Neutral Citation No: [2021] NICh 9	*Ref:* **HUM11554**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **16/06/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

Between:

PATRICIA ANN MARIE LEEPER
AND
PAUL WILLIAM FRANCIS LEEPER

Plaintiffs/Respondents

-and-

BRIAN JOSEPH MURPHY

Defendant/Appellant

_____

Terry Ringland (instructed by T. G. Menary & Co) for the Defendant/Appellant
John Rafferty (instructed by Walker McDonald) for the Plaintiff/Respondent

_____

HUMPHREYS J

Introduction

[1] The plaintiffs/respondents (hereinafter 'the respondents') issued an Equity Civil Bill on 18 May 2018 against their neighbour, the defendant/appellant ('the appellant'), seeking an order declaring an entitlement to an easement in respect of a drainage system over the appellant's land for the benefit of the respondents' lands.

[2] The respondents are the owners of lands known as 53 Carrick Road, Portadown, Co. Armagh whilst the appellant is the owner of 55 Carrick Road. The issues between the parties arose as a result of an effluent outflow pipe from the respondents' septic tank becoming blocked and causing discharge onto the appellant's land. The proceedings were necessitated by the fact that any easement enjoyed by the respondents had not been registered as a burden on the appellant's Folio.

The January 2019 Agreement

[3] On 11 January 2019 the Civil Bill came on for hearing at Craigavon County Court. On that date, the parties entered into an agreement which provided as follows:

> *"The parties agree the following steps in full and final settlement:*
>
> 1. *Installation of a treatment plant to the satisfaction of building control and Northern Ireland Environment Agency, within four weeks of the date hereof.*
>
> 2. *All remaining pipework from original soakaway to be disconnected.*
>
> 3. *Separate storm water system from 1, above, to be installed if necessary to flow to field drain.*
>
> 4. *Costs 1-3 to be borne by Plaintiffs without prejudice to further order of the Court.*
>
> 5. *Upon building control and Northern Ireland Environment Agency approval for step 1, Defendant to grant Plaintiffs an easement and burden for sewer system within 14 days.*
>
> 6. *All professional and legal costs to be determined by the Judge upon completion of steps 1-5."*

[4] These terms were signed by the parties and witnessed.

The March 2019 Hearing

[5] The matter came back before the County Court judge at Craigavon on 8 March 2019. At that time, Counsel for the respondents opened the case to the judge, referred to the January 2019 terms and claimed that their obligations under the terms had been fulfilled. The court was asked by the parties to determine the following issues:

(i) Did the new treatment works cause discharge directly into a watercourse, which would have been a breach of the statutory Consent to Discharge?; and

(ii) Was it necessary to install a separate storm water system?

[6] Counsel for the appellant stated to the court that the respondents had *"done a very good job in putting in the water system for the treatment of sewage"* but that discharge was caused into the watercourse. In the absence of confirmation from the NIEA, his client was not satisfied with the works as completed. He also informed the court that his client believed a separate storm water system was necessary. In the absence of these two features of the agreement being fulfilled, it was contended, there was no obligation on the appellant to grant an easement and cause it to be registered as a burden. He did stress, however, that the parties were *"very very close to a satisfactory resolution"* and all that was required were *"some very small tweaks."*

[7] The judge proceeded to hear evidence from Uel Weir, an architect instructed on behalf of the respondents, who designed the new works which were installed following the January 2019 agreement. He gave evidence that the requisite consents had been obtained and there was no need for any separate storm water system.

[8] The second named respondent also gave evidence as did the appellant and his retained expert, Michael McCorry. Mr McCorry's evidence was that there was discharge directly into a watercourse which was a breach of the terms of the existing Consent. He also opined that a storm water drain was necessary to prevent excess water running onto the appellant's land.

[9] Having heard the evidence and submissions, the judge concluded:

(i) That he preferred the evidence of the respondents on the issue of the discharge from the pipe and therefore concluded that no new Consent was required;

(ii) That a new storm water system was not necessary;

(iii) The court would order that the appellant grant an easement to the respondents and their successors in title;

(iv) The appellant should pay the respondents' costs on Equity Scale 6.

[8] At no stage did Counsel for the appellant make any submission that the County Court judge lacked jurisdiction. On the contrary, both he and the appellant participated fully in the March 2019 hearing, called evidence, cross-examined witnesses and made submissions.

