Neutral Citation No. [2011] NIQB 29 | *Ref:* WEA8130

Judgment: approved by the Court for handing down | *Delivered:* 15/3/2011
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

FULFORD HYMAN LIMITED (In Liquidation) formerly SERE Group Limited

and SERE PROPERTIES LIMITED

Plaintiffs;

-and-

IVAN BEATTIE and DES RANKIN

trading as S Rankin & Company

Defendants.

WEATHERUP J

[1] This is the defendants' application for an Order that the plaintiffs, having established liability under the provisions of the Criminal Damage Compensation (Northern Ireland) Order 1977 and received compensation in respect of loss and damage, are barred from proceeding against the defendants for damages for loss and damage relating to the same incident, by virtue of (1) the doctrine of res judicata, (2) issue estoppel and (3) abuse of process. Mr McNulty QC appeared for the plaintiff and Mr Simpson QC appeared for the defendants.

[2] The plaintiffs operated as motor traders and the defendants as insurance brokers. On 13 January 2000 the plaintiffs agreed to purchase premises known as Quarry Inn at Quarry Corner, Dundonald in Belfast. On 17 January 2000 the defendants were contacted by the plaintiffs and requested

to make immediate arrangements for insurance cover in respect of the premises. The defendants represented to the plaintiffs that a letter confirming that insurance cover had been put in place had been sent by the defendants to Anglo Irish Bank Ltd, which bank provided financial assistance to the plaintiffs for the purchase of the premises.

[3] On 30 January 2000 the premises were subject to extensive damage. The case made by the plaintiffs is that by reason of the breach of contract and misrepresentation of the defendants the appropriate insurance cover was not put in place and the plaintiffs have therefore suffered loss and damage. The heads of loss and damage as pleaded are, first of all, material damage representing building reinstatement costs at some £230,000 and contents at some £150,000. A second head of claim is for loss of profits due to business interruption based on a projected turnover for the premises from April 2000 to September 2001, which the plaintiffs formulate as loss of profits of £1.3M.

[4] The Statement of Claim indicates that the plaintiff had initiated a claim for criminal damage compensation and that the claim had been substantially compromised on legal advice. The plaintiffs received a payment from the Compensation Agency of £250,000 and the plaintiffs agree that that amount be deducted from the amount of the plaintiffs claim.

[5] The grounding affidavit on behalf of the defendants states that on 30 June 2003 at Newtownards County Court full liability was decided in favour of the plaintiffs on the criminal damage compensation claim. The plaintiffs on legal advice substantially compromised the claim and accordingly the affidavit states that, liability having been established under the provisions of the Criminal Damage Order and an agreement having been reached in respect of quantum, the plaintiffs' claim is barred by reason of the matters now relied on, namely res judicata, issue estoppel and abuse of process.

[6] The replying affidavit on behalf of the plaintiffs sets out what is described as a time line of the unfolding events. The unfolding events extend to stating that the intention of the plaintiffs in respect of the premises was to refurbish the site as opposed to demolishing the existing premises and that architects had prepared plans to convert the premises, which had been a public house, to a car sales showroom. The plaintiffs planned to move their head offices to the building and the expectation was that the site would become operational in April 2000. The affidavit states that the Compensation Agency, having accepted liability in a without prejudice letter, subsequently rejected the claim and the hearing of the claim occurred on 30 June 2003. The issues were split in relation to liability and quantum. The hearing before HH Judge Gibson QC established that there had been malicious damage and liability was established under the Criminal Damage Order.

[7] The issue of quantum eventually came on for hearing before HH Judge Gibson QC on 27 October 2006. There were negotiations between the respective Senior Counsel who represented the parties and during the course of the morning the Judge spoke to Senior Counsel on the clarification of the issues, the extent of the dispute and any legal principles involved. At the meeting the Judge's view was that the claim being made for consequential loss was not going to succeed. It was considered that the consequential loss claim would require a hearing of between 3 and 5 days and would result in substantial accounting and legal fees, which in the event of the consequential loss claim being dismissed would have been borne by the plaintiffs. In those circumstances and given the Judge's comments the affidavit states that it would have been an unreasonable risk for the plaintiffs to have proceeded with the consequential loss claim against the Compensation Agency.

