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Judgment: approved by the Court for handing down | *Delivered:* **12/03/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JACQUELINE MC VEIGH AND EDITH BARR
T/A SUNSHINE ISLAND

Plaintiffs;

-and-

Hollhouse Limited

First Defendant;

-and-

John Murphy Clarke

Second Defendant.

MORGAN J

[1] At all material times the second named defendant was the owner of premises at 4 Court St Newtownards (the premises). By virtue of an assignment on 22 April 1999 the second named plaintiff became a tenant of the premises and thereafter conducted therein a tanning business in partnership with the first named plaintiff. In September 1999 the first named defendant commenced building work at adjoining premises. The plaintiffs contend that the building work caused damage to the premises. On 23 November 1999 solicitors retained by the plaintiffs wrote to the second named defendant's solicitors alleging that the second named defendant had failed to carry out any or any adequate repairs to the premises and advising that the plaintiffs intended to cease payment of rent forthwith until such repairs were completed.

The lease

[2] The relevant covenants within the lease were:

"AND the Lessee hereby covenants with the Lessor:-

1. To pay the rent hereby reserved at the times and in the manner aforesaid clear of all deductions…

8. To maintain the premises in a good and tenantable state of repair internally and externally (repairs hereinafter covenanted to be done by the Lessor alone excepted) and in a reasonable state of decoration internally and externally and to insure all glass including plate glass windows against damage and replace or repair same if damaged…

AND the Lessor hereby covenants with the Lessee:-

1. To keep the exterior of the premises with roof gutters and downpipes in good structural repair….

3. That the lessee observing and performing the covenants on his part and conditions contained therein may peaceably occupy and enjoy the premises…

AND IT IS HEREBY MUTUALLY AGREED:

1. That if the premises shall be destroyed or substantially damaged by fire or other inevitable accident not the fault of the Lessee this demise shall at the option of the Lessee or Lessor (to be exercised within 7 days of such destruction or damage) terminate forthwith but if such option is not exercised this demise shall continue in force but the Lessor shall with all reasonable speed rebuild or reinstate the premises to their former condition but the rent hereinbefore reserved shall be suspended or (if a part only of the premises shall be destroyed or rendered unusable) reduced rateably during such time as the premises or such part as aforesaid shall be unusable and if the parties hereto cannot agree as to the proportion of the rent to be charged as aforesaid such proportion shall be determined by an arbitrator appointed with the consent of the parties."

The plaintiffs accept that they had no entitlement under the lease to suspend or cease payment of the rent. In particular it is no part of their case that the premises were rendered unusable by reason of the state of the premises.

[3] On 24 March 2000 the plaintiffs' solicitors sent a letter of claim to the second named defendant alleging that they had sustained loss and damage due to the state of disrepair of the premises and breach of the landlord's covenant under the terms of the lease. This, of course, is a claim that could only be maintained by the second named plaintiff. On 12 June 2000 the plaintiffs' solicitors sent a "Bullock letter" threatening to sue the second named defendant and others in respect of their losses. On 19 November 2000 the second named defendant's estate agents wrote claiming the rent due and advising that the correct course of action was for the plaintiffs to look to whoever had caused their loss for recompense.

The pleadings and earlier proceedings

[4] On 4 December 2000 the plaintiffs issued a Civil Bill against the first named defendant claiming damages for loss and damage sustained by them by reason of the alleged negligence and nuisance of that defendant in respect of the building works. On 7 December 2000 the second named defendant issued a Civil Bill claiming arrears of rent from the second named plaintiff. The rent action was listed for hearing on 3 April 2001. The plaintiffs asked the second named defendant to adjourn that action so that it could be heard with their claim for damages against the first named defendant. The second named defendant refused but prior to the proposed hearing date the parties reached a settlement of the rent action the terms of which are contained in a letter dated the 30 March 2001 from the second named defendant's solicitor.

> "We would refer to our telephone conversation of 29th inst., when you confirmed your client accepted that rent was due to our client and that she wished to settle this action. We note further that your client has confirmed that she will start to pay rent again from next week.
>
> We calculate that arrears of rent up to 3 April 2001 amount to £4440.
>
> We are prepared to advise our client to accept settlement of this action in the following terms:-
> 1. That rent arrears have accrued in the sum of £4440 plus interest…
> 2. Our client's full costs and outlay will be settled by your client..

