

WAITE

1985 No. 1514P

THE HIGH COURT

BETWEEN

WILLIAM WAITE AND SEAMUS WAITE

AND

PLAINTIFFS

HOUSE OF SPRING GARDENS LIMITED

ARMOURSHIELD-LIMITED AND MICHAEL SACKS

DEFENDANTS

Judgment of Mr. Justice Barrington delivered the 26th day of June, 1985.

This is the Defendants' Motion to strike out the Plaintiffs' action on the ground that the claim made therein is res judicata and that the action is an abuse of the process of the Court.

The Plaintiffs' Action is to set aside an Order of Mr. Justice Costello made on the 27th day of April, 1983 on the grounds that the said Order and the Judgment on which it was based were obtained by fraud. The said Order of Mr. Justice Costello was made in an action in which the present Plaintiffs, with others, were Defendants and the present Defendants were Plaintiffs. The registered number of the proceedings was 1982 No. 1367P. The action was a fiercely disputed one and the said Order followed a lengthy hearing and most painstaking and elaborate judgment on the part of Mr. Justice Costello. Mr. Justice Costello's decision was upheld by the Supreme Court by Order dated the 11th of January 1985.

After the hearing of the appeal in the Supreme Court and when that Court was about to deliver its reserved judgment the Plaintiffs

in the present action being Defendants and Appellants in that action brought a Motion seeking to set aside the said Judgment and Order of Mr. Justice Costello and seeking a new trial on the basis that new evidence had come to light which, allegedly, showed that Mr. Justice Costello had been deceived. The Supreme Court was due to deliver judgment on the 19th of December, 1984 but, instead, on that day, heard the application for a new trial. Chief Justice O'Higgins delivered the judgment of the Court on the application. Counsel's note of what he said is as follows:-

"The Court has considered this Motion which is unusual and has been brought by the Defendants at a stage which is in effect on the very eve of the reserved Judgment to be given by the Court.

The purpose of the Motion is to seek a new trial of this action not merely on the grounds advanced in the Notice of Appeal or in the argument in the Court on the appeal but on the basis that new evidence has become available since the trial of the action which, if true, indicated that the proceedings had been initiated and conducted by the Plaintiffs in circumstances of deception if not fraud, and that as a result the Court of Trial and up to this, this Court, had been deceived in a manner which ought not to be countenanced in the administration of justice. The members of the Court heard the arguments put forward in support of this Motion very carefully and very large questions arise with regard to whether due and proper diligence was observed in preparing for the trial and also in relation to whether the evidence now adduced is credible or not.

The Court comes to the view that its concern must be to

ensure that at all times justice is not only done but that it should appear to be done. That may appear to be an empty saying but it is a reality and it is the bounden duty of this Court under the Constitution. Certainly it does appear to the Court that if it had turned out that this evidence was in fact true then very serious disruption would have been produced on the administration of justice. It would not be possible and it would not be right to express views at this particular stage on the matter. On that account the Court has decided to facilitate the granting of this Motion but on certain terms which will be announced now and which will not be changed.

Between this date and the 10th of January, 1985, if this Motion is to be allowed, there must be lodged in Court here by the Defendants moving this Motion (to the credit of this appeal in the Accountant's Office) a sum of 3.75 million Sterling which is intended also to include a provision in relation to costs. Failure by those Defendants to make the lodgment on that date will mean that the Motion stands refused and on that basis the appeal will be listed for delivery of Judgment on the following day, 11th January. In fixing these terms which may appear high, and are intended to be strictly adhered to, the Court bears in mind the duty it owes to the Plaintiffs who having succeeded in their action in the High Court would be very seriously damnified if in fact this Motion does not turn out to have a foundation of truth in it. The Plaintiffs are entitled to be properly secured.

This is the Judgment of the Court....."

The Defendants in that action did not in fact lodge the 3.75 million pounds Sterling by the time indicated. Their Motion accordingly stood refused and the Court delivered judgment on the 11th of January, 1985 upholding the decision of Mr. Justice Costello.

The Defendants in the earlier action have apparently no assets within this jurisdiction and the Plaintiffs in that action (being the present Defendants) have instituted proceedings in the United Kingdom to enforce the Order of Mr. Justice Costello as upheld by the Supreme Court.

