

APPROVED

[2023] IEHC 296



THE HIGH COURT

2020 No. 259 SP

BETWEEN

HUGH CARTY, JOHN P. CARTY, H. GAVAN CARTY, SHANE CARTY  
PRACTISING UNDER THE STYLE AND TITLE OF KENT CARTY SOLICITORS

PLAINTIFFS

AND

FRANK HARTE  
GERALDINE QUAIL

DEFENDANTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 9 June 2023**

## INTRODUCTION

1. The within proceedings take the form of an application for well charging orders and orders for sale. The proceedings are predicated on a series of judgment mortgages which have been registered against properties held in the name of the first defendant.
2. This ruling is delivered in respect of an application by the first defendant to stay these well charging proceedings pending a challenge to the validity of an earlier

NO REDACTION REQUIRED

ruling by the Taxing Master of the High Court. The ruling of the Taxing Master represented a staging post in the process which culminated in the registration of the judgment mortgages. For the reasons explained herein, any further challenge to the validity of the ruling of the Taxing Master is precluded by the principle of *res judicata*.

### **PROCEDURAL HISTORY**

3. These proceedings seek to enforce a judgment entered in favour of the plaintiffs as against the first defendant in 2017. The judgment relates to legal fees owing to the plaintiffs in respect of legal services provided by them to the first defendant in the context of family law proceedings in 2009 / 2010.
4. The background to the matter is as follows. The plaintiffs had instituted proceedings by way of summary summons on 1 November 2010 seeking to recover legal fees from the first defendant (“*the summary proceedings*”). The High Court (Ryan J.) made an order on 23 February 2011 directing that the legal fees be taxed, i.e. measured, by the Taxing Master of the High Court. The summary proceedings were adjourned to allow the taxation process to be completed.
5. The Taxing Master issued his initial ruling on 4 February 2015. The Taxing Master measured the solicitors’ general instructions fee in the sum of €30,000; and measured the brief fees for senior and junior counsel in the sum of €12,600 and €8,400 respectively. It appears from the first defendant’s affidavit that the overall fees were reduced by a sum of approximately €40,000. The Taxing Master subsequently delivered a ruling on objections on 1 December 2015.

6. The first defendant sought to challenge the Taxing Master's decisions before the High Court. More specifically, the first defendant issued a motion seeking to stay the order and decision of the Taxing Master. This motion was treated, in effect, as constituting an application for a review pursuant to Section 27(3) of the Courts and Court Officers Act 1995. The application for a review was heard and determined by the High Court (Barrett J.). A reserved judgment was delivered on 8 November 2016 upholding the rulings of the Taxing Master.
7. The same judge then heard and determined the summary proceedings. A written judgment was delivered on 11 July 2017. The first defendant lodged an appeal to the Court of Appeal in respect of this judgment. Crucially, this appeal was subsequently withdrawn, and an order was made on consent by the Court of Appeal on 6 June 2019. The order recites that the Court of Appeal had received a "*Consent Order*" and had made same a rule of court.
8. The schedule to the "*Consent Order*" specified a settlement sum in the amount of €160,000 together with interest at the rate of 2% per annum. It was further provided that in the event the settlement sum had not been received by certain specified dates, the plaintiffs/respondents shall be entitled to avail of such enforcement methods as are available to them in respect of their High Court judgment, High Court taxed costs, and the costs of the Court of Appeal once taxed and ascertained.
9. The plaintiffs instituted the within proceedings on 6 October 2020 ("*the well charging proceedings*"). The well charging proceedings seek to enforce, by way of well charging orders and orders for sale, judgment mortgages which have been registered against a number of properties held in the first defendant's name. The second defendant has been joined to the proceedings in circumstances where it

is suggested that she may have a beneficial interest in some of the properties. The second defendant is not involved in the motion the subject of this judgment and, indeed, has not participated in the proceedings to date.

