Neutral Citation No. [2016] NICh 4 | *Ref:* **STE9889**

Judgment: approved by the Court for handing down | *Delivered:* **05/02/2016**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

BETWEEN:

HERBERT McDONALD

Plaintiff;

-and-

EASTONVILLE TRADERS LIMITED

Defendant.

_____

STEPHENS J

Introduction

[1] The Plaintiff, Herbert McDonald, by Summons dated 29 July 2015 applied to set aside an Order of this Court dated 11 February 2015 ("the Order"). The Order was made on consent between the Plaintiff and the Defendant, Eastonville Traders Limited and it provided that judgment was entered in the action for the Defendant against the Plaintiff with no order as to costs. The Summons applying to set aside the Order dated 11 February 2015 was accompanied by the Plaintiff's Affidavit which contained one sentence only namely:-

> "That I am requesting the Court to set aside the Order of the Court made by Mr Justice Stevens [sic] on 11 February 2015".

The application comes before me today for hearing. I have also considered an application on behalf of the Plaintiff for leave to appeal to the Court of Appeal.

[2] Before proceeding to hear the application I raised with both of the parties the question as to whether they wished another judge to hear the application given that I

was the trial judge and had heard and seen the Plaintiff give evidence before the Order was made on 11 February 2015. Neither party objected to my hearing the application and both parties agreed that I should do so.

[3] Mr McDonald is a personal litigant and he was assisted by a McKenzie friend. Mr Dunlop appeared on behalf of the Defendant.

Factual Background

[4] The Plaintiff commenced these proceedings in the Chancery Division by Writ of Summons issued on 31 August 2012. In the action he claimed that the Defendant was obliged to pay fees to him in respect of two property development sites known respectively as the Malmaison site and the Great Junction Street site. The Defendants denied liability and the action came on for hearing before me on 10 February 2015. The Plaintiff opened the case and then gave evidence. During the course of cross-examination on 10 February 2015 the Plaintiff indicated that he was no longer pursuing his claim in relation to the Malmaison site.

[5] His cross-examination continued on 11 February 2015 and shortly before lunchtime he stated that he was:-

> "Exhausted with the whole thing to be honest with you, so forget about it. Same as yesterday."

As the Trial Judge I then stated to him:-

> "Mr McDonald this is a Trial process. If you are tired you tell me and we have a break. I have given you a break already so I am going to rise now and we can sit again at 2 o'clock."

[6] A question arises as to whether the Plaintiff was physically tired or tired with the litigation. In any event upon the Court reconvening at 2.00pm a settlement of the action was announced on the basis that Judgment would be entered for the Defendant with no order as to costs. The Order of the Court was drawn up but failed to record that it was a Consent Order. On 30 June 2015 the Order was amended to make it clear that it was a Consent Order.

[7] The Plaintiff was dissatisfied with the outcome of the litigation and accordingly he lodged an appeal to the Court of Appeal. The Defendants relied on section 35 (2) (f) of the Judicature (Northern Ireland) Act 1978 which provides that:-

> "No appeal shall lie to the Court of Appeal without the leave of the Court or Judge making the order from an order of the High Court or a Judge thereof made with the consent of the parties".

This was a Consent Order and the Plaintiff had not sought or obtained Leave from this Court to appeal to the Court of Appeal. The Defendants also relied on the

decision in *Re F (a Minor) (Appeal)* [1992] 1 FCR 167 in which Lord Justice Nourse held that the Court of Appeal:-

> "Cannot entertain an appeal against a perfected and subsisting order by a party who is expressed to have consented to it. While the order stands the party who seeks to appeal is estopped by record from saying that he did not give his consent and thus from reopening the subject matter of the dispute. Moreover the lower court has ex hypothesi not adjudicated on the validity of its own order so that there is nothing to be brought up for question in a Court of Appeal. The only remedy is to commence a fresh proceeding at first instance to set the order aside."

In view of the fact that the Plaintiff did not have Leave to Appeal and given that he had not applied to set aside the Order the appeal to the Court of Appeal was adjourned to facilitate the Plaintiff bringing those applications.