Both parties in the hearing before me relied on the Note of the Judgment of Chief Justice O'Higgins quoted above. Mr. Cooke (on behalf of the Applicants to dismiss the proceedings) alleged that the present Plaintiffs were given an opportunity by the Supreme Court to adduce new evidence in the earlier action but did not avail of it. Mr. Feeney, on behalf of the present Plaintiffs, submitted that the question of whether his clients should be allowed to adduce new evidence in the former action was a matter of discretion for the Supreme Court which gave his clients leave to adduce new evidence but under terms which were not acceptable to them. At the same time he relied upon the fact that the Chief Justice appeared to accept that if the allegations being made by his clients were correct that Mr. Justice Costello, and the Courts, were being deceived. Whether his clients should be allowed to adduce the new evidence and ventilate their grievances in the old proceedings was a matter of discretion for the Supreme Court which had placed his clients under terms which were not acceptable to them. But any litigant, he submitted, had an

absolute right, in an appropriate case, to institute proceedings claiming that any judgment of the Court had been obtained by fraud. That was his right and there were no grounds for striking out his proceedings.

I accept that the Court has jurisdiction to strike out or stay proceedings in an appropriate case. (See Barry -v- Buckley 1981 Irish Reports, page 306). The question is whether this is such a case.

There is no doubt that an action may be brought to set aside a judgment obtained by fraud and that no leave is required of the Court prior to the institution of such proceedings. (See Halsbury 4th Edition, Volume 26, paragraph 56; Volume 16, paragraph 1553; Volume 8 paragraph 727.)

The Annual Practice for 1985 at page 1047 paragraph 71/9/2 says that in an application to set aside a Judgment on the grounds that it was obtained by fraud it is immaterial that the facts on which the Defendants relied to establish fraud were known to them and could have been raised in the original proceedings. (See Syal -v- Heyward and Another 1948, 49 TLR page 476; 1948 2 A.E.R. p 576. This appears to be the law at any rate where a fraud on the Court is in issue.

In Jonesco -v- Beard (1930 Appeal Cases page 298 the House of Lords held that it was the settled practice of the Court that the proper method of impeaching a completed Judgment on the ground of fraud was by action in which the particulars of the alleged fraud were exactly set out. In Kennedy -v- Dandrick (1943 2 All England Reports, page 606) it was held by Morton J. in the Chancery Division of the English High Court that the proper method of impeaching a Judgment on the ground that it had been obtained by fraud was to proceed by issuing a new writ and that the Court had no jurisdiction to put the Plaintiff in the

new proceedings upon terms as a condition of proceeding with the action.

Mr. Cooke's clients naturally suggest that the new proceedings are merely a device designed to make it more difficult for his clients to recover judgment in the United Kingdom on foot of the Order of Mr. Justice Costello as affirmed by the Supreme Court. That is as it may be but in law it would appear that the present Plaintiffs have an absolute right to institute such a proceeding and that this Court has no power to strike out the proceedings or to put the present Plaintiffs on terms.

The only question is whether the present Plaintiffs, by failing to avail of the opportunity accorded to them by the Supreme Court in the former proceedings, have lost what would otherwise be an absolute right. One can see many reasons for being sceptical at the behaviour of the present Plaintiffs. They made what looks like a desperate last minute effort to stave off the judgment against them in the former proceedings. The Supreme Court gave them an opportunity of a new trial but on the very onerous condition of lodging 3.75 million pounds in Court. They could not, or at any rate did not, comply with these conditions and the judgment went against them.

That judgment therefore stands and no doubt any Plaintiff attempting to set it aside will carry a very heavy onus. In those proceedings nevertheless the former Chief Justice did say that if the matters deposed to and the affidavits filed in the Supreme Court were true they indicated that the Trial Judge and the Supreme Court had been deceived in a manner which ought not to be countenanced in the administration of justice.

In the circumstances I do not think that I have any

jurisdiction to strike out or stay the new proceedings.

I will therefore dismiss the Defendants' Motion.

De By

LIST OF AUTHORITIES CITED

Barry -v- Buckley 1981 Irish Reports, page 306
Halsbury 4th Edition, Volume 26, paragraph 560; Volume 16
paragraph 1553; Volume 8, paragraph 727
Supreme Court Practice 1985, page 1047
Jonesco -v- Beard 1930 Appeal Cases, page 298
Kennedy -v- Dandrick 1943 2 All England Reports page 606
Syal -v- Heyward and Another 1948, 64 TLR page 476;
1948 2 All England Reports page 576.