[29] I fail to see how the failure of the plaintiff to bring the proceedings by way of counterclaim could have influenced the manner in which either of the defendants processed or presented their claim at the initial hearing or that knowledge of such a claim would have permitted them to have presented their case more effectively. It seems to me that the decision not to enter an appeal against the decision of Judge Grant was a matter to be assessed entirely on the strength of the case that had been presented to the judge and I have not been persuaded that the presence of a claim by the plaintiff would have materially influenced the decision not to enter an appeal.

[30] Finally I have taken into account the considerations which led the plaintiff to act as he did. I have also weighed the overall balance of justice in the case. The plaintiff was entitled in my view to act on the advice of his insurers and to have awaited the outcome of the initial hearing before determining his course of action. It would be unjust to deprive the plaintiff and his insurers of the opportunity to seek recovery of damages in those circumstances.