> 3. We will agree to a stay of enforcement pending the resolution of your client's actions against Hall House (sic)..
> 4. That you undertake that your clients damages cheque arising out of her action against Hall House shall be made payable to you and that you will discharge the monies due to our client…"

The second named defendant obtained a decree on consent on 3 April 2001 for £4440 plus costs and the plaintiffs thereafter recommenced paying rent in respect of the premises in accordance with the lease until they vacated the premises in November 2003. The plaintiffs have still not paid the amount due on foot of the decree granted on 3 April 2001. I see no merit in the submission that the plaintiffs should have issued a counterclaim in the rent action against the second named defendant in respect of the damage which was already the subject of the first civil bill. If such a claim was to be pursued it was plainly appropriate to pursue it in the original damage action.

[5] On 22 November 2001 the Civil Bill against the first named defendant was removed to the High Court. The statement of claim was served on 4 January 2002 claiming £31,094. The first named defendant went into creditors' liquidation and a liquidator was appointed of 16 July 2003. Upon application made by the plaintiffs the second named defendant was joined in the damage action on 26 January 2004. As no statement of claim was then served, the second named defendant made an application on 25 August 2005 to dismiss the plaintiffs' claim for want of prosecution. That application was refused and eventually the plaintiffs served an amended statement of claim on 24 February 2006 increasing the claim to £69,466.55. Although the claim against the second named defendant is framed in negligence, nuisance and breach of covenant the thrust of the plaintiffs' case is that the second named defendant is in breach of various express and implied covenants arising from the lease which are pleaded as follows:

> "(a) Breach of the implied term whereby the plaintiffs would have quiet enjoyment of the premises and the premises would be in good repair.
> (b) Breach of an implied term whereby the landlord would rebuild or reinstate damaged or destroyed premises with all reasonable speed.
> (c) Breach of express term of the lease for quiet enjoyment, repair and reinstatement.
> (d) Breach of lessor's express obligation to keep the exterior of the premises in good structural repair.
> (e) Breach of express covenant/contractual term for peaceable enjoyment by the plaintiffs without disturbance.

(f) Breach of paragraph 1 of the mutually agreed terms of the said lease.
(g) The second defendant being on notice of the damage, disrepair and/or defective premises and failing to take steps to remedy the situation adequately or at all committed a continuing breach of contract. ”

[6] By his defence served on 16 May 2007 the second named defendant denies that he has been guilty of the alleged negligence nuisance or breach of covenant and by paragraph 8 pleads:

> “Further, and in the alternative, the plaintiffs claim is barred by the doctrine of res judicata, and/or issue estoppel, and/or waiver, and/or is otherwise an abuse of process of the court by reason of:
>
> (a) settlement of civil proceedings, or about 3 April 2001, which said proceedings had been issued by this defendant against Edith Barr Trading As "Sunshine Island", as servant or agent of Jacqueline McVeigh. and/or as agent for their joint business "Sunshine Island", for arrears of rent in relation to the lease, whereby Edith Barr agreed, for and on behalf of the Plaintiffs that:
>
> (i) the plaintiffs were liable to pay the rent arrears due and owing;
> (ii) the plaintiffs would pay the landlord’s full costs and outlays in respect of the civil proceedings;
> (iii) the landlord would agree to a state of enforcement pending the resolution of the plaintiffs claim against the first defendant;
> (iv) the plaintiffs’ solicitor would undertake that any damages cheque arising out of the plaintiffs’ action against the first defendant would be made payable to this defendant’s solicitor and that they would be responsible for the discharge of all monies to this defendant;
> (v) the plaintiff's failure to issue a counterclaim against the second defendant in relation to the claim for arrears of rent.
>
> (b) In the circumstances, the plaintiffs claim against this defendant is barred by the doctrine of res

judicata; and/or of issue estoppel, and/or waiver, or is otherwise an abuse of process of the court."