[8] On 4 November 2015 I directed that the Plaintiff by 25 November 2015 set out in writing the grounds upon which he applies to set aside the Order to include details and particulars. The Plaintiff has purported to comply with that direction in that he has provided an undated typed document which refers to various parts of the transcript of the hearing on 11 February 2015. That typed document raises evidential points that could have been made during the course of the hearing. The grounds upon which the Plaintiff applies to set aside the Order which can be taken from that document are:-

(a) That the Plaintiff was injured whilst giving evidence. He states that "at one point while lifting the file I injured myself." This is a reference to a file of documents to which the Plaintiff was being referred in cross-examination by Mr Dunlop whilst the Plaintiff was in the witness box. The Plaintiff alleges that he sustained an injury as a result of lifting the file.

(b) That the injury affected his ability to give evidence. He states that "from that point on I was in extreme discomfort and found it difficult at times to see properly and could not concentrate."

(c) That the Plaintiff was in distress in the witness box whilst giving evidence. He states that "Mr Dunlop then proceeded to accuse me of perjury. This caused me a great deal of distress as I felt I was being bullied by Mr Dunlop."

(d) That the Plaintiff was confused whilst giving evidence. He states that "Mr Dunlop throughout the trial tried to conflate and confuse legislation and costs between 2007 and 2015."

(e) In addition, though this is not in the typed document, the Plaintiff alleges that he was unwell when he was presenting his case and giving his evidence. In support of that allegation he has made available a medical report from J Kathryn Fleming MRCGP dated 1 February 2016 which contains her opinion that:-

> "On the basis of the information supplied by Mr McDonald today these symptoms and signs are consistent with a panic attack. This can cause great distress and it seems to me that at that time he would have been incapable of making rational decisions or having rational thoughts."

[9] So in essence the Plaintiff alleges that he was injured whilst in the witness box, that he was unwell, that he was harassed and confused by Counsel and that as a consequence the contract which led to the Order being made should be set aside with the consequence that the Order should also be set aside.

Legal principles

[10] The Order was made on foot of a contract that was entered into between the parties. If the contract can be set aside so then can the Order. For instance a contract obtained by fraud would be set aside as would any Order of the Court that was made in reliance on that contract.

[11] Mr Dunlop raised a procedural point and that is whether the application to set aside the contract and therefore the Order should be by way of new proceedings. In support of that contention he relied on *Re F (a Minor) (Appeal)* in which it was stated that:-

> "The only remedy is to commence a fresh proceeding at first instance to set aside the order."

Mr Dunlop contended that this Court was functus officio having entered final Judgment in favour of the Defendant on 11 February 2015 and that the proper procedure was for the Plaintiff to commence a further action seeking to set aside the Order.

[12] In *Eden v Naish* [1878] 7 Ch D 781 the Plaintiff had commenced an action to dissolve a partnership and to obtain an account. The Court ordered dissolution of the partnership and directed accounts. Negotiations then took place and it was agreed in writing that the Defendants would pay the Plaintiff £1,200.00 for the whole of his share and interest in the partnership. Shortly afterwards the Plaintiff repudiated the agreement alleging that it had been obtained from him improperly, in fact by trickery and fraud and he said for instance that he was not a free agent when it was put before him and that he was led to sign it by surprise. The Plaintiff having repudiated the agreement wished to proceed with the partnership action and obtain an account. The Defendants applied by Summons to stay the action on the basis that a settlement agreement had been entered into between the parties. The

application for a stay came on for hearing before Hall V.C. The Plaintiff submitted that it was not competent for the Court to deal with the issue upon Summons. That is that it could only be dealt with by the Defendants bringing an action to enforce the agreement. It can be seen that this is a contention similar to that made by Mr Dunlop in these proceedings in that he states that the application to set aside the contract and therefore to set aside the Order of the Court can only be made in new proceedings. In *Eden v Naish* the Court held that the matter could be dealt with by way of Summons. Evidence was heard in relation to the issue as to whether the settlement agreement was obtained improperly and should be set aside. In the event the Vice Chancellor considered that where there was a variance between the Plaintiff's evidence and that of a Mr Taylor he considered that the evidence of Mr Taylor was to be preferred. He did not set aside the settlement agreement and he stayed the Plaintiff's partnership action on the basis that it had been settled. Mr Dunlop sought to distinguish the procedure adopted in *Eden v Naish* on the basis that there were clearly proceedings at first instance still in existence in that case. The partnership had been dissolved but accounts were still outstanding.

