THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 393

Record Number: 2016 321

Peart J.
Whelan J.
McGovern J.

BETWEEN/

MARTIN SMALL

PLAINTIFF/

APPELLANT

- AND -

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

FIRST NAMED DEFENDANT/

RESPONDENT

AND

DERMOT FREHILL

SECOND NAMED DEFENDANT

AND
HELEN RAFTERY

THIRD NAMED DEFENDANT

AND

CONLETH HARLOW PRACTISING UNDER THE TITLE AND STYLE OF CONLETH HARLOW AND CO., SOLICITORS

FOURTH NAMED DEFENDANT/

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 19th day of December 2018

1. This is Mr. Small's appeal against orders made on 2nd June 2016 by Mr. Justice Mac Eochaidh in the High Court dismissing the proceedings on foot of a notice of motion dated 30th June 2014 brought on behalf of the Governor and Company of the Bank of Ireland (hereinafter "the bank"). The motion was heard over three days in late May 2016. The judge delivered an ex tempore decision on 2nd June 2016 and ordered that the appellant's claim against the bank stand dismissed as an abuse of process on the basis of the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

Background to litigation
2. The appellant is a businessman, builder and developer who in the years leading up to the economic crash operated two partnerships with one Fionan Raftery ("the deceased"). The partners were involved in the carrying out of a number of developments including at a 4 acre site acquired in about 2003 at Knockcroghery, Co. Roscommon ("Partnership 1"), which operated on a 50:50 basis. They later acquired 11.75 acres at Golf Links Road, Roscommon under a separate partnership agreement ("Partnership 2") on a 60:40 basis in favour of Fionan Raftery. The latter acquisition was financed with a loan of €3,150,000 from the bank. Fionan Raftery was diagnosed with oesophageal cancer in about the month of August 2007. In December 2007 the appellant acquired 10% of the Golf Links Road partnership holding of Fionan Raftery to achieve equality of legal ownership between the partners. This was financed with the aid of a loan for €500,000 from the bank. The loan documentation is dated 21st November 2007. The circumstances surrounding the advancing of the said loan by the bank to the partners is the subject of the current proceedings and the appellant has alleged impropriety including fraud against the bank. Fionan Raftery died on 18th April 2011.

2012 litigation
3. Less than a year following the death of his partner the appellant instituted proceedings on 27th February 2012 by way of plenary summons Record Number 2012/2023P ("the 2012 proceedings"). The defendants were Helen Raftery and the bank. Helen Raftery was sued in her capacity as the legal personal representative of the deceased.

4. Among the reliefs sought in the 2012 proceedings as against the bank were the following:

- damages for breach of trust, breach of contract, misrepresentation and breach of fiduciary duty,

- damages for negligence, breach of duty and for slander of title,

- a declaration that a purported loan agreement of 21st November 2007 between the appellant and the bank was null and void and of no legal effect,

- certain injunctions particularly in relation to a property known as Daltons Public House at Fuerty, Castlecoote, Co. Roscommon.

The said property had been held in the name of the deceased and his wife and following his death had been transferred into her sole name.

5. On 18th March 2012 the appellant issued a notice of motion seeking interlocutory orders as against Helen Raftery, in her capacity as legal personal representative, and the bank. In the notion of motion the appellant sought a number of injunctive reliefs including, inter alia:

(i) An injunction restraining the defendants and others from disposing of/dealing with the property known as Daltons Public House situate at Fuerty, Co. Roscommon,

(ii) An injunction restraining the defendants and others from carrying out any works on the said property,

(iii) An injunction restraining the defendants and others from taking any steps to sell or let the property in any manner,

(iv) An injunction restraining the defendants and others from slandering or continuing to slander the plaintiff's title to the said lands,

(v) A mandatory injunction compelling the delivery of the property fortwith to the plaintiff,

(vi) An order setting aside the purported transfer of the property to the plaintiff in his personal capacity,

(vii) In the alternative an order directing the first-named defendant's solicitors and others to take all necessary steps to deposit all proceeds of the sale of the property to the plaintiff and the first-named defendant.

Allegations against the bank in affidavit sworn 15th March 2012

6. The motion was grounded on an affidavit of 15th March 2012 sworn by the appellant where he outlined the background to his course of dealings with the deceased and deposed that between the years 2004 and 2011 they were parties to two property partnerships. He alleged that both the bank and the deceased had caused damage to him by acting unconscionably, were guilty of misrepresentation and that they had acted in concert to exert undue influence over him.

7. At para. 4 of the said affidavit he deposes as follows: "The latter part of the action is included in these proceedings in an effort to reduce costs as between the parties and in circumstances where it is alleged, *inter alia* that both the bank and the Deceased caused damage to your deponent by acting unconscionably, were guilty of misrepresentation and that they acted in concert to exert undue influence over your deponent."

8. He further deposed that Partnership 2 was formed with the deceased for the purpose of purchasing and developing an 11.75 acre site at Golf Links Road, Roscommon. The purchase price of the Golf Links Road site was €3m. which was financed with a loan from the bank in the sum of €3.15m. The said partnership was 60:40 in favour of the deceased. The appellant alleged that with the assistance of his accountant he had become aware that there was significant mismanagement of the partnership and misapplication of partnership funds. He alleged collusion between the bank and the deceased in respect of certain matters and that loan agreements he entered into were procured by undue influence and unconscionable conduct on the part of the deceased and servants or agents of the bank. He characterised the agreements entered into as being exclusively for the benefit of the deceased and the bank and that no benefit had accrued to himself. He alleged the agreements were to his significant disadvantage and this was deliberately concealed from him.