The Appeal

[9] On 26 March 2019 the appellant issued a Notice of Appeal but failed to serve this on the respondents' solicitors until 16 April 2019. This necessitated an application by the appellant to extend the time for service of the Notice. The appellant's solicitor swore an affidavit to ground this application on 21 June 2019. This sets out the basis for the appellant's appeal, namely:

(1) A separate storm water system was necessary;

(2) The new treatment works caused discharge into a watercourse in breach of the terms of the Consent to Discharge.

[10] The appellant therefore sought a rehearing in the High Court of the same issues which were litigated before the County Court. He maintained his position that the respondents were not entitled to a legal easement on foot of the January 2019 terms. No mention was made in that affidavit of any issue regarding the jurisdiction of the County Court.

[11] Counsel for the appellant prepared a skeleton argument for the extension of time hearing dated 21 June 2019. It referenced the need for further investigative works to be carried out, particularly to identify the location of pipes and whether these have been damaged. It was clearly foreseen that further expert evidence would be obtained. No mention was made of any jurisdiction issue.

[12] On 28 June 2019 McBride J extended time for service of the Notice of Appeal and ordered that the appellant pay the costs of the application.

[13] The appeal was reviewed on 13 September 2019 and the court directed the exchange of experts' reports, a meeting of experts and a joint consultation between the parties. The experts duly reported and met, with minutes being signed off in January 2020.

[14] Counsel for the appellant prepared a skeleton argument for the hearing of the appeal which was stamped received on 31 January 2020. It stated as follows:

> *"The Court subsequently had to adjudicate on the terms of the Agreement as Murphy felt the terms of the Agreement had not been brought into effect properly and that the flooding problem in particular had not been resolved…**The appeal is against the trial Judge's ruling on the completion of the terms of the settlement**. Once the Agreement was signed in January 2019 the original dispute between the parties was dead. Any ongoing dispute related to the Agreement between the parties; it was a contractual dispute. In effect in the County Court the Leepers were asking for specific performance of the contract between the parties. At the County Court the trial Judge held that the Leepers had fulfilled their obligations under the contract and ordered Murphy to perform his obligations in allowing an easement. **The Court is now asked to consider whether or not the County Court Judge was correct in deciding that the Leepers had fulfilled their obligations under the Agreement**."* [emphasis added]

[15] The position could not therefore be clearer. Not only is no issue taken with the jurisdiction of the County Court judge, Counsel for the appellant seeks to have the High Court re-hear the self-same issue as to the compliance with the January 2019 terms by the respondents.

[16] In a further skeleton argument dated 10 February 2020, Mr Ringland entirely changed tack. He submitted:

> *"When the Agreement between the parties was signed it became a contract. The claim contained in the Civil Bill was consequently dead. New proceedings based on the alleged breach of contract should have been initiated. On that basis alone the Appellant must succeed in his claim and the Order be dismissed"*

[17] At the same time, further expert investigations were taking place to report on the existing soakaway pipe which involved excavations.

[18] On 18 February 2020, another skeleton argument emanated from Mr Ringland, expanding on the submissions which he had made in respect of jurisdiction. In March 2020 the court agreed to hear the issue of the jurisdiction of the County Court as a preliminary point and this was timetabled accordingly.

[19] The court continued to encourage settlement and various directions were made in relation to the agreement to and instruction of a single joint expert. The parties were unable to agree and the court issued a set of instructions and questions to the expert, Kenny Elliot, on 19 November 2020. Despite the receipt of this report, and the court's direction to negotiate, the parties were unable to resolve their differences and the court therefore proceeded to hear the preliminary issue on 1 June 2021.

The Submissions on Jurisdiction

[20] Mr Clarke, solicitor for the appellant, filed an affidavit on 23 April 2021 in which he unashamedly blamed the County Court judge for hearing the case on 19 March 2019. He averred:

> *"The Court failed to recognise that the settlement of the case deprived it of its jurisdiction to hear the case on its merits and that the cause of action was now breach of contract…The Court made the mistake of hearing the case on its merits."*

[21] Mr Clarke chose not to refer to the fact that both he and the Counsel instructed on behalf of his client actively participated in the County Court hearing without raising any question of jurisdiction. He also failed to mention his previous affidavit in the appeal proceedings, sworn on 21 June 2019, in which he addressed

the points his client wished to pursue on appeal, none of which concerned the jurisdiction of the County Court. In these circumstances, it was entirely inappropriate for an officer of the court to seek to blame the judge for proceeding to hear and determine the case.

