Neutral Citation [2013] IEHC 8

THE HIGH COURT

[2008 No. 2471S]

BETWEEN/

ASHCOIN LTD (IN CREDITORS' VOLUNTARY LIQUIDATION)

PLAINTIFF

AND

MORIARTY HOLDINGS LTD (No.2)

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 16th January, 2013

1. Does the special feature of the general abuse of process jurisdiction known as the rule in *Henderson v. Henderson* (1843) 3 Hare 100 apply where it has proved necessary to reconstitute proceedings? That, in essence, is the issue which now arises for consideration, given that the receiver of the plaintiff company ("Ashcoin") now accepts that the debenture instrument on which he originally moved the court was insufficient for this purpose. The issue arises in the following way.

2. In these proceedings the receiver of Ashcoin seeks to recover on its behalf what it contends is its share of the proceeds of a grant which Sustainable Energy Ireland agreed to make in April 2007 to the defendant ("Moriarty Holdings") in respect of a housing development at Spicers Mill, Balbriggan, Co. Dublin. As Ashcoin had provided engineering solutions for these heat efficient dwellings, it is contended that Moriarty Holdings agreed in June, 2007 to share the proceeds of that grant with it on an equal basis. A grant of some €328,500 was paid by Sustainable Energy Ireland in June 2008, but the relevant moiety allegedly payable to Ashcoin remains in dispute and has not been paid.

3. When the matter originally came before me (*Ashcoin Ltd. v. Moriarty Holdings Ltd*. [2012] IEHC 365), the receiver sued pursuant to a debenture which had charged all debts of Ashcoin (other than book debts) in favour of Ulster Bank Commercial Services Ltd. as well as creating a first floating charge over the property and assets of the company. On 20th June, 2008, the debenture holder had appointed Mr. Kieran Wallace as receiver over the assets of the company.

4. In *Ashcoin (No.1*) Mr. Wallace now maintained these proceedings against Moriarty Holdings in that capacity as receiver. Moriarty Holdings disputed his entitlement to do so on the grounds that if any monies are in fact due to Ashcoin, they would constitute a book debt within the meaning of the December, 2007 debenture and that Mr. Wallace accordingly had no standing to maintain these proceedings, since book debts were expressly excluded from the scope of the debenture from which Mr. Wallace derived his authority. In my judgment in *Ashcoin (No.1*) I agreed that any such proceeds would so constitute a book debt, so that the action was not maintainable in its present form.

5. In arriving at that conclusion, I deliberately refrained from expressing any view in relation to any issues which might arise were the proceedings to be reconstituted. Whereas Mr. Wallace's standing to act had originally derived from a debenture executed in December, 2007 in favour of Ulster Bank Commercial Services Ltd. ("UBSC"), in these reconstituted proceedings that renewed standing is said to derive from an invoice discounting agreement which Ashcoin had entered into with UBSC which has since been terminated. It is, however, not now in dispute but that UBSC is owed some €121,000 (including VAT) pursuant to that agreement. It is likewise agreed from the evidence that UBSC purchased the entirety of the debt allegedly due to the plaintiff from the defendant. For its part, UBSC has agreed that it will return the balance of any recoverable proceeds (after payment of appropriate costs and expenses and the processing of any preferential claims) to the liquidator of Ashcoin for the benefit of the liquidation of the company.

6. It is against this background that Moriarty Holdings objects to the reconstitution of the proceedings. Counsel for Moriarty Holdings, Mr. Walker, contends that the maintenance of these proceedings in their reconstituted form amounts to an abuse of process and that under the rule in *Henderson v. Henderson*, Ashcoin are debarred from electing to sue for the same debt under a different basis. It is this preliminary issue which accordingly now falls to be determined.

7. There is no doubt but that the rule in *Henderson v. Henderson* – which, broadly speaking, requires a plaintiff to advance the entirety of his or her case and forbids him or her to hold back an alternative argument in reserve - is *capable* of applying to the present case since it would have been open to Ashcoin to advance the present basis for the proceedings at a much earlier stage. The rule would certainly have applied to bar the reconstitution of the proceedings if there was evidence that Ashcoin had deliberately originally elected for strategic reasons not to pursue the alternative argument.

