THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 57

Record Number: 2017/577

Whelan J.
McGovern J.
Donnelly J.

BETWEEN/

PETER FLANAGAN

PLAINTIFF/APPELLANT

- AND –

AIB PRIVATE BANKING, AIB MORTGAGE BANK, ALLIED IRISH BANKS PLC, AIB CORPORATE BANKING LIMITED, AIB FINANCE LIMITED, AIB SERVICES LIMITED AND FRANK FUREY

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 28th day of February 2020

1. This is an appeal from orders made on the 6th December, 2017 by the High Court (O'Regan J.) on the application of the second, third, fourth, fifth and sixth named respondents dismissing the appellant's claims against them as *res judicata* and/or precluded by the application of the rule in *Henderson v Henderson*, save for the claim in negligence made by the appellant against the second and third named respondents (hereafter "the bank").

Factual and procedural background

2. The appellant, prior to the events the subject matter of the proceedings, owned a number of restaurants and residential investment properties, which he had purchased as business and pension investments. He has been a customer of AIB bank since the 1970s and has been provided with various loan facilities from time to time in respect of his investments.

Summary Summons June 2015

3. By way of summary summons issued on the 17th June, 2015 (*Allied Irish Banks PLC and AIB Mortgage Bank v Peter Flanagan*, Record No. 2015/1149S) the bank sought judgment against the appellant in the sum of €7,027,149.77 on foot of four loan agreements entered into by the appellant in 2005, 2007, 2008 and 2009 respectively. The appellant contended that the seventh named defendant in the within proceedings, Mr. Frank Furey, a senior lender employed by the bank, involved himself in the appellant's business affairs and induced him to enter into the first two aforementioned loan transactions, coercing the appellant and his son (who was not a party to the said proceedings and is not a party to this appeal) into becoming partners with him in property developments which ultimately caused his business to collapse. Mr. Furey is not a party to this appeal. The alleged

partnership with Mr. Furey broke up in early 2008. A contention put forward on affidavit by the appellant in the said proceedings and advanced now in the within plenary proceedings was that the bank failed to formally conclude or take any steps on foot of an internal investigation to address the formal complaints made by the appellant in relation to Mr. Furey's conduct or the loss and damage caused to him as a result.

4. The appellant sought to defend the proceedings and filed a replying affidavit sworn the 21st August, 2015 asserting that he had a *bona fide* defence to the bank's application for summary judgment. His grounds of defence were as follows: -

   (i) that a conflict of interest existed because Mr. Furey was a "silent partner" in the property investments in 2005;

   (ii) that the 2008 and 2009 loan agreements were signed by the appellant under duress and in the absence of independent legal advice; and

   (iii) that it had been agreed by the bank at a meeting in early December 2013 attended by the appellant and his financial adviser, Mr. Des Walshe, FCA, that in light of the misconduct of Mr. Furey, the debts of the appellant would be forgiven.

5. By notice of motion issued on the 21st August, 2015 the appellant sought to have Mr. Furey joined as a third party in the summary proceedings – this application was refused.

Summary Judgment

6. On the 16th October, 2015 Hedigan J. granted summary judgment in favour of the bank in the amount claimed ruling that none of the three grounds of defence raised by the appellant disclosed a *bona fide* defence or met the test in *Harrisrange Ltd v Duncan* [2003] 4 IR 1. The appellant did not appeal the summary judgment.

7. In relation to the alleged existence of a conflict of interest, Hedigan J. noted that the appellant, an experienced businessman, had the assistance of a solicitor throughout all the dealings, had represented himself as the sole borrower in the loan agreements and had not complained about the alleged conduct of Mr. Furey to the bank until February 2010 – 23 months after the partnership allegedly broke up. When the bank was informed of the purported behaviour of its official, it inaugurated disciplinary proceedings which concluded when Mr. Furey, who denied any wrongdoing, became ill and left the bank – any conflict that existed was exclusively between Mr. Furey and his employer at the bank, the judgment held.

8. Hedigan J. found that the allegation of duress was not supported by any evidence and that, short of some clear indication of a disability on the part of a borrower, there was no legal obligation on the bank to ensure a customer has independent legal advice. He found that no credible basis existed to support the debt forgiveness agreement claimed and that same was inconsistent with email correspondence which post-dated the alleged agreement of December 2013. He further noted that there was no affidavit sworn by Mr. Walshe to support the appellant's claim.

Receiver appointed

9. By deeds of appointment dated the 13th March, 2015 and 2nd April, 2015 respectively, Mr. Ken Tyrrell was appointed as receiver in respect of specified properties of the appellant held as security for his loans. On foot of the granting of the summary judgment, a process of disposal of such properties began.

Plenary Summons December 2014

10. The within proceedings were commenced by plenary summons issued on the 23rd December, 2014. As such they were instituted prior to the summary proceedings, a factor the appellant appears to attach weight to. The appellant delivered a statement of claim. The relief claimed included an order setting aside the judgment of Hedigan J., a declaration that the bank was estopped from relying on security taken over the assets of the appellant as security for loans, an order setting aside the appointment of the receiver over the assets of the appellant and in the alternative, damages for negligence, breach of duty, negligent misstatement and breach of contract in the sum of €7,027,149.77.

Motion to Dismiss

11. The bank issued a motion, which is the subject of this appeal, on the 16th of September 2016, seeking to have the appellant's claim dismissed on the basis that the within proceedings were an abuse of process, representing a collateral attack on the decision of Hedigan J., which decision already determined the issues raised and are thus *res judicata*, or, in the alternative, that the proceedings were bound to fail.

12. The motion was grounded on the affidavit of Ms. Lynda Muller, a manager at the bank, sworn on the 9th September, 2016, who averred that the claim of the appellant as pleaded in his statement of claim was based on the factual matrix considered by Hedigan J. in the summary proceedings and that the said issues had already been adjudicated in full. Reliance was placed on the affidavits sworn by the appellant and Hedigan J.'s findings on the three defences raised in the summary proceedings.