[22] In terms of the legal position, Mr Ringland submitted:

(1) The respondents' original cause of action was 'dead' once the January 2019 Agreement was entered into and the court had no jurisdiction in relation to any breach of that Agreement;

(2) The respondents' remedy was to issue fresh proceedings alleging breach of contract and seeking specific performance of the January 2019 Agreement;

(3) The absence of a court order containing a 'liberty to apply' provision was fatal to the respondents' position;

(4) The fact that the parties left the issue of costs to be determined by the judge did not affect the principal submission;

(5) There was no discretion vested in the County Court judge to proceed to hear the matter;

(6) Since he had no jurisdiction, the order of the County Court was null and void and the appellant was entitled, on that ground alone, to succeed in his appeal.

[23] Mr. Rafferty, for the respondents, contended:

(1) The appellant, through his legal representatives, accepted that the County Court judge had jurisdiction as evidenced by the hearing which took place;

(2) No issue regarding jurisdiction was raised when the appeal was lodged, nor when an extension of time was sought. It only appeared belatedly in a skeleton argument in February 2020;

(3) The hearing on 11 January 2019 was adjourned following the entering into of the Agreement;

(4) The parties intended and agreed that the court would have jurisdiction over the January 2019 terms.

[24] The respondents also adduced evidence from their solicitor, Mr Walker who has referred to a discussion with his opposite number, Mr Clarke, at Craigavon Court on 8 March 2019 prior to the adjourned hearing. He has deposed to the fact that he raised with Mr Clarke that if there was any issue around the interpretation of the January Agreement then solicitors would have to come off record and the matter

be further adjourned. Mr Clarke is said to have replied that this would not be necessary but the case could go on. I note that this averment from Mr Walker has not been gainsaid.

Compromise - The Legal Principles

[25] Parties to litigation are always encouraged to compromise their disputes. If terms of settlement can be reached, there are a number of ways in which compromise can be effected. In *Green v Rozen* [1955] 1 WLR 741, Slade J alluded to five possible methods:

(1) A judgment of the court with an agreed stay of execution pending the carrying out of certain terms;

(2) A consent order of the court;

(3) A Tomlin Order, whereby proceedings are stayed on foot of terms set out in a schedule to the order;

(4) A stay on terms endorsed on Counsels' briefs with liberty to apply for the purpose of enforcement of terms;

(5) A simple agreement between the parties, not made an order of court.

[26] The learned judge considered the routes to enforce the terms of settlement in each of the methods of compromise set out. In any case, a binding settlement will extinguish the cause of action, unless the terms themselves permit for the resurrection of the original claim. Foskett on Compromise (9th Edition) at paragraph 6-01 states:

> *"An unimpeached compromise represents the end of the dispute…The court will not permit them to be raised afresh in the context of a new action. If the parties have agreed that their original dispute may be resurrected in certain circumstances then, of course, the position may be different"*

[27] The question of enforcement of terms of settlement in the event of breach resolves to one of three options:

(1) The court may be able to enforce the terms;

(2) The original cause of action may be revived; or

(3) The aggrieved party may have to issue fresh proceedings.

[28] Which of these three applies depends on the mode of compromise and the terms which were agreed. Where the terms are embodied in a court order or made a rule of court, they can be enforced in the original proceedings without the need for a fresh action. Similarly, where an action is stayed in a Tomlin Order, the court will have jurisdiction to enforce the terms in the schedule[1].

[29] Where the parties agree settlement terms but adjourn proceedings pending implementation of same, Foskett states[2]:

> *"A party may be prepared for the trial of his claim…to be adjourned…to enable the other party to carry out the terms of the agreement…Should the terms not be carried out, the original claim could proceed."*

[30] In the event that the compromise of a claim is purely contractual, the aggrieved party can always issue fresh proceedings for breach of contract, seeking damages or specific performance. Foskett comments[3]:

> *"Where a party to a compromise attempts to ignore its existence, either by continuing or commencing proceedings, the other party may either set up the agreement as a defence to the claim or apply to the court for an order staying the proceedings…The question of whether a binding agreement exists is normally directed to be tried as a preliminary issue"*

[31] A hybrid situation arose in *Atkinson –v- Castan*[4] wherein the parties agreed a 'Draft Consent Order' in relation to remedial works for damage caused by a tree which recited:

> *"It is ordered that there be no order save that the defendant to pay the plaintiffs' costs"*