The preliminary issues

[7] The second named defendant applied on 15 November 2007 for a preliminary trial pursuant to Order 33 Rule 3 of the RSC(NI) 1980 and on 18 December it was ordered on consent that the following questions should be dealt with by way of such preliminary trial:

> "(a) Are the plaintiffs estopped from suing the second defendant by reason of:
>
> (i) Settlement of the second defendant's claim against Edith Barr trading as Sunshine Island;
>
> (ii) and/or the resumption of rental payments made pursuant to that settlement;
>
> (iii) their continued trading from the premises from April 2001 until 2003.
>
> (b) Further, and in the alternative, does the aforesaid settlement estop the plaintiffs from issuing proceedings against the second defendant pursuant to Talbot v Berkshire County Council [1994] QB 290 and/or issue estoppel
>
> (c) Further, and in the alternative, does the settlement of second defendant's claimed and/or the resumption of rental payment amount to a waiver of the plaintiffs' claim against the second defendant "

Waiver and estoppel related to rent

[8] It is convenient to start with the third of the preliminary issues raised by the second named defendant namely whether settlement of the rent claim and/or the resumption of rental payment amounted to a waiver of the second named plaintiff's claim against that defendant. Both parties accept that a waiver occurs where a party to an agreement voluntarily agrees to forbear from insisting on the mode of performance or the time of performance fixed by the contract, or forbears from so insisting. In those circumstances the party forbearing is not entitled to go back on his promise and insist on his strict rights under the agreement. (The Law and Practice of Compromise, Foskett 6th edn). In support of her submission Ms Danes QC, who appeared with Miss Jacqueline Simpson for the second named defendant, relied on the terms of settlement reflected in the letter dated 30 March 2001 from the second

named defendant's solicitors to the plaintiffs' solicitors. The terms of this correspondence are silent as to the obligations of the parties under the lease other than in respect of rent arrears. Paragraph 1 of the lessee's covenant under the lease set out at paragraph 2 above requires the payment of rent **clear of all deductions**. It is common case that the plaintiff had no entitlement to withhold the rent because of any alleged breach of the repairing obligation under the lease. If, therefore, the second named defendant is to establish any forbearance by the second named plaintiff in relation to her right to initiate proceedings in respect of such an alleged breach as a result of the settlement terms it must be found by the inference of a common intention between the parties or by implication.

[9] In order to sustain that implication the second named defendant relies on the contractual principle that a term will be implied if it is necessary, in the business sense, to give efficacy to the contract. I do not consider that the principle is of assistance to the second named defendant in this case. The action with which the correspondence was concerned was a rent action only. The correspondence indicates that the plaintiff accepted that rent was due to the second named defendant. The settlement figure represented the entirety of the rent due. A letter of claim in relation to breach of the repairing covenant had already been sent to the second named defendant by the time of settlement of the rent action. Indeed as discovery now shows the second named defendant had been in negotiation with the first named defendant in relation to the damage caused to the premises and in October 1999, unknown to the plaintiffs until recently, the first named defendant had made the case that the roof of the premises was substandard and that responsibility for this lay with the second named defendant. Although at the time of settlement of the rent action the plaintiffs' action for damages in respect of the damage to the premises was commenced against the first named defendant only it did not follow that the plaintiff was thereby giving up its entitlement to sue the second named defendant under the repairing covenant. The second named defendant did forbear to enforce his entitlement under the decree but in return he got a promise that the solicitors for the plaintiffs would apply any monies recovered against the first named defendant in discharge of the outstanding rent. I can find nothing in these circumstances to justify any inference that there was any common intention between the parties depriving the second named plaintiff of her entitlement to sue under the lease for breach of the obligation to repair nor do I find any basis upon which to imply such a term. I am further satisfied that since the obligation to pay rent was independent of any claim for breach of the landlord's repairing covenant it could never be the case that payment or the resumption of payment of the rent alone would amount to a waiver of the right to pursue the landlord for a breach.

[10] The first preliminary issue is couched in terms of estoppel but is probably best described as waiver by estoppel and occurs where, without any

request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party and the other party acts in reliance on that representation. For the same reasons as set out above I do not consider that the terms of the settlement of the rent action or the resumption of rental payments constitute a representation to the second named defendant that the plaintiff would forbear to enforce the terms of the repairing covenant. Mr Dowd for the plaintiff relied upon Porter v Jones [1942] 2 AER 570 to support the proposition that continued reasonable use of premises in accordance with the lease after notice of disrepair does not excuse the landlord from his liability under a repairing covenant. Accordingly I do not consider that the second named defendant can succeed on this issue either.