13. On the 6th December, 2016 Mr. Walshe swore an affidavit in response to the bank's motion. Mr. Walshe refers to the existence of a non-disclosure agreement (NDA) and averred that the bank insisted he sign and commit to it before it would engage with him in connection with the appellant's formal complaint against Mr. Furey and the bank. He deposed that it was for this reason alone that no affidavit was sworn by him in the summary proceedings, as he believed that he was bound by the agreement he had signed.

14. In his affidavit, Mr. Walshe averred that during the summary proceedings, counsel for the bank disclosed material in court in breach of the NDA and that this "selective disclosure" misled Hedigan J. as to the position in the case before him. Hedigan J. had been unaware that a formal complaint made by the appellant to the bank concerning Mr. Furey remained unresolved. Mr. Walshe deposed to the purported dealings between the bank and the appellant, averring that the bank had acknowledged that Mr. Furey had been guilty of "serious misconduct" and had agreed that a resolution of the complaint would be based upon a "restitution of Mr. Flanagan's financial position". The affidavit avers to the

allegedly inadequate manner in which the bank dealt with the appellant's complaint in its investigation into Mr. Furey's actions.

Hearing of this motion before the High Court

15. Before the High Court, counsel for the appellant conceded that he was not entitled to seek an order setting aside the summary judgment granted against the appellant in October 2015 nor was he entitled to relitigate issues determined in the summary proceedings. All aspects of the pleadings which amounted to a collateral attack on the summary judgment were abandoned. The remaining pleas centred upon the appellant's claim for damages for negligence and misrepresentation concerning primarily the actions of Mr. Furey but also the bank in terms of the latter's vicarious liability for the wrongful actions of its employee or agent Mr. Furey. During the hearing, counsel for the appellant argued that the bank was estopped from bringing the motion, submitting that at the outset of the summary proceedings hearing in October 2015 it was canvassed by the appellant that the bank's summary claim and the herein plenary proceedings be heard together, however the bank objected and in the course of that objection expressly stated in open court that the appellant could advance any claim he wished in the herein plenary proceedings.

Decision of the High Court on the 6th December, 2017

16. In delivering her decision at the conclusion of the motion, O'Regan J. considered that vicarious liability was a defence that should have been, and was in its own way, actually raised as against the banks in the summary judgment claim. She stated at p.123-125 of the transcript:

> "The…plaintiff…gave considerable detail in relation to his dealings with Mr. Furey in an attempt to resist the summary judgment…just because he didn't actually use the words 'vicarious liability'…does not mean that nevertheless his position as put forward… before Mr. Justice Hedigan was not that of a vicarious liability character.
>
> I believe it was entirely a vicarious liability character, and to that extent if it is not under the rule of *Henderson v Henderson*, it seems to me that it can actually slot under the rule of *res judicata* because Mr. Flanagan raised all these dealings with Mr. Furey and expressed all his misgivings and how he was led astray by Mr. Furey, nevertheless the Court went on and gave full judgment in the amount of the outstanding indebtedness to the bank, and that in itself in my view is a significant matter in dealing with whether or not Mr. Flanagan should be allowed now to pursue a claim for vicarious liability because of the alleged wrongs of Mr. Furey as against the banks…
>
> *Johnson v. Gore* would say that a litigant is not to be unjustly hounded or unjustly harassed. I think it would be unjust hounding and harassment for the matter now to be relitigated again…I am not sure that it's not under the strict rule of *res judicata* at all… and if it is not, the circumstances are such that it is something that was out there, was in the mix and therefore was raised and should not be raised again…"

17. The trial judge found that issues concerning the alleged "parking" of the loans, independent legal advice, duress/undue influence and the existence of a conflict had all been dealt with by Hedigan J. and were therefore *res judicata*.

18. The trial judge formed the view that the sole issue which remained outstanding was the assertion of negligence on the part of the bank, in relation to its investigation of the appellant's complaint against Mr. Furey, the seventh named defendant, and the appointment by the bank of a receiver over the appellant's assets, issues pleaded in para. 22 (xxviii), (xxix), (xxxi), (xxxiii) and (xxxiv) of the statement of claim.

19. The appellant was ordered to deliver an amended statement of claim reflecting the remaining balance of the claim.

20. An amended statement of claim was delivered by the appellant on the 21st March, 2018 following a motion issued by the bank to compel delivery of same.

21. Unhappy with the amended statement of claim delivered, the bank issued a further motion on the 6th June, 2018 seeking to strike out the balance of the proceedings on the grounds that same did not comply with the order of O'Regan J. That issue is not part of this appeal.

Grounds of appeal

22. The notice of appeal encompasses the following grounds:

    (i) The trial judge erred in allowing the appellant to further prosecute his claim only in respect of para. 22 (xxviii), (xxix), (xxxi), (xxxiii) and (xxxiv) of his statement of claim and in determining that the balance of the claim pleaded was *res judicata*, save for the deletion of the references to conflict of interest and undue influence contained in the first paragraph of para. 22 and subparagraphs (xxiv), (xxv), (xxvi), (xxvii)(c), (xxx) and (xxxii) which the appellant does not seek to appeal.

    (ii) The trial judge erred in finding that the issue of vicarious liability should have been raised in the aforesaid summary proceedings and erred in exercising her discretion under the rule in *Henderson v Henderson* in refusing to allow the appellant to raise the issue of vicarious liability in the herein proceedings.

    (iii) The trial judge erred when exercising her discretion under the rule in *Henderson v Henderson* in failing to give any or any sufficient weight to the representation made by counsel for the bank in the summary hearing before Hedigan J. that the appellant could advance any claim he wished in the plenary proceedings.