The plaintiffs later sought to enforce the terms through the court and the defendant argued that fresh proceedings were necessary since there was 'no order' and 'liberty to apply' had not been provided for. Despite this, the Court of Appeal held that the terms could be enforced by the court. Woolf LJ stated:

> *"It is clear from that document first of all that the compromise was set out in full in the recitals; secondly, that it was intended that the compromise so set out should be included as part of the record of the decision of the court; thirdly, that the purpose of this being done was to ensure that the compromise would have*

---

[1] The debate referred to in *Green –v- Rozen* having been resolved in favour of Court enforcement
[2] At 9-38
[3] At para 11-03
[4] [1991] 4 WLUK 62

> *the added status which results from a compromise being part of or incorporated into a decision of the court; fourthly, that the obvious purpose of this added status was to put the plaintiffs in a position where they would have the advantages, which would not otherwise be available, of going back to the court in the existing action to have the compromise enforced if the court was prepared to make the necessary orders to achieve this result; and fifthly and finally, that in these circumstances it was implicit, although not express, that there should be liberty to apply for the purposes of enforcing the action. When the matter came before the court, the court had a discretion as to whether or not in the circumstances to make the further orders. On the material which was before the judge in this case there was ample reason why he should regard it as sensible and desirable that the plaintiffs should not be required to bring a fresh action."*

[32] There is therefore authority to the effect that the courts will imply a 'liberty to apply' provision into a court order where it would be sensible and desirable to obviate the need for fresh proceedings and compel parties to comply with obligations which were freely entered into.

Estoppel by Convention

[33] An estoppel by convention can arise when both parties to a transaction act on an assumed state of facts or law – see, for example, *Amalgamated Investment and Property Co v Texas Commerce International Bank* [1982] QB 84 and *ING Bank v Ros Roca* [2011] EWCA Civ 353. This can arise either where the assumption is shared by both parties or made by one and acquiesced in by the other. The effect of such an estoppel is to preclude the parties from denying the truth of the assumption where it would be unjust or unconscionable to do so.

[34] Importantly, the authorities make it clear that the assumption in question can be one of law as well as fact. An incorrect but mutual assumption as to the construction of a contract can therefore fall within the ambit of this species of estoppel.

[35] In *Essex CC v Essex Incorporated Congregational Church Union* [1963] AC 808, Lord Reid stated:

> *"It is a fundamental principle that no consent can confer on a Court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such Court or tribunal has acted without jurisdiction."*

[36] The facts of the *Essex CC* case are instructive. The church authorities served a notice on the local authority requiring it to purchase a church and church hall when

these had been affected by highway works. The premises were exempt from rating and under the relevant statutory provision, did not qualify for the protection afforded by the legislation. However, the council failed to take this point in its counter-notice. The Lands Tribunal and the Court of Appeal proceeded to determine the question of jurisdiction. However, the House of Lords held that the Lands Tribunal had no jurisdiction to rule on this issue and therefore the Court of Appeal ought not to have done. Their Lordships held that by failing to raise the issue in the counter notice, the council could not seek to do so later and by another means.

[37] The issue in *Hiscox v Outhwaite* [1992] 1 AC 562 was whether an arbitral award was made in London or in Paris since this would dictate whether the High Court in England & Wales would have jurisdiction to hear an application for leave to appeal. An analysis of the evidence revealed that solicitors on both sides assumed that the fact the arbitral award was "Dated at Paris" was no obstacle to the exercise by the English courts of their supervisory jurisdiction. On the basis of this common, but mistaken, assumption, the plaintiff incurred costs in the preparation for the hearing of his application before the issue was belatedly raised. Lord Donaldson MR held:

> *"In my judgment it would be unconscionable now to allow Mr Outhwaite to renege from the common assumption which extended not only to the fact that applications under the Acts of 1950 and 1979 could be made within a specified time, but by necessary implication that in respect of an award which stated on its face that it was "Dated at Paris" such applications could and would be heard and determined on their merits."*

[38] There are older cases to like effect. In *H. Tolputt v Mole* [1911] KB the plaintiff brought a negligence action against the defendant solicitor which was unsuccessful and a costs order was made in the defendant's favour. The defendant also happened to be the County Court Registrar tasked with the taxation of the costs which he duly carried out. The Court of Appeal held that the plaintiff had waived his objection to the jurisdiction of the defendant in the taxation by participating in that hearing.

Consideration

[39] Applying the well-recognised principles on the construction of contracts, the court must ascertain the objective meaning of the language used by the parties to the January 2019 agreement. The court must place itself in the position of the reasonable person, armed with all the information reasonably available to the parties at the time, and determine what he or she would have understood the parties to have meant.