10. The first defendant issued a motion on 26 January 2023 seeking various reliefs. In particular, the motion purports to seek an order of *certiorari* quashing the ruling of the Taxing Master of 4 February 2015. It appears that the first defendant envisages that the High Court will now carry out some form of judicial review and that the first defendant will be entitled to call witnesses and to cross-examine the witnesses in respect of the bill of costs. The first defendant seeks a stay on the well charging proceedings pending the outcome of this process.
11. The first defendant has also sought an order that all hearings are to be held *in camera*. This order is sought on the basis that the legal costs, which form the subject-matter of the judgment debt, relate to earlier family law proceedings. With respect, there is no proper basis for departing from the default position that justice should be administered in public. The present proceedings are not family law proceedings and are not subject to the statutory *in camera* rule. Moreover, the resolution of the present proceedings will not require consideration of any of the matters raised in the family law proceedings. Accordingly, the rationale underlying the holding of family law proceedings in private, namely, the protection of the dignity of family life by ensuring that intimate matters are not aired in a public hearing, with a risk of wider publicity; does not apply to the present proceedings.

**RES JUDICATA / ISSUE ESTOPPEL**

12. The term *res judicata* is often used as an umbrella term, embracing a number of related principles all of which seek to advance the public interest in the finality of litigation. The strictest form of *res judicata* is cause of action estoppel, whereby a party is precluded from pursuing a particular cause of action in consequence of a final judgment in earlier proceedings. The next form of *res judicata* is issue estoppel, whereby a party will, generally, be precluded from relitigating an issue of fact or law which has previously been determined against them in earlier proceedings. The determination of that issue must have been necessary to the outcome of the earlier proceedings, i.e. the finding on the issue must have been fundamental rather than merely collateral or incidental.
13. Put otherwise, notwithstanding that the judgment in earlier proceedings may not have entailed a final determination on the legal right asserted in subsequent proceedings, it may nevertheless have determined an *issue* which is common to both sets of proceedings. Provided that the determination of this issue had been an essential part of the rationale for the earlier judgment, then the finding on the issue will, generally, be binding in the subsequent proceedings.
14. There is a third species of *res judicata*, whereby a party will, generally, be precluded from litigating an issue in a second set of proceedings if that party should have—but failed—to raise the issue in an earlier set of proceedings. This principle is described as the rule in *Henderson v. Henderson*, but recent case law confirms that it too is grounded in the principle of *res judicata* (*Arklow Holidays Ltd v. An Bord Pleanála* [2011] IESC 29, [2012] 2 I.R. 99 (at paragraphs 46 and 57)).

15. It should be explained that the application of both issue estoppel and the rule in *Henderson v. Henderson* are subject to exceptions. These species of *res judicata* represent aspects of the court's inherent jurisdiction to prevent an abuse of process (*McCauley v. McDermot* [1997] 2 I.L.R.M. 486 and *Arklow Holidays Ltd v. An Bord Pleanála* (cited above)). The court has a discretion, in special circumstances, to allow a party to pursue an issue in subsequent proceedings notwithstanding that the issue had been decided against the party in earlier proceedings or that the party had failed to raise the issue in those earlier proceedings. In exercising this discretion, the court must seek to balance (i) the constitutional right of access to the courts against (ii) the public interest and the common good in ensuring that there is finality to litigation and that an individual is not subject to repeated or duplicative litigation in respect of issues which have previously been determined.

## **DISCUSSION AND DECISION**

16. The within well charging proceedings seek to enforce the judgment entered in favour of the plaintiffs in 2017 pursuant to the earlier summary proceedings. That judgment is final and conclusive. Whereas the first defendant had lodged an appeal to the Court of Appeal against that judgment, the proceedings were subsequently settled as between the parties and the appeal withdrawn. The terms of settlement expressly provided for the plaintiffs to enforce the judgment obtained against the first defendant in the event that a schedule of payments was not met. This is the basis upon which the plaintiffs now pursue the well charging proceedings.