    (iv) The trial judge erred in failing to give any or any sufficient weight to the uncontradicted affidavit evidence of Mr. Walshe.

Submissions of the appellant

23. The appellant submits that the decision of Hedigan J. did not consider the question of the bank's vicarious liability and made no findings or determination in respect of same nor was it raised before him. The only issues which Hedigan J. sought to determine were

whether judgment could be resisted on grounds of (a) conflict of interest and/or (b) duress/lack of independent legal advice and/or (c) a claim of debt forgiveness. By contrast, the claims now being advanced in the statement of claim involve different issues which received no consideration and were not the subject of any determination by Hedigan J. The appellant argues that the factual background to the proceedings, outlined in his affidavits sworn in the summary proceedings, does not equate to arguing vicarious liability as a ground of defence in the summary claim.

24. The appellant further submits that the trial judge was incorrect in determining that the alleged negligence on the part of the bank to investigate the appellant's complaint and the appointment of a receiver are the only issues remaining in the proceedings; one outstanding issue was the repeated requests made by the bank of the appellant to forebear instituting the herein proceedings on the assurance that it was conducting an investigation into the conduct of Mr. Furey. Such requests, it is contended, unequivocally gave the appellant the understanding that the investigation was not being undertaken as a purely internal matter solely for the benefit of the bank, but that the appellant had a real interest and stake in the outcome of same.

25. The appellant, referring to the affidavit of Mr. Walshe, submits that as the bank has chosen not to contradict his averments by way of a replying affidavit, its contention that the herein proceedings constitute an abuse of process is itself an abuse of process and an attempt to deprive the appellant of his right of access to the courts.

26. The appellant posits that the judge erred in striking out the proceedings against the bank based on the *res judicata* doctrine. He relies on the decision of *McConnon v President of Ireland* [2012] 1 IR 449 wherein Kelly J. (as he then was) stated that to successfully rely on the doctrine, it must be shown that there was:

> "(a) A previous decision of a judicial tribunal of competent jurisdiction.
> (b) That decision must have been a final and conclusive judgment.
> (c) There must be an identity of parties.
> (d) There must be an identity of subject matter."

27. Within the ambit of identity of subject matter, he contends that there is a distinction between cause of action estoppel and issue estoppel. The appellant refers to the judgment of Diplock L.J. in *Thoday v Thoday* [1964] 1 All ER 341 at p. 352 wherein he describes the former as that branch of estoppel which: -

> "…prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties".

28. The appellant argues that in the present case there cannot be any cause of action estoppel, since the cause of action in the summary proceedings involved the bank's claim in contract for payment of a liquidated debt, whereas the cause of action in the plenary

proceedings is, *inter alia*, a damages claim for negligence, misrepresentation and breach of duty.

29. Regarding issue estoppel, the appellant again refers to the judgment of Diplock L.J. in *Thoday* at p. 352 where he stated:

> "…there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny it was fulfilled if the court in the first litigation determined that it was."

The appellant relies on *Rhatigan v Gill* [1999] 2 ILRM 427 wherein O'Sullivan J. stated:-

> "…The issue must be identical with the issue already determined in earlier litigation and the determination, when it is an issue of fact, must be a formal determination of that issue in the same manner as it would have arisen in the second set of proceedings and not by reason, only, of the application of a principle of law which would not apply in the second set of proceedings."

The appellant further relies on the decision of *Short v Ireland* [2004] IEHC 64 where Peart J. considered that the question of whether an issue has been previously ventilated: "…must be gleaned from the judgments themselves and what the judges actually said, and not simply by reference to what was actually argued before those Courts."

30. The appellant submits that his claim in the present case, being a damages suit, is brought on different grounds which give rise to different issues than those arising in the summary proceedings which were confined to the three defences raised by him. Therefore, no issue estoppel arises and thus the requirement for identity of subject matter, as referred to by Kelly J. above, is demonstrably absent.

31. Regarding the rule in *Henderson v Henderson*, the appellant relied on the Supreme Court decision in *McFarlane v Director of Public Prosecutions* [2008] 4 IR 117 approving the dicta of Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1.

32. The appellant places particular reliance on *A.A. v The Medical Council* [2003] 4 IR 302 wherein Hardiman J., having considered the jurisprudence in the area, determined that the rule could not, in its nature, be applied in an automatic or unconsidered fashion and that the public interest in the efficient conduct of litigation did not render the raising of an issue in later proceedings necessarily abusive where, in all the circumstances, the party concerned was not misusing or abusing the process of the Court.

33. With regard to the foregoing, the appellant points to a number of factors in the present case to support the view that the rule in *Henderson v Henderson* does not apply, arguing that the court, in the exercise of its discretion, ought not to strike out the present proceedings. Key arguments included: -

(i) The present proceedings are not "successive proceedings" which the rule in *Henderson v Henderson* is intended to protect against – they were in fact the first in time;

(ii) There is no requirement for a party who is a defendant in proceedings which are second in time, to maintain by way of counterclaim in those proceedings, the claim that he has instituted first in time in his own set of proceedings;

(iii) Hedigan J. was aware of the plenary proceedings when he heard and determined the summary proceedings in 2015 and nothing in his judgment purports to rule that the appellant was not entitled to continue to pursue that claim for damages;

(iv) The representation made by the bank's counsel during the hearing of the summary proceedings that the appellant could maintain whatever claim he wished in the plenary proceedings in circumstances where a draft statement of claim had been delivered to the bank was a submission relied on by Hedigan J. when he refused the appellant's application to join Mr. Furey as a third party to the summary proceedings; and

(v) Weight should be attached to the uncontradicted affidavit evidence of Mr. Walshe.