[13] Mr Dunlop submitted that in the case before me a final Order had been made and accordingly that I had no jurisdiction to hear and determine the application to set aside the Order. The Plaintiff, it was contended should be left to the remedy of commencing an entirely new action rather than bringing a Summons in these proceedings.

[14] Mr Dunlop accepted that after 11 February 2015 this Court still had jurisdiction to deal with an amendment to the Order to accurately reflect that it was a Consent Order and that it also had jurisdiction to deal with the grant or refusal of Leave to Appeal. In those respects the proceedings still continued so that those applications could be made to this Court.

[15] In *Millen v Brown and Others* [1984] 10 NIJB 1 Carswell J considered an application by an insurer to be joined as an additional Defendant after Judgment had been given at trial in favour of the Plaintiff in circumstances where the insurer wished to appeal to the Court of Appeal. One of the issues which arose was whether after Judgment had been entered in favour of the Plaintiff against the then Defendants the proceedings were no longer in being. Carswell J held that:-

> "I do not consider that there is anything in the authorities I have cited which militates against acceptance of the proposition that in a case such as the present the proceedings are still in being until any necessary steps have been taken to claim the Judgment sum from the insurers under Article 98 of the Road Traffic Northern Ireland Order 1981. *I am also of the opinion that where an appeal has been brought against the Judgment the proceedings are still in being and I shall be attracted to the proposition if it were necessary to decide the point that where an appeal has not been brought that proceedings remain in being at least during the time*

> *limited by the Rules of the Supreme Court for service of a Notice of Appeal.* Whether they could be so regarded if that time has elapsed but a good case on the merits can be made for an extension is a more difficult point but I shall resist the temptation to explore these thickets any further. I hold accordingly that I have jurisdiction to add the Third Named Defendant as a party to the action." (my emphasis)

[16] On the basis of that authority I consider that this Court has jurisdiction to entertain an application by Summons to set aside the settlement contract and thereby to set aside the Order dated 11 February 2015. A question may arise as to whether the jurisdiction requires the Court to exercise discretion as to whether or not to require the Plaintiff to commence a new action. If there was such discretion to require an individual to do so then ordinarily this would only add to the costs of the proceedings and might only be exercised in circumstances where there was a need for the definition of pleadings in a particular case or a need for extensive interlocutory applications. I am content that if there is such discretion to order that there should be a new action that discretion should not be exercised in this case.

[17] I indicated to the parties that I would hear and determine the Plaintiff's application on foot of the Summons and the parties were provided with the opportunity to call witnesses and to cross-examine those witnesses. The Plaintiff availed of that opportunity, gave evidence himself and also called his son who was his McKenzie Friend to give evidence as well.

Discussion

[18] The Plaintiff alleged that he injured himself with a file during the course of his evidence. He referred to page 62 of the transcript of the hearing which is in the following terms:-

> MR DUNLOP:
>
> "No, but what ultimately concluded, just so that we can see the documents and there is no misunderstanding page 400" [silence]. "Do you have page 400 Mr McDonald?"
>
> MR MCDONALD:
>
> "No, I've injured myself here with this file." [laughter].
>
> MR DUNLOP:
>
> "Sorry it's that file."
>
> MR MCDONALD:

> "No it's not falling apart, its just heavy and this narrow shelf. Hold on, I'm getting there, yeah I've got to 400."

