Neutral Citation : [2014] NIMaster 8 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **12/5/14**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

James Joseph Rooney

Plaintiff;

and

Kieran Kelly trading as JKL Furniture Warehouse

Defendant.

Master Bell

Introduction

[1] I begin with my conclusion : this litigation is vexatious litigation and an abuse of the process of the court. I therefore dismiss the plaintiff's action, ordering costs of the action to the defendant, such costs to be taxed in default of agreement.

[2] The facts of the case are essentially these. The plaintiff purchased a sofa, chair, table and rug from the defendant in or around Spring 2010. He was displeased with these and commenced proceedings in the Small Claims Court in January 2010. That case was heard on 23 May 2012 and was dismissed. The matter was subsequently relisted and on 23 January 2013 the District Judge struck out the claim. On 22 July 2013 the plaintiff wrote a letter to the defendant as follows :

"Dear Mr Kelly,

If you don't give me my money back, I will get the High Court to issue this Writ against you.

Yours faithfully,

Mr J. Rooney"

On 9 August 2013 the plaintiff then issued a Writ against the defendant.

[3] The defendant now makes an application before me seeking an order striking out the plaintiff's Writ under Order 18 Rule 19(d) of the Rules of the Court of Judicature on the ground that it is an abuse of process. At the hearing of the application, the plaintiff appeared as a litigant in person and the defendant was represented by Miss Ellison.

[4] Order 18 Rule 19 of the Rules provides :

> "19. - (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court,
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[5] The indorsement on the plaintiff's Writ reads as follows :

> "The plaintiff's claim is for :
>
> Being a victim of criminal fraud and deceit.
>
> Being a victim of lies and deceit from Mr K Kelly while he was under oath.
>
> Goods not fit for purpose."

[6] I shall deal with each of the three limbs of the indorsement in turn. At the hearing of this application I enquired of the plaintiff whether his reference in the first limb of the indorsement to "being a victim of criminal fraud and deceit" referred to the defendant's representations and conduct at the original transaction when the plaintiff purchased the goods or whether it referred to the defendant's conduct in the Small Claims Court. He submitted that it referred to the former.

[7] The second limb of the indorsement is essentially that Mr Kelly committed perjury in the Small Claims Court when he gave his evidence under oath. Counsel for the defendant submitted that paragraph 16-72 of Clerk and Lindsell on Torts (20th Edition, 2010) sets out the legal position. It states in essence that there is no such thing as a civil action for perjury. Perjury is therefore a criminal offence dealt with in the criminal courts. I accept that submission. Even if Mr Kelly were to agree that he committed perjury (which he strongly denies in his affidavit) it is entirely misconceived by the plaintiff that the High Court has any jurisdiction in the matter.

[8] The third limb of the plaintiff's indorsement, that the goods he purchased were not fit for purpose, clearly arises out of the same set of facts which were litigated in the Small Claims Court.

[9] Miss Ellison referred me to the decision of Girvan J as he then was in *Ulster Bank Limited v Fisher and Fisher (a firm)* [1999] NI 68. That decision considered the doctrine of *res judicata*. Girvan J observed that English and Northern Ireland law in common with many other legal systems, including Roman law, recognise the importance of ensuring finality of litigation (*rei publicae interest ut sit finis litium*), of protecting parties from multiple claims in relation to the same dispute (*nemo debet bis vexari*) and of avoiding conflicting decisions between courts. While the general body of law giving effect to these principles in English law is generally and loosely referred to as the doctrine of "Res Judicata" there are in fact a number of different doctrines in play which it is important on occasions to distinguish. Firstly, there is the doctrine of res judicata estoppel which includes cause of action estoppel and issue estoppel. Secondly, there is the doctrine of former recovery or merger in judgment. Thirdly, there is a principle sometimes called the "extended doctrine of res judicata" and sometimes referred to as "implied issue estoppel" based upon the court's inherent jurisdiction to control its own proceedings.

[10] In his judgment Girvan J drew conclusions in connection with the authorities on the extended doctrine of *res judicata.*

> "It cannot be said that the authorities on the question of the so-called wider principle of *res judicata* speak with one voice or that it is possible to distil an entirely coherent set of principles from

the authorities. A number of conclusions can, however, be drawn with some confidence from the case law.

(1) The extended doctrine is based on the court's inherent jurisdiction to prevent abuse of its process (see in particular Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney General of Queensland* [1979] AC 411 at 425 approving Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255).