Submissions of the bank

34. Whilst the bank agreed that Hedigan J. did not identify "vicarious liability" as a heading under which the appellant's defence to the summary summons proceedings was being analysed, it contends that the appellant relies on the same factual matrix in both sets of proceedings. In the summary proceedings, the appellant outlines on affidavit a series of matters arising from his interactions with Mr. Furey, for which he asserted that the bank was legally responsible and as a consequence of which he sought to resist the bank's claim for repayment of the monies borrowed by him. It is submitted that, in the statement of claim, while the appellant does not formally plead "vicarious liability", he sets out a series of alleged facts relating to his interactions with Mr. Furey on the basis of which it is alleged that the bank is liable to him. The bank further submits that absent from the appellant's analysis is a realisation that "vicarious liability" is not a standalone cause of action. As pleaded vicarious liability creates no right or entitlement such as would advance his claim for relief in the proceedings or provides a basis for this Court to interfere with the order of O'Regan J.

35. The bank argues that the issue of Mr. Furey's involvement with the appellant and his alleged unprofessional behaviour has been fully adjudicated upon by Hedigan J. who, notwithstanding all of the above-mentioned matters, determined the appellant was significantly indebted to the bank.

36. The bank seeks to rebut the appellant's submission that there can be no cause of action estoppel, stating that the appellant's plenary proceedings, which had initially sought the forgiveness of the appellant's debt and to set aside the unappealed summary judgment, amounted to a clear and impermissible attack on a decision of a court of competent jurisdiction.

37. In response to the appellant's assertion that counsel for the bank had acknowledged in the summary proceedings that the appellant could advance any claim he wished in the herein proceedings, the bank contends that all counsel did, in the context of addressing an attempt by the appellant to stave off summary judgment by linking the summary proceedings to the plenary proceedings, was to state that if the summary proceedings proceeded, the appellant would still be entitled to pursue his plenary claim and that this statement of counsel in 2015 cannot be construed as a waiver of any legal defence open to the bank to the plenary claim. The bank notes that no statement of claim in final form had yet been served.

38. The bank submits that even if comments as alleged by the appellant had been made (which was not accepted) to the effect that issues raised in the statement of claim are the very issues that the bank's counsel acknowledged could be pursued by the appellant, legal principles applicable cannot be by-passed. It relies on the Supreme Court decision in *Grealish v Murphy* [2009] 3 IR 366 where it was held that the clear written representation from the defendant insurance company that following certain steps being taken, an offer of settlement would be made, amounted to an implied representation giving rise to an equitable estoppel precluding the defendant from relying upon the Statute of Limitations. The bank submits that the representation relied upon in *Grealish* is distinguishable from the conduct alleged in the current case, contending that the latter could never amount to a representation that no objection would be taken to those issues if they were in fact pursued or that the defence of any such issues would not be materially altered by the outcome of the bank's application for summary judgment.

39. The appellant contented that other issues outstanding included that the bank had made repeated requests of the appellant to withhold issuing the herein proceedings on the assurance that it was conducting an investigation into the conduct of Mr. Furey. In respect of that contention, the bank observes that this line of argument is not precluded by the order of O'Regan J. who permitted the appellant to advance his claim of negligence against the bank in relation to its investigation of Mr. Furey, making an appeal on this point moot.

40. It posits that even if the appellant did not articulate his "vicarious liability" argument with sufficient clarity before Hedigan J., he is in any event bound by the principles of *Henderson v Henderson* as so determined by O'Regan J. In this regard, the bank relies on the decision of this Court in *Small v The Governor and Company of the Bank of Ireland* [2018] IECA 393 at para. 71: -

> "The operation of the rule in *Henderson v. Henderson* in this jurisdiction means that where a litigant seeks to bring a claim in legal proceedings which could readily, and

in all the circumstances, should have been brought forward in previous litigation but was not the court will closely scrutinize such conduct."

41. The bank submits that the series of reasons advanced by the appellant as to why the thread of jurisprudence reflected in *Henderson v Henderson* should be regarded as not applying to his case or, in the alternative, should be regarded as falling within "exceptional circumstances" which would justify the court exercising its discretion to permit the appellant to pursue the grounds which have been struck out, are spurious and would not legally serve either purpose.

42. It contends that the argument based on the assertion that these are not successive proceedings is pedantic as the appellant raised all of the same arguments in defence to the summary proceedings that he now seeks to raise as plaintiff in these proceedings; reliance on the summary proceedings being second in time is also meaningless as what is relevant is the first set of proceedings to be heard and determined.

43. The bank argues that while Hedigan J. did not rule that the appellant would be entitled to pursue his plenary proceeding, he equally did not rule that the bank was not entitled to defend those proceedings or that it would not have to comply with all applicable rules of law and procedure. It is not now open to the appellant to speculate as to what matters influenced Hedigan J. when he refused to allow the appellant join Mr. Furey to the summary proceedings as a third party.

44. With regard to Mr. Walshe's affidavit, it was submitted that it was a matter for the trial judge to afford appropriate weight to the evidence before her – particularly in circumstances where serious issue was taken by counsel for the bank with much of the content of Mr. Walshe's affidavit, to which no response was offered by counsel for the appellant in reply during the plenary proceedings hearing.

Discussion and Determination

45. At the outset it is to be observed that the argument that plenary proceedings having been instituted first in time were not amenable to the rule in *Henderson v Henderson* by virtue of that fact is wholly misconceived and *nihil ad rem*.

Ground 1 - Issue estoppel – *res judicata*

46. Hilary Biehler, Declan McGrath and Emily Egan in *Delany and McGrath on Civil Procedure in the Superior Courts* (4th Ed., 2018) observe at para. 16-74: -

> "There has also been a notable tendency for the courts to channel the pressures for the abandonment of the strictures of issue estoppel, notably that of mutuality, into the development and application of the doctrine of abuse of process. The doctrine has…been invoked in a number of cases where it has been shown that an identical question has already been decided by a court of competent jurisdiction even though an identity of parties cannot be established."