[19] The Plaintiff did not at the time state the nature of the injury. He laughed after informing Mr Dunlop that he was injured. The Plaintiff has now identified the injury as a strain of his chest. As the Trial Judge, if there was any injury of any substance I would have allowed a break in the proceedings. If I discerned that the Plaintiff was under any physical stress at all I would have taken appropriate precautions. There was nothing of that kind that was evident at the hearing of this case. I was perfectly content that the Plaintiff was able to give evidence. My assessment of him in the witness box was that paperwork and the organisation of paperwork did not fit easily with his personality. That an ability to control files of papers was a function of that aspect of his character and most decidedly was not the Plaintiff becoming physically tired or physically upset.

[20] The Plaintiff alleges also that subsequently from then on he was in extreme discomfort and found it difficult at times to see properly and could not concentrate. I did not discern anything of the sort. There was no appearance of extreme discomfort or of discomfort beyond what one would expect from anybody having to present a difficult case in a court room environment. There was no evidence whatsoever of the Plaintiff being incapable of seeing properly or not being able to concentrate. Rather he was dealing as best he could, given his character and background, with some complicated issues in the witness box.

[21] The Plaintiff alleges that Mr Dunlop accused him of perjury and that by his conduct of the cross-examination bullied and confused him. I entirely reject that allegation. Mr Dunlop cross-examined the Plaintiff in a professional and appropriate manner. He was at liberty to challenge the Plaintiff and to suggest to the Plaintiff that the evidence he had given was misleading and inaccurate. He did that and the Plaintiff accepted that it had been misleading and inaccurate in relation to one aspect of his evidence and apologised for this. Mr Dunlop did not suggest that the Plaintiff knew at the time that he gave misleading and inaccurate evidence, that it was misleading and inaccurate. Rather, what was being suggested to the Plaintiff was that he was not a credible witness and he was not a witness to be relied upon. That did not involve an allegation of perjury. For the Plaintiff to have to accept that his evidence was inaccurate and misleading no doubt did upset him but that is a necessary consequence of such evidence being given. I reject any suggestion that the Plaintiff was bullied or harassed.

[22] I turn to consider the medical evidence which consists of a written report from Dr Fleming. It is hearsay evidence, admissible under the Civil Evidence Northern Ireland Order. It is based on information supplied by the Plaintiff. The accuracy of the conclusions depends upon the accuracy of the information. I consider that the information insofar as a suggestion is made that the Plaintiff had told me that he had pains related to his heart disease and that it was apparent that he was perspiring heavily and drinking a lot of water and that because of that I as the Judge suggested an early lunch, is entirely inaccurate. I did not see the Plaintiff

perspiring at all. The amount of water he drank was no more than one would expect in such circumstances and I most certainly did not suggest an early lunch because of my noticing any difficulties being experienced by the Plaintiff. I had the opportunity of assessing the Plaintiff in the witness box. It is correct that he was vague and his evidence was not structured but I considered that to be a reflection of his character and the way in which he carries on business. I did not observe at any stage the Plaintiff being unable to have rational thoughts. He understood all the questions. He understood so far as his character permitted, the issues. The decision to abandon his claim could be viewed as impulsive until one analyses the questions and answers that preceded it during which the Plaintiff made substantial concessions. I also note that after the conclusion of the case he did not seek medical attention.

[23] I reject the proposition that in someway the agreement was obtained or was entered into at a stage when he did not know what he was agreeing to or that he was incapable of making rational decisions or that he was incapable of having rational thoughts. I go further and say there was nothing from which anybody could have discerned any such thing. Not only do I reject that as a proposition as to what he felt but I reject it as a proposition of what anybody else could have discerned.

[24] So having dealt serially with all the grounds upon which the Plaintiff seeks to set aside the contract and therefore to set aside the Order, I refuse the application.

Application for leave to appeal

[25] That leaves the question of whether I should grant Leave to Appeal to the Court of Appeal in relation to the Order it being a consent Order. There are no grounds on which I consider that leave can be granted and none have been articulated to me.

[26] I refuse Leave to Appeal.

[27] All the costs incurred in relation to the Plaintiff's Summons dated 29 July 2015 and at today's hearing will be paid by the Plaintiff to the Defendant, such costs to be agreed or taxed in default of agreement.