8. Thus, for example, in *Re Vantive Holdings* [2009] IESC 69, [2010] 2 I.R. 118 the Supreme Court held that it would be an abuse of process for a company deliberately to suppress evidence relevant to an examinership petition and then attempt to resurrect that evidence when presenting a second such petition. It would likewise be prima facie abusive to endeavour to raise a new ground in a second set of proceedings when no explanation had been offered in respect of the failure to raise this ground, especially when this endeavour would be oppressive to witnesses who would then have been required to give evidence of intimate matters on yet a further occasion: see *AA v. Medical Council* [2003] IESC 70, [2003] 4 IR 302.

9. But there are several persuasive factors which tell against its application in the present case. First, it is clear from the authorities that the rule in *Henderson v. Henderson* should not be applied with remorseless severity, as if indeed it were otherwise, the rule could then often apply so as to preclude even the routine amendment of pleadings since it might be plausibly contended that the rule precluded the plaintiff from now advancing the amended case.

10. The objects of the rule were described by Fennelly J. in *McFarlane v. Director of Public Prosecutions* [2008] IESC 7, [2008] 4 I.R. 117:-

> "The rule is aimed to prevent abuse of the courts' process and to protect parties from being subjected to harassment by

> successive proceedings dealing with the same subject-matter. In essence, it discourages parties from keeping points over from one legal proceeding to another. If a point could have been raised in a first action (either by way of claim or defence), a party may not be permitted to raise it in a second."

11. Fennelly J. then quoted with approval the following passage from the judgment of Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1, 31:

> "It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in a later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

12. In *SM v. Ireland* (No.1) [2007] IESC 11, [2007] 3 IR 283 Kearns J. advocated a similar approach, saying that the rule in *Henderson v. Henderson* must not be "applied in a rigid or mechanical manner so as to deprive the court of any discretion to hold otherwise in an appropriate case."

13. This case-law therefore mandates an approach towards the *Henderson v. Henderson* which is discretionary in nature and which, above all, seeks to protect a defendant from harassment or abusive conduct.

14. Second, the entitlement of the plaintiff to reconstitute proceedings concern a procedural – rather than a substantive – matter. It is important here to note that there has been no adjudication by me of the underlying merits of Ashcoin's claim. All that was determined in *Ashcoin (No.1)* was that the first set of proceedings were improperly constituted inasmuch as the proceedings had been brought by Mr. Wallace qua receiver pursuant to the terms of a debenture which expressly excluded book debts, yet the proceedings themselves sought recovery of a sum which I held to be a book debt.

15. Third, the motives of the plaintiff and the conduct of the proceedings by the plaintiff are all therefore relevant to the assessment of whether the re-constitution of the proceedings may be regarded as abusive. It seems perfectly clear from the affidavits that, as counsel for the plaintiff, Mr. O'Reilly SC submitted, all that happened was that the plaintiff took a legal view that the (alleged) debt which is the subject of the proceedings was not a book debt, a view which this Court held to be incorrect. There was no intention to overreach or to act oppressively or to circumvent unfairly an adverse judicial ruling. It is true that it has been held that the original set of proceedings were defective and required to be re-constituted. But the plaintiffs have been penalised by the award of costs at the conclusion of *Ashcoin (No.1).* Moreover, while the ensuing procedural complications have doubtless been deeply frustrating for Moriarty Holdings, I nonetheless consider that to bar Ashcoin from proceeding to have its claim adjudicated on its merits would in itself represent too dogmatic an attitude in respect of a discretionary jurisdiction whose ultimate aim is to safeguard the legitimate interests of a defendant rather than to penalise a plaintiff for having taken a legitimate – if ultimately erroneous – view of the scope of a legal instrument.

Conclusions

16. While acknowledging, therefore, that Ashcoin's application potentially comes within the scope of the rule in *Henderson v. Henderson*, given that there was no intention on the part of the receiver to overreach and that the necessity to reconstitute the proceedings stems from the fact that it took a legitimate (if erroneous) view of the scope of a legal instrument, it would be oppressive and dogmatic in these circumstances to utilise the rule to bar the reconstitution of these proceedings. This would be especially so where there has as yet been no adjudication on the legal merits of the claim.

17. It is essentially for these reasons that I am of the view that the plaintiff's application to reconstitute the proceedings in the manner I have already described is not barred by the application of the *Henderson v. Henderson* rule.