The test as to whether or not issue estoppel arises is set out in the decision of *McCauley v McDermott* [1997] 2 ILRM 486 wherein Keane J. observed in that case: -

"While the doctrine of what has come to be called 'issue estoppel' has been the subject of explanation and analysis in many modern decisions, its essential features were helpfully summarised as follows by Lord Guest in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 at p. 935A:

'The requirements of issue estoppel still remain

(1) that the same question has been decided;
(2) that the judicial decision which is said to create the estoppel was final; and
(3) that 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….'"

The judgment continues that what must be determined is whether the plaintiff is: -

"…seeking to relitigate an issue which was conclusively and finally determined against him in the Circuit Court proceedings, the very mischief which the doctrine of issue estoppel was intended to prevent. That this could be the consequence of the invocation of the doctrine in its traditional English form was pointed out by Jeremy Bentham in his *Rationale of Judicial Evidence* where he said:

> 'There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a formal proceeding to which he was not a party; but there is no reason whatever for saying he shall not lose his cause in consequence of the verdict in a proceeding to which he was a party, merely because his adversary was not. It is right enough that a verdict obtained by A against B should not bar the claim of a third-party C.; but that it should not be evidence in favour of C against B, seems the very height of absurdity.'

A similar view has led the courts in the United States to take what might be described as a more robust view of issue estoppel, as a result of which a litigant will be estopped from litigating an issue which has already been decided against him. Thus, in *Bruszewski v. United States* (1950) 181 F 2d 419, where…a plea of *res judicata* was upheld by the Court of Appeals (3rd Circuit). Delivering the opinion of the majority, Judge Hastie said:

> 'The finding of no negligence … was made after full opportunity to Bruszewski on his own election to prove the very matter which he now urges a second time. Thus, no unfairness results here from estoppel which is not mutual. In reality the argument of the appellant is merely that the application of res judicata in this case makes the law asymmetrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata*.'

…As Gannon J. pointed out in *Donohoe v. Browne* [at p. 99]:

> '*Res judicata* is a matter of pleading to prevent as a matter of justice an abuse of the process of the administration of justice. Of its nature it can be raised properly only as against a party by whom or against whom a judgment has been obtained. That is to say the injustice to be avoided is the apparent disclaimer of a binding court order by the party bound by it.'"

Keane J. continued: -

> "In cases of this nature, the courts are concerned with achieving a balance between two principles. A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of *res judicata* where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which he or she had no control. *Res judicata* must be applied in all its severity, however, where to do otherwise would be to permit a party bound by an earlier judgment to seek to escape from it, in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled again by a law suit which has already been decided."

47. As was observed by Lord Keith in *Arnold v National Westminster Bank Plc.* [1991] 2 AC 93: -

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

Whether the seventh defendant was guilty of negligence, breach of duty, misrepresentation or matters which fall to be determined in the within proceedings, these issues did not form a necessary ingredient in the summary proceedings which the bank litigated to judgment and which the appellant, contrary to the initial state of the statement of claim delivered, does not seek to re-open nor could he in circumstances where any such claim would amount demonstrably to a collateral attack on the summary judgment which the bank holds.

48. As this Court noted in *Small v The Governor and Company of Bank of Ireland* at paras. 60-61: -

> "It is now generally accepted, based on the dictum of Lord Keith that, in relation to issues not determined in the earlier litigation, *Henderson v. Henderson* offers:
>
> > '…the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action.'" (p. 105)

The Court continues –

"The judgment of Lord Keith suggests that where the first decision has determined the relevant point the result will differ as between cause of action estoppel and issue estoppel:

> '… there is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel where the subject matter is different.'" (p. 108)

Whilst it appeared to have been argued before the High Court (transcript at p. 85) that cause of action estoppel and issue estoppel are effectively interchangeable, that does not appear to be a correct characterisation of those principles. In the context of issue estoppel the principle extends to a state of affairs where, notwithstanding that the cause of action is not the same in the later action to come to trial as it was in the earlier one, some issue which is necessarily common to both was litigated to a conclusion at the earlier hearing and is thus binding upon the parties. The principle is said to derive from the decision in *Duchess of Kingston's Case* (1776) 20 St. Tr. 355. Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2014] AC 160 states at para. 17: -

> '"Issue estoppel' was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198."

Lord Sumption considered that "cause of action estoppel…is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings."

Application of *Carl Zeiss Stiftung* principles to facts

(i) That the same question has been decided in the earlier proceedings

49. Hedigan J. had noted in the summary proceedings that one of the grounds on which the appellant, who was a defendant in the said proceedings, sought leave to defend the bank's claim for summary judgment was the alleged "existence of a conflict of interest between the bank official with whom the defendant dealt was, in fact, a so-called 'silent partner' in the property investments in properties adjoining the defendant's restaurant in Malahide in 2005." Hedigan J. observed: -

> "The defendant's application for finance…were all in his own name. No reference was made to a partnership involving his son and Mr. Furey the bank official…The defendant did not make complaint of Mr. Furey's role in the partnership until February 2010, 23 months after the partnership allegedly broke up. Until then, the bank had no knowledge of the alleged role of Mr. Furey as partner in the defendant's property venture. It is agreed that if his account of Mr. Furey's role in this partnership is true, then Mr. Furey was acting in an improper manner inconsistent and in conflict with his role as a bank official. This situation would have been apparent to the defendant as an experienced businessman and previous

borrower with the bank. He however chose to remain silent and did not inform the bank until February 2010 of the behaviour he alleges against Mr. Furey. It is clear that throughout all these dealings the defendant had the assistance of his solicitor because he witnessed all but one of the mortgages of the eleven secured properties the exception being one dated on the 9th January 2004 which was witnessed by a trainee solicitor. He could have asked his advice at any time as to the role of Mr. Furey and his apparent conflicted relationship with his employer. On the presented facts the defendant was well aware of the alleged improper role of Mr. Furey. He chose to remain silent. When he did inform the bank of the alleged behaviour of its official, they inaugurated disciplinary proceedings. These concluded when Mr. Furey who denied any wrongdoing became ill and left the bank. The conflict, if any, was between Mr. Furey and his employer the bank. No conflict existed between the bank and the defendant. If the defendant's account of events is true, then his conduct does him no credit as he participated in that official's clearly improper conduct. In any event it does not release him from his obligation to repay the sums he borrowed and which he undertook solely to repay. No *bona fide* defence is revealed under this heading."