[40] Reading the document as a whole, and in particular considering the use of the phrase "in full and final settlement", the court construes the January 2019

Agreement as a final and binding settlement of the dispute which had been brought to the court by way of Equity Civil Bill. The cause of action relied upon by the respondents was thereby compromised and replaced by the various rights and obligations created by the agreement. The court was left with the limited jurisdiction in relation to costs, which was only to be exercised once the steps set out at paragraphs 1 to 5 of the agreement had been completed.

[41] It is evident that the steps foreseen by the agreement were not fulfilled. The easement was not granted by the appellant and whether or not the respondents had complied with their obligations was a matter in dispute.

[42] The parties could have regulated their affairs by asking the court to make an order embodying the terms and including a 'liberty to apply' provision which would have enabled the court to adjudicate on disputed claims of breach of the terms. Instead the parties chose to adjourn the proceedings to permit implementation of the terms of settlement but did not make provision leaving the original cause of action to be litigated in the event the terms were not fulfilled.

[43] Had the parties made a court order, it may well be that this court would be prepared to have implied a 'liberty to apply' provision in order that an unmeritorious objection could have been defeated and fresh proceedings obviated. However, no court order was made and there is no basis to imply such a term into the private contractual arrangements entered into between the appellant and the respondents.

[44] On this basis, the only enforcement option open to an aggrieved party under the January 2019 Agreement was to commence fresh proceedings seeking specific performance of the obligations arising thereunder.

[45] However, the matter does not end there. The court has uncontroverted evidence from Mr Walker in relation to his conversation prior to the March 2019 hearing with Mr Clarke. It is clear from this that the parties proceeded on a common assumption that the County Court judge did have jurisdiction to hear the dispute and determine whether there had been compliance with the January 2019 Agreement.

[46] Moreover, the court has had the benefit of the transcript of the March 2019 hearing. The appellant and his legal representatives participated fully in this hearing, calling factual and expert evidence, cross-examining the witnesses on behalf of the respondents and making legal submissions. At no stage was any issue raised about the judge's jurisdiction. There can be no doubt that the parties were acting under a common assumption that the judge had the requisite jurisdiction, as he would have done on foot of a consent order with a liberty to apply provision.

[47] The question then arises as to whether it would be unjust or unconscionable to now allow the appellant to deny the truth of that assumption. The determination

of this issue is assisted by a consideration of the chronology of events. The parties entered into a settlement agreement in January 2019 and, on foot of this, the respondents carried out works on the land in purported compliance with their obligations. A hearing took place in March 2019, which gave rise to further legal and expert costs. An appeal was filed in April 2019 which necessitated a hearing to extend time in June 2019, thereby giving rise to further legal costs. In the High Court, the case has been reviewed by the Chancery Judge with directions given for invasive investigations to be carried out, supplemental expert reports obtained and meetings of experts to take place. It was not until February 2020, over a year after the Agreement and 11 months after the hearing in the County Court that any mention was made of an issue relating to jurisdiction.

[48] It would be manifestly unfair, unjust and unconscionable to permit the appellant, after that passage of time, and following the incurrence of substantial legal and expert costs, to object to the County Court's jurisdiction. The circumstances of this case are much more compelling than those which prevailed in *Hiscox*. I therefore find that the appellant is estopped from denying the jurisdiction of the County Court and the order made in March 2019 is therefore valid and binding on the parties.

[49] I dismiss the preliminary point and order that the appellant pay the respondents' costs of this issue to be taxed in default of agreement.

Postscript

[50] Settlement of disputes in civil proceedings is always to be encouraged. It is an essential part of the administration of justice that the courts facilitate parties to resolve disputes and thereby save court time and costs, as well as maintaining control over their rights and obligations. However, it is important that settlement agreements seek to achieve certainty and finality and not themselves provide further opportunities for litigation.

[51] Practitioners at all levels should take particular care when drafting and agreeing terms of settlement that definition is brought to the question of enforcement in the event of breach. The case of *Green –v- Rozen*[5] and the principles outlined in Foskett should be read and understood. At the time of execution of a settlement agreement or the reduction of terms into a court order, it should be clear to parties and their representatives whether, in the event of non-compliance, the original cause of action can still be litigated, the court can be called upon to take steps to enforce the terms or fresh proceedings will be required.

[5] **See Chancery Practice Direction no 5 of 2003 per Girvan J**