The extended doctrine of res judicata

[11] The issue between the parties on which most attention was focused in the course of the hearing was whether the plaintiff was estopped from pursuing proceedings against the second named defendant on what is sometimes called the extended doctrine of res judicata or implied issue estoppel based upon the court's inherent jurisdiction to control its own proceedings. This is often referred to as the rule in Henderson v Henderson (1843) 3 Hare 100 and the classic exposition of the rule was stated by Wigram VC:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

[12] Although the rule was initially conceived in respect of res judicata on a narrow basis it took on a wider remit in respect of cases where claims could have been made but were not made in earlier litigation. In Talbot v Berkshire County Council [1994] QB 290 the plaintiff and his passenger were injured when a car driven by the plaintiff struck an expanse of water and went out of control. The passenger sued the plaintiff. His solicitors issued a third party notice against the council as the local highway authority. The passenger joined the council as second named defendant. At the trial liability was apportioned between the plaintiff and the council so that the council was one third responsible. The plaintiff then issued proceedings outside the limitation period against the council. His solicitors in the passenger claim had not informed him that the council were being joined. The court held that the wider doctrine of res judicata applied. The plaintiff's claim against the council arose out of substantially the same facts as the cause of action in respect of which the passenger's claim had been made and should have been included in the third party proceedings in the passenger's action. The plaintiff's action was struck out as res judicata and an abuse of the process of the court.

[13] The rule was reviewed by the House of Lords in Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1. That was a case in which the plaintiff was controller of a company which sued a firm of solicitors in respect of its allegedly negligent provision of services. That action was eventually settled. The plaintiff then initiated proceedings on his own behalf against the solicitors relying on many of the same alleged breaches of duty. The action was struck out as an abuse of process by the Court of Appeal but the House of Lords reversed that decision. Lord Bingham reviewed the rule.

> "It may very well be, as has been convincingly argued (Watt, The Danger and Deceit of the Rule in Henderson v Henderson : A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287), that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to *31 res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. 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 a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves 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. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable 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. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

Conclusion

[14] In this case the first proceedings issued were those by the plaintiff against the first named defendant on 4 December 2000 (the present proceedings). The letter of 19 November 2000 referred to in paragraph 3 above was essentially an invitation on behalf of the second named defendant to issue against the first named defendant only. The proceedings issued some days later by the second named defendant against the plaintiff were solely in respect of rent. The allegation of breach of the covenant to repair was not and could not have been a defence to that action. Any counterclaim raised in that action against the second named defendant would have involved many of the issues which were going to arise in the present proceedings. That is a strong pointer towards the proposition that those issues, if raised, should be dealt with in the present proceedings. The correspondence between the parties indicates that the plaintiff and the second named defendant were both looking to the first named defendant for compensation until its liquidation in July 2003. That was a new circumstance which caused the plaintiffs to review their strategy. This is not a case of a plaintiff keeping a cause of action up his sleeve. The second named defendant has been joined within the primary limitation period before any of the issues in these proceedings have been determined and will be fully entitled to make any case he wishes at the trial.

[15] The real substance of the second named defendant's complaint is that he no longer has a solvent first named defendant to whom he can look for contribution or indemnity. It is clear, however, that if the plaintiff had continued to pay her rent in accordance with the lease the second named defendant could have had no basis upon which to resist being joined to these proceedings in 2004. In my view the second named defendant has not established any factor which demonstrates that the institution of his rent claim and its acceptance by the plaintiff in the terms set out above should thereby deprive her of the entitlement to pursue her claim in respect of the repairing covenant. The reason that the second named defendant will now have to deal with the second named plaintiff's claim is that the first named defendant is no longer solvent but the proceedings against him have been issued within the primary limitation period and before the determination of any of the issues in the action.

[16] Taking account of all of the facts and applying a broad, merits based test I conclude that the second named plaintiff has not abused the process of the court and is not estopped from pursuing her claim against the second named defendant by the rule in Henderson v Henderson. Accordingly I answer each of the preliminary questions "No".