50. The limitations of the decision of Hedigan J. in the summary proceedings must be borne in mind. It pertained to an application for summary judgment against the appellant in the sum of € 7,027,149.77. Mr. Furey, the bank official against whom allegations are being advanced in these proceedings, was not a party to the said proceedings. The allegations contended for insofar as they concerned Mr. Furey in the summary proceedings was that he was a bank official who had a conflict of interest between his obligations to the bank on the one hand and his obligations within the partnership on the other.

51. By contrast in the within proceedings, a materially different claim is being advanced, which in its current iteration primarily is a suit in damages. The claim sounds in damages for, *inter alia*, misrepresentation, negligence, breach of agreement and breach of duty.

52. In circumstances where the appellant has now withdrawn all pleas amounting to a collateral attack on the summary judgment, no aspect of the extant pleadings trenches upon or seeks to undermine collaterally the legal effect of the judgment delivered on the 16th October, 2015 and consequent orders. Accordingly, I am satisfied that that the questions to be determined in the plenary proceedings have not been decided in the earlier summary proceedings.

(ii) That 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

53. In the summary proceedings brought by the second and third named respondents as plaintiffs against the appellant as defendant it is necessary to recall in the first instance that the first, fourth, fifth, sixth and seventh respondents were not parties to the said litigation.

54. The parties to the judicial decision in the plenary proceedings or their privies are not the same persons as the parties to the summary proceedings in respect of which the estoppel

is raised. Neither can the appellant fairly be characterised as seeking to relitigate an issue which was conclusively and finally determined against him.

Ground 2 – Rule in *Henderson v Henderson*

55. The appellant contended that the trial judge erred in determining that the issue of vicarious liability had been raised in the summary proceedings wherein Hedigan J. delivered judgment on the 16th October, 2015. It was further and separately contended that the trial judge in exercising her discretion under the rule in *Henderson v Henderson* failed to give any adequate weight to the representations made in open court by counsel for the bank in the summary proceedings to the effect that the appellant could advance any claim he wished in the plenary proceedings.

56. The rule in *Henderson v Henderson* as the principle originally formulated by Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100, 115 is known, precludes a party from raising in subsequent litigation matters which were not, but could and should, have been raised in earlier litigation. *Henderson v Henderson* is but one aspect of the multi-faceted doctrine of *res judicata*. It is authority for the general proposition that parties must normally advance the totality of their claim in the first tranche of litigation. Save in exceptional circumstances it is not open to them to bring forward a point which should have been raised in the first litigation and which could have been so raised with the exercise of reasonable diligence.

57. In *Arnold v National Westminster Bank Plc.* Lord Keith drew a distinction between cause of action estoppel and issue estoppel observing at p. 104: -

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment."

58. It is now well settled in this jurisdiction that the principle in *Henderson* applies both to the law governing abuse of process as well as the doctrine of *res judicata*. The issue was comprehensively analysed by Lord Sumption in *Virgin Atlantic*. Of particular relevance is para. 26 of that judgment where he stated: -

> "… Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

59. A key issue for determination then in light of the above dictum is the extent to which, if at all, the claims of the appellant as duly modified, and having regard to claims abandoned could be said as of the date of hearing of the motion before the High Court to amount to a direct challenge to the outcome of the judgment and orders of Hedigan J. The said judgment and orders were not the subject of any appeal. Therefore, no claim that can

undermine same or could be characterised as a collateral attack on the said judgment and orders can be allowed to proceed in these proceedings.

60. Care must be exercised not to ascribe extravagant consequences to the carefully qualified adumbrations of Lord Sumption where in *Virgin Atlantic* he considers the *Arnold* decision and whether the doctrine of issue estoppel bars the raising in subsequent proceedings of points which were not raised in the earlier proceedings or were raised, but unsuccessfully. At para. 22 of the judgment in *Virgin Atlantic* he observed: -

"*Arnold* is … authority for the following propositions:

(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.

(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

In my view, in light of the authorities cause of action estoppel does not operate against the appellant in the instant case since the claim is not identical to that in the earlier proceedings, neither is it between the same parties or their privies; neither does it involve the same subject matter in substance.

Ground 3 - representations of counsel for the bank in the summary proceedings

61. One ground of appeal concerns representations made by counsel for the bank at the hearing of the summary proceedings before Mr. Justice Hedigan in the High Court in 2015. The issue of the applicability of the rule in Henderson v Henderson in such circumstances was considered by the Supreme Court in *T. v L.* [2018] IESC 26 where Dunne J., referring to the decision of McKechnie J. in the High Court, stated: -

> "McKechnie J. concluded that the grounds of challenge set out in the notice of motion before him could have been raised at an earlier point in the proceedings and if they had been so raised would almost certainly have been determined as was the issue of domicile. However he exercised a jurisdiction having regard to the importance of the issue raised to determine the issue. He noted in so doing and I quoted:
>
> > 'Furthermore and this point is of considerable significance, is the fact that counsel on behalf of [Mr. L.], having taken express instructions, gave an

undertaking to this Court that no further issue or new ground of challenge would be raised by him, once the present matters were finally determined. On this basis, and for these reasons, I propose to entertain the present application of the respondent, despite some hardship which undoubtedly this conclusion may cause the applicant.'"