9. The said affidavit continued:

"It must have been clear to both parties that I would not have entered into such agreements had I understood the effect of those agreements and were it not for undue influence and misrepresentations on their part."

It will be recalled that these very same assertions are repeated again in the current proceedings and form a significant part of his claim against the bank.

10. Mr. Small deposed that there were; "very substantial unauthorised withdrawals" by the deceased from partnership assets. He asserts that the loan agreements entered into with the bank were not enforceable. He alleged that the deceased had misapplied funds of the partnership to his own use without his knowledge or consent. He alleges at paragraph 17 that: "… I was required to purchase the additional 10% to convert to a 50/50 partnership at a time when it was apparent that the assets of the partnership would be of no significant value." He also characterises himself at para. 17 as being the victim of a misrepresentation and unaware that the deceased had "withdrawn sums that should have been available to both partners at the time of formation of Partnership 2."

11. He outlines the history of the disposition of 1.693 hectares, part of the Golf Links Road site, to the Office of Public Works in 2007 deposing at para. 19 that €1.35m. of the proceeds of sale was applied to discharge bank borrowings of Partnership 2, and that the balance of the net proceeds was divided 60:40 in favour of the deceased. He states:

"As a result of the foregoing deceit the Deceased received €914,999.74 and I received €609,999.82."

12. At paras. 23 and 24 of the March 2012 affidavit the appellant conjectures that the bank must have colluded with his deceased partner and that they had by design created a state of affairs whereby he did not have independent legal advice in November 2007. "It is part of my claim that the bank acted in breach of the express or implied terms of their contract with me, were [in] breach of their duty of care, they were negligent and acted in breach of fiduciary duty owed. I further claim that they were guilty of unconscionable conduct in procuring an agreement which was entirely to their benefit and could confer no benefit on [y]our deponent whatsoever. In this regard and in circumstances where the said agreement was manifestly detrimental to my interests I claim that no consideration passed the agreement is null and void and of no legal effect."

13. At para. 25 of the affidavit he asserts that the conduct of the bank was reckless and inexplicable where security provided by his partner was encumbered with prior loans.

14. He deposes that the bank was, or ought to have been aware of, mismanagement and misapplication of partnership funds.

Affidavit of appellant sworn 19th November 2012
15. In a further affidavit sworn on 19th November 2012 in the said proceedings, Record Number 2012/2023P, the appellant deposed at para. 4 regarding the loan agreement letter of 21st November 2007:

"This letter increased the Partnership loan by €500,000 and stated that the purpose of the loan was "Continuation of existing facility… previously accepted by Mr Fionan Raftery and Mr Martin Small plus an additional €500,000 to assist with the restructure of existing facilities and cover interest roll up of €151,000".

He continued:

> "The reality, however was quite different as condition precedent no. 3 states that Mr. Fionan Raftery was to obtain independent legal advice, and the solicitor had to confirm that this had been sought. It however was not a condition precedent that I would obtain independent legal advice and it is quite clear that if I did, I would never have signed this loan agreement."

The compromise of 2012 proceedings with the bank
16. On 16th May 2013, an injunction application in proceedings 2012/2023P was listed for hearing before the High Court. The appellant's claim against the bank was compromised and formal orders of the court were made on that date. The said orders were perfected on 20th May 2013 and provided as follows:

> "Whereupon and on hearing what was offered by Counsel for the respective parties And It Appearing that a settlement has been reached herein in the motion and action between the Plaintiff and Bank of Ireland.
>
> By Consent IT IS ORDERED that the Plaintiff's action against Bank of Ireland together with the motion be struck out of the List and with no order as to costs….."

The current proceedings against the bank
17. Less than a year later, on 16th January 2014, the appellant issued the plenary summons in the above entitled proceedings. The defendants included the bank, Dermot Frehill, an official of the bank, Helen Raftery and Conleth Harlow, solicitor. When the pleadings are considered in conjunction with the affidavits and pleadings in the 2012 proceedings it is clear that there is a very substantial overlap with regard to the matters alleged and the reliefs claimed as against the bank. The appellant seeks to litigate substantially similar issues in respect of the specific transactions referred to in the 2012 proceedings.

18. In these proceedings the appellant seeks, inter alia, as against the bank, to re-open three separate transactions which were the express subject matter of complaints against the bank and his deceased partner's legal personal representative in the 2012 proceedings. They include the following:

> (i) The 50/50 partnership in regard to the Knockcroghery development. The appellant pleads that the bank and his deceased partner conspired without his knowledge to use the property for the benefit of the bank and the deceased and to the appellant's detriment.
>
> (ii) Further that the lands were availed of by way of security for advances by the bank to the partner, Fionan Raftery, and his wife and this took place without the knowledge or consent of the appellant.
>
> (iii) The appellant repeats the 2012 claim that the bank and the deceased conspired without his knowledge to use the lands comprised in the Golf Links Road investment and, in particular, the proceeds of sale derived from the portion sold to the Office of Public Works in 2007 to benefit the bank and the late Fionan Raftery to his detriment.
>
> (iv) It is further pleaded that loan monies advanced in March 2006 by the bank to assist his deceased partner in the acquisition of the property known as Dalton's Public House was secured over the Knockcroghery