17. The first defendant seeks to challenge the validity of the rulings of the Taxing Master from 2015. With respect, it is impermissible for the first defendant to seek to reagitate issues which were finally and conclusively determined by the judgment of the High Court on the application for review pursuant to Section 27(3) of the Courts and Court Officers Act 1995. The High Court upheld the rulings of the Taxing Master, and the first defendant did not seek to appeal that decision to the Court of Appeal. (The appeal appears to have been confined to the subsequent High Court decision in the summary proceedings).
18. If and insofar as the first defendant seeks to suggest that the issues which he now seeks to raise are new ones, not previously considered by the High Court, this does not allow him to avoid the doctrine of *res judicata*. As explained earlier, a party will, generally, be precluded from litigating an issue in a second set of proceedings if that party should have—but failed—to raise the issue in an earlier set of proceedings.
19. Similarly, if and insofar as the first defendant seeks to suggest that the issues now raised are ones which could not have been dealt with in the context of a statutory review under Section 27(3) of the Courts and Court Officers Act 1995, but only by way of judicial review under Order 84 of the Rules of the Superior Courts, this is not an answer. The first defendant sought to challenge the Taxing Master's rulings in 2016 and should have pursued all grounds of challenge at that time. If he thought that this would have been better achieved by way of an application for judicial review, rather than a statutory review, he should have taken judicial review proceedings in 2016. Having failed to do so, and having chosen instead to confine his challenge to one under Section 27(3) of the Courts and Court Officers Act 1995, the first defendant is now caught by the rule in

*Henderson v. Henderson*. Moreover, and in any event, as discussed at paragraphs 22 and 23 below, the first defendant is hopelessly out of time to pursue an application for judicial review.

20. The first defendant's reliance on the judgment of the English Court of Appeal in *Firman v. Ellis* [1978] 3 W.L.R. 1 is entirely misplaced. This judgment is concerned principally with a different issue, namely whether the lower court should have exercised its statutory discretion to extend a limitation period for personal injuries proceedings. Insofar as the judgment discusses *res judicata*, the Court of Appeal held that the earlier proceedings were void *ab initio* and there was no *res* which could found an estoppel. No such considerations apply in the present case and the first defendant is bound by the earlier judgments of the High Court (Barrett J.) in 2016 and 2017.
21. There is a further obstacle to the first defendant's motion. The only practical significance of the rulings of the Taxing Master is that they represent staging posts to the judgment entered against the first defendant in the context of the summary proceedings. The first defendant is bound by that judgment in circumstances where he withdrew his appeal to the Court of Appeal and agreed to have the terms of the consent order made a rule of court by the Court of Appeal. The first defendant cannot seek to launch a collateral challenge to that judgment by seeking to set aside the rulings of the Taxing Master.
22. For completeness, it should be observed that the first defendant's application is fatally flawed on procedural grounds as follows. It is impermissible to seek to challenge a decision of the Taxing Master by way of an application within existing special summons proceedings. The proper procedure for challenging a decision of the Taxing Master is to apply for a review pursuant to the provisions



of Section 27 of the Courts and Court Officers Act 1995. In principle, it is also open to a party to seek to apply for judicial review of a decision of the Taxing Master. This would be unusual in that the statutory review under the Courts and Court Officers Act 1995 normally provides a full avenue for redress. The first defendant cannot ignore these procedural routes and seek, instead, to challenge the Taxing Master's rulings in the context of the present proceedings.

23. Any application now for a (second) statutory review under Section 27 of the Courts and Court Officers Act 1995 would be hopelessly out of time: the twenty-one day time-limit prescribed under the (former) Order 99 of the Rules of the Superior Courts has long since expired. Similarly, any application for judicial review would also be hopelessly out of time: the three month time-limit prescribed under Order 84, rule 21 of the Rules of the Superior Courts has long since expired.
24. Having regard to these procedural defects, the reliefs sought in the first defendant's notice of motion of 26 January 2023 would have to be refused in any event, irrespective of the more fundamental objection that the matters are all *res judicata*.

#### **CONCLUSION AND FORM OF ORDER**

25. The reliefs sought in the first defendant's notice of motion of 26 January 2023 are refused. The validity of the Taxing Master's rulings, and the finality of the judgment entered by the High Court in the summary proceedings, are *res judicata* and the first defendant is bound by same.
26. As to legal costs, my provisional view is that the plaintiffs, having been entirely successful in resisting the reliefs sought in the motion, are entitled to their costs

in accordance with the default position under Section 169 of the Legal Services Regulation Act 2015. If the first defendant wishes to contend for a different form of costs order, he will have an opportunity to do so when the matter is next listed before me.

27. This case will be listed for directions, and to address the issue of legal costs, on Monday 19 June 2023 at 10.30 AM.

*Appearances*

Darren Lehane, SC and Martin Canny for the plaintiffs instructed by Kent Carty Solicitors LLP

The first defendant appeared as a litigant in person

Approved  
Gemma S. MNS