62. It is not reasonable for the appellant to characterise the conduct of counsel for the bank at the hearing of the summary proceedings as amounting to a concession that "the appellant could make whatever case he wanted against the bank in his plenary proceedings".

63. It is clear that at most said counsel acknowledged what was a fact, namely that it was open to the appellant to raise matters and issues in the subsequent pending litigation which of course was in being but had not been prosecuted with any degree of expedition. Nothing stated by their counsel operates as a waiver of any legal defence open to the bank in the plenary proceedings.

Ground 4 -Affidavit evidence of Des Walshe

64. In the instant case, the deponent Mr. Walshe is characterised as a banking consultant by profession in his affidavit. He describes himself as an advisor "with experience in the practice, operation and functioning of banks generally as lending institutions both within and outside the State". The affidavit thus has the status of an affidavit furnished by an expert on behalf of the appellant.

65. There was a clear conflict between the affidavit evidence of the parties. No notice to cross-examine was served on Mr. Walshe. His averments were not disputed on affidavit. There were irreconcilable differences between the parties on matters of central importance. Mr. Walshe's averments remain uncontradicted save to the extent modified by counsel for the appellant at the hearing in response to queries from the judge.

66. As the authors of *Delany and McGrath* succinctly observe at para. 21-100: -

> "Where a conflict of evidence on affidavit arises, a court will not be in a position to choose between the competing versions of the facts unless cross-examination on the affidavits takes place or there is sufficient uncontradicted credible evidence upon which the court can reach a decision. In circumstances where cross-examination does not take place, a court is not obliged to accept evidence given on affidavit if there is conflicting evidence given on affidavit or orally that the court accepts. The effect of not cross- examining may be that the court resolves the issues of fact against the party that bears the burden of proof but may not do so where the application is interlocutory in nature so that the party is not required to prove matters on a balance of probability."

67. The approach of the bank in not filing an affidavit was characterised by the bank's counsel in the High Court at p. 67 of the transcript as follows: -

> "Now in the commercial list proceedings Mr. Flanagan deposed that he instructed Mr. Walshe in or around the 26th January 2010…The decision was taken not to respond to these affidavits, they are what they are. In my respectful submission they go nowhere and Mr. Flanagan doesn't say anything that couldn't perfectly easily have [been] said explicitly and all of which he did more or less say implicitly in the affidavits he filed on the motion for summary judgment. I think he didn't use the words undue influence but he used duress."

68. It is stated at para. 23-228 of *Delany and McGrath* that: -

> "The question of whether a different approach should be taken where disputed findings of fact are based entirely on affidavit evidence and the exhibits thereto was considered by Charleton J. in *Ryanair Limited v. Billigfluege.de GmbH* [2015] IESC 11. He expressed the view that:
>
> > 'Principles based on the superior ability of a judge to decide, as between live witnesses, who is to be preferred in terms of credibility or of recollection cannot apply with the same force where facts are merely deposed to on affidavit. Apart from the gap between the experience of hearing and seeing a person giving testimony and the recitation of facts on paper that affidavit evidence represents, it must also be remembered that the gulf widens through those words on paper being generally chosen by lawyers as a reflection of what a witness wishes to say, as opposed to witnesses speaking or writing the account themselves.'"

Charleton J. in his judgment observed that where a decision of the court was made based on key findings of fact drawn from affidavit evidence –

> "… The appellant must establish an error in those findings that is such as to render the decision untenable."

The authors further observed that –

> "Charleton J reiterated that any party appealing a decision bears the burden of demonstrating that the trial judge had been incorrect in relation to the findings of fact which underpin the decision."

The authors continue: -

> "…it may need to be established on appeal that the decision reached cannot be upheld because an essential conflict could not be resolved on the material which was before the trial judge."

69. However, in the instant case there was no cross-examination of the deponent Mr. Walshe and no replying affidavit positing a competing version of the key events he had deposed to. This was the bank's motion and the burden of proof rested with them. To baldly assert, without more, that the matters alleged in Mr. Walshe's affidavit "go nowhere" at

best disputes the averments but fails to adequately contradict them. There was in fact no conflicting evidence given either on affidavit or orally at the hearing of the motion which the court was entitled to prefer over that of Mr. Walsh and which would have entitled the trial judge to reach the conclusions which she did.

70. The appellant in his affidavit sworn in the summary proceedings had deposed to the involvement of Mr. Walshe in negotiations with the bank, including in or around December 2013 and at para. 25 of his said affidavit the appellant had said that Mr. Walshe had been involved as his adviser and had understood that the debt of the appellant would be "permanently parked on a without prejudice basis in recognition of the conduct of Frank Fury who is now the seventh named defendant in the proceedings but not a party to this motion". This contention had been dealt with by Hedigan J. in his judgment in the summary proceedings and at para. 8 of his judgment in the said proceedings delivered on the 16th October, 2015 in the High Court he rejected the claim of debt forgiveness as not being made out on the evidence. That judgment and ensuing orders were not appealed against.

71. The judgment of Hedigan J., however, was directed towards the summary judgment being sought by bank only as against the appellant. In all the circumstances the averments in the affidavit of Des Walshe did amount to "uncontradicted affidavit evidence" of a material kind. The submissions of counsel alone did not contradict the key averments and did not constitute a valid basis for the trial judge disregarding the said affidavit.

72. I am satisfied that the uncontradicted averments in the affidavit of Mr. Walshe directed to matters of central materiality and underpinning several key matters pleaded in the statement of claim were not correctly dealt with by the trial judge and she failed to afford appropriate weight to same and failed to have regard to the fact that the failure to contradict its averments or cross-examine the said deponent resulted in the bank failing to discharge the burden of proof in the context of the motion before her.