(2) As in any case of alleged abuse of process the court will not lightly strike out proceedings as an abuse of process in this field (see for example A L Smith LJ in *Stevenson v Garnett* [1898] 1 QB 677 at 680). Otherwise there would be a danger of a party being shut out from bringing forward a genuine subject of litigation.

(3) The categories of abuse of process are not closed and it is not possible or appropriate to definitively define the circumstances in which the court will strike out as an abuse of process (see Lord Diplock in *Hunter v Chief Constable of West Midlands Police and ors* [1982] AC 529 at 536.)

(4) The requirements of issue estoppel proper are: (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and (iii) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies (see Lord Guest in *Carl Zeiss Stiftung v Rayner v Keller Ltd No 2* [1967] 1 AC 853 at 935). Lord Lowry in *Shaw v Sloan and ors* [1982] NI 393 at 397 with his customary insight pointed out: 'The entire corpus of authority on issue estoppel is based on the theory that it is *not* an abuse of process to re-litigate a point where any of the three requirements of the doctrine is missing….' It is salutary to bear that comment in mind when approaching any question of whether proceedings should be struck out as an abuse of process in this field.

(5) The court will strike out proceedings as an abuse if the second set of proceedings are in effect an attempt to re-litigate the same or essentially the same issue that was decided in previous proceedings ("the same old charge" in the words of Tucker LJ). This will include issues which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be unjust to permit a new proceeding to be started in respect of the matter.

(6) Where the judgment sought by the party bringing the fresh proceedings would conflict with or be inconsistent with or involve a collateral attack on the correctness of the previous judgment then the second proceedings would be an abuse of process (see *Port of Melbourne Authority v Anshun Pty Ltd*, *Stevenson v Garnett,* and *Hunter v Chief Constable of West Midlands Police* [1982] AC 529.) Indeed *Spencer Bower* suggests that the extended doctrine does not prevent a party bringing forward in later litigation a cause of action not previously adjudicated upon provided it is not substantially the same as one that has been unless success in the new proceedings would result in inconsistent judgments (see at para 454). For my own part I am not convinced that the extended doctrine is quite so limited.

(7) If the later proceedings can be seen to be without merit in the light of an earlier decision a fortiori where the parties are the same, they will be struck out as an abuse of process (see *Reichel v McGrath* [1889] 14 App Cas 665, *Montgomery v Russell* [1894] 11 TLR 112.)

(8) Justice and fair play between the parties must represent an underlying principle of the extended doctrine of res judicata. While in seeking to prevent abuse of its process the court is exercising a form of discipline over the parties to litigation, the court's procedural rules and principles are themselves always aimed at the doing of justice between the parties."

[11] The application of these principles to this case is quite simple. Firstly, when one compares the third limb of the plaintiff's Writ where he states that the goods were not fit for purpose and his Notice of Application for a Small Claim, it is clear that essentially the same question has previously been decided by the Small Claims Court. That court heard the plaintiff's complaints that the table fell apart after a week, that the design on the rug was coming off, that the "leather" sofa supplied was in fact plastic, and that the plaintiff did not believe that the "leather" chair was in fact leather. In reaching a decision on these facts the District Judge will inevitably have considered the credibility of the parties and had to reach conclusions about whether or not the parties were being truthful. Secondly, the judicial decision there was a final one. The plaintiff had a right of appeal against the District Judge's decision under Article 30(4)(ab) of the County Court (Northern Ireland) 1980 but did not lodge a notice of appeal in respect of that decision. Thirdly, the parties to the judicial decision in the Small Claims Court were the same persons as the parties to these proceedings in which the estoppel is now raised. I inevitably conclude therefore that the these second set of proceedings

are in effect an attempt to re-litigate the same or essentially the same issue that was decided in previous proceedings before the Small Claims Court.

[12] In his oral submissions to me the plaintiff was frank that he had issued his Writ because the thought that the decision of the District Judge was wrong. The plaintiff's request was that I adjourn the defendant's application, organise matters so that Mr Kelly could be in a witness box and be asked questions so that Mr Kelly's alleged perjury would be revealed.

[13] I consider therefore that the defendant has made out his case that the proceedings commenced by Writ are an abuse of process.

[14] I have also concluded that the plaintiff's action falls within that category of proceedings described as vexatious litigation. In *AG v Barker* [2000] 1 FLR 759 Lord Bingham of Cornhill CJ described the hallmark of a vexatious litigation as follows:

> "Vexatious is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

[15] I therefore have no hesitation in reaching the conclusion that I must dismiss the plaintiff's action and order costs of the action to the defendant, such costs to be taxed in default of agreement and I certify for counsel.