[8] The issue about recovery of consequential loss that emerged in the criminal damage claim related to the entitlement to claim for the loss of profits for the period from April 2000 to September 2001. There are two relevant authorities in relation to criminal damage compensation and recovery of consequential loss. In Public Works Belfast Limited v. Secretary of State [1987] NI 322, where an explosion had occurred at a construction site where the applicant was carrying out road and bridge building works. Physical damage was caused to the works canteen and compensation for that damage was agreed. In addition the applicant made a claim for consequential loss arising from disruption of the applicant's work programme due to injury or shock to employees as a result of the explosion. The County Court made a decree in respect of that consequential loss and the Compensation Agency appealed. It was held by Carswell J, allowing the appeal, that the Property Compensation Act (Northern Ireland) 1971 provided that compensation should be payable where a person suffered loss from the damage sustained and it was not proved that the loss of the canteen building and contents caused any material disruption of the work and accordingly the loss that was claimed for disruption of the programme due to injury to the employees did not flow from the damage to property and could not be included in the compensation payable to the plaintiff.

[9] The other authority is O'Neill v. The Secretary of State [1988] decided by Nicholson J on 20 May of that year. There had been a sectarian attack on premises owned by the applicant in Cookstown in September 1985, as a result of which he left his premises. He made a claim not only for the damage to the property but for various items of consequential loss. Consequential loss was not recoverable for the costs of moving into the premises, namely removal expenses to move in, professional fees for the purchase, survey fees, mortgage payments, rates and connection charges. On the other hand certain items of consequential loss were recovered, namely the costs associated with the applicant being put out of the premises, namely the selling agents fees for the resale of the premises, emergency accommodation after being put out,

temporary housing for a period and removal expenses to the new property. Nicholson J stated that the appellant was entitled to compensation for loss which was the direct result of or the natural and direct consequence of the damage and on that basis he disallowed the first items and allowed the second items.

[10] Thus there was an issue as to entitlement to recover for the loss of profits in the criminal damage compensation claim and the plaintiff contends that because of the uncertainty about the outcome there was a compromise of the claim.

[11] There are three grounds to the defendants' present application but at the hearing the defendants did not proceed with the claims of res judicata and issue estoppel. Thus the application proceeds on the basis of abuse of process. The defendants rely on a number of matters as constituting that abuse of process. First of all that the Compensation Agency accepted liability. Secondly that the County Court Judge on 30 June 2003 ordered that the Compensation Agency should deal with the case on a full liability basis. Thirdly that in many cases where an insurance company is involved, the insurance company is made aware of and frequently consents to the insured applicant making an application to the Compensation Agency and the insurance company may even pay under the policy and then conduct a subrogated application to the Compensation Agency. Fourthly that in the present case there was no insurance company which could have brought a subrogated application or could have directed or agreed to such an application. Fifthly the defendants, as the alleged negligent brokers and their insurers, were not consulted about the settlement of the criminal damage claim nor permitted to have any input into the decision. Sixthly the brokers and their insurers are now called upon to make up the alleged shortfall in the losses recovered by the plaintiff.

[12] The broad category of abuse of process relied on by the defendants is relitigation, where public policy seeks to promote finality of litigation. Relitigation extends beyond cases where there has been a previous Court decision and of course there was not a previous Court decision in this case because the claim against the Compensation Agency was compromised. Relitigation extends to situations where issues are raised that could and should have been raised in earlier proceedings. The defendants refer to Johnston and Borewood [2002] 2 AC 1 where Lord Bingham reviewed the position and at page 31 stated -

> "…. there will rarely be a finding of abuse unless the later proceedings involve 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. This 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."

[13] The plaintiffs rely on two propositions. The first is that this is a case where the plaintiffs had a choice of compensators and were entitled to make an election as to proceeding against all or some of the compensators. Secondly the plaintiffs' obligation is to mitigate any loss sustained. Where there is recovery against one compensator the obligation to mitigate is satisfied by a corresponding reduction of the damages recoverable from another compensator. In the present case the plaintiffs credit the defendants with the amount recovered from the Compensation Agency.

[14] The plaintiffs refer to the judgment of Weir J in Clarke v. Boyle and Allianz Corporate Ireland plc [2005] NIQB 7. The plaintiff was injured when he was struck by a stolen motor vehicle driven by the defendant. There were civil proceedings against the driver as well as a criminal injury compensation claim against the Compensation Agency. The criminal injuries claim was held in abeyance. The driver had no insurance as the vehicle had been stolen so the second defendant was involved as insurer concerned. The Defence pleaded that the civil proceedings were an abuse of process as they had been initiated by the plaintiff prior to completing the criminal injury compensation claim.

[15] The defendants objected to the plaintiff's approach in three respects. First, that the approach infringed the principle of unjust enrichment or double compensation for undertaking both the criminal injury application and the civil action. However there was no question of double compensation being claimed or permitted.

[16] Secondly it was claimed that the plaintiff was in breach of his duty to mitigate his loss by failing to prosecute his application for compensation. In response the plaintiff relied on Gardiner v. Moore and others [1984] 1 All ER 1100 in relation to a party undertaking a criminal injuries compensation claim as well as a common law action. Lord Hailsham stated –

> "…. the two remedies are not necessarily mutually exclusive alternatives and were not designed to be so. The criminal injuries scheme is itself markedly

> less advantageous to the claimant than the MIB agreement and since the MIB agreement and road traffic legislation came into being long before the Criminal Injuries Scheme was introduced I cannot see that the scheme can be used as an aid to their construction."

[17] Thirdly, it was claimed that the plaintiff was not entitled to pursue the civil action in priority to the criminal injury compensation claim. The plaintiff responded that while the application for criminal injury compensation was made before the civil action had been commenced the plaintiff was entitled to decide which of the two claims to pursue or, if he was pursuing both, in which order he would pursue them. Weir J agreed and stated that it was a matter for the plaintiff and for those advising him how he would proceed and it was not a matter to be dictated by the defendants.

[18] In the circumstances of the present case I do not accept that this action constitutes an abuse of process. The plaintiffs seek to recover for consequential loss that the plaintiffs contend was not recovered in the criminal damage claim. If there is a dispute about whether any part of the consequential loss was recovered in the criminal damage claim that will certainly be an issue in the action and there will not be double recovery. I am satisfied that the plaintiffs acted in the criminal damage claim in a reasonable manner in compromising the claim in the light of the uncertainty about the extent of entitlement to recovery. Whether the plaintiffs can recover in respect of the loss of profit against the defendants in the present action is another matter and that will be determined in the action. Any dispute about entitlement does not render the attempt to pursue that aspect of the claim in the proceedings an abuse of process. I do not accept that the plaintiffs should have pursued the loss of profits claim at first instance or on appeal as the defendants contend.

[19] The plaintiffs had two compensators and were entitled to take action against one or both, while accepting, as the plaintiffs do, that they are not entitled to double recovery. The defendants' particular focus on this application draws a parallel with cases where an insurer is involved. In those circumstances the insurer is often on notice of the alternative claim and would expect to be consulted and may consent to the matter being pursued by way of a criminal damage claim and may pay the claim and take the subrogated right to the criminal damage compensation claim.

[20] I do not accept that any such requirement arises in the present case. The absence of engagement with the defendants or any insurer of the defendants in relation to the criminal damage claim does not constitute an abuse of process. The loss of the opportunity for the defendants to influence the criminal damage claim does not constitute an abuse of process. It was

reasonable for the plaintiffs not to pursue the consequential claim against the compensation Agency. Thus while the loss of profits claim was an issue that could have been litigated in the criminal damage claim it was not an issue that should have been litigated in the criminal damage claim. By seeking to litigate the loss of profits claim in the present proceedings the plaintiffs are not misusing or abusing the process of the Court. The policy reasons for finality of litigation are not offended in the present case. This is no relitigation issue giving rise to abuse of process. The proceedings do not amount to unjust harassment of the defendants.

[21] I reject the application to strike out the plaintiffs' pleadings.