Conclusions

73. The particular issues that form the core claims in the plenary proceedings did not form a necessary ingredient in the summary suit, neither could it be said that they were litigated and decided upon in the said proceedings, such as would give rise to issue estoppel being effectively raised against the appellant.

74. In my view, at issue in the instant case is issue estoppel rather than cause of action estoppel since in circumstances where the appellant has abandoned specific pleas that in substance amounted to a collateral attack on the original decision, that aspect of the objection to the statement of claim falls away leaving outstanding the question of issue estoppel. The rule in *Henderson v Henderson* has evolved so that it can be availed of to strike down as an abuse of process litigation sought to be progressed after the conclusion of an action even though the issues or the parties may not be identical as in the first suit, or where the court never gave a judgment in the first case.

75. I am satisfied that there were adequate reasons advanced to the trial judge for why the issues arising and sought to be prosecuted now in the within the plenary proceedings were not agitated in the summary summons litigation. The appellant acknowledges that the summary judgment and orders stand, they were not appealed against, and the within proceedings cannot, nor do they in their current iteration, constitute a collateral attack on the court orders which the bank holds.

76. Lord Bingham made clear in *Johnson v Gore Wood* that it would be 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 the subsequent litigation being brought to hearing necessarily abusive. To take such a stance would be to adopt too dogmatic an approach. It will be recalled that in *Johnson v Gore Wood* the House of Lords permitted the appellant to proceed with an action in his own name against former solicitors notwithstanding that such an action could have been brought at the same time as an earlier action against the same firm by his company which suit had been compromised. The allegations of negligence and breach of duty made against the solicitors by the company in the firstly pursued action were said to be essentially the same as those on which the claimant was relying in the second suit.

77. The public interest to be protected for those who resort to litigation and obtain a final and conclusive determination of their disputes was considered by Finlay Geoghegan J. in *Vico Limited v Bank of Ireland* [2016] IECA 273 where she characterised the principle derived from *Henderson v Henderson* as follows: -

> "The underlying principle is similar to that in *res judicata* namely the public interest in those who resort to litigation obtaining a final and conclusive determination of their disputes."

78. I am satisfied that the trial judge erred in her determination of the issue of estoppel and insofar as she characterised the decision of *Johnson v Gore Wood* as saying "that a litigant is not to be unjustly hounded or unjustly harassed." This does not adequately reflect the nuanced ratio of the said judgment. It is clear that the cause of action as identified in the current iteration of the statement of claim and with all elements as could be construed as a collateral attack on the summary judgment does not offend the rule in *Henderson v Henderson* and does not amount to an attempt to seek to re-argue in substance the issues determined in the summary proceedings.

79. It is acknowledged by the appellant that the judgment of the High Court in the summary proceedings stands, it has never been appealed, and the appellant does not seek to impugn same or to have it in anywise interfered with. That a cause of action in damages for misrepresentation and negligence against the bank has now been framed as well as vicarious liability for the misrepresentations, negligence and breaches of duty of the seventh named defendant is a wholly distinct matter.

Alleged denial of access to the courts

80. In the instant case it was suggested that the appellant in the circumstances of this case suffered a denial of access to the courts. The said claim is not sustainable. However, McKechnie J. in *Ulster Bank (Ireland) Limited v Beades* [2019] IESC 83 observed: -

> "Quite frequently one finds an argument made or a submission advanced that any inhibition which restricts a full hearing is a denial of access to the court…This in my view is to misunderstand what is truly meant by such phrase. A proper example of this type of restriction is to be found in *Macauley v Minister for Posts and Telegraphs* [1966] IR 345. In that case it will be recalled that Kenny J. decided that the requirement to obtain the fiat of the Attorney General in order to bring an action against a Minister of Government was a breach of the right of access. That is an example of what is really meant by a denial of access. On the other hand the principles and rules above mentioned cannot accurately or properly be described in the same way. Decisions resulting therefrom are made within the administration of justice rather than being external to it: such are and may be necessary to preserve both the judicial process and litigation."

81. Accordingly, I would allow the appeal and conclude as follows: -

(a) That the trial judge erred in dismissing the proceedings against the second, third, fourth, fifth and sixth named respondents.

(b) With regard to the vicarious liability issue I am satisfied that it continues to be maintainable. Without doubt, the statement of claim warrants careful overhaul by any party who seeks to stand over it as the basis for the remedies it seeks, particularly in regard to general damages. As counsel for the bank correctly identified, vicarious liability does not of itself give rise to a cause of action. I am satisfied however that the trial judge erred insofar as she considered that the defence raised in the summary proceedings was "entirely" of a vicarious liability character or that same had been the subject of a determination in the summary proceedings so as to render the matter *res judicata* or subject to issue estoppel.

(c) The rule in *Henderson v Henderson* must not be applied in a rigid or technical manner so as to deprive the court of any discretion to hold otherwise in an appropriate case.

(d) It is significant that a draft of the statement of claim had been furnished to the bank's legal team prior to the hearing of the summary summons suit before the High Court. Accordingly, the stance being adopted by the bank at that point was based on a knowledge and understanding of the ambit of what was intended to be claimed in the within plenary proceedings by the appellant.

(e) It will be for the appellant to establish at the trial of this action the close connection criterion required and further it will be open to the appellant and the bank to advance such arguments as they see fit including an evaluation of whether the

conduct complained of by Mr. Furey fell within or outside the scope of any employment and whether in all the circumstances the first to sixth defendants or any one or more of them is liable for any tort as may be established by the court to have been committed by the seventh named defendant.

(f) The pleadings identify the claims and it will be a matter for the trial judge to determine whether the evidence supports the allegations advanced in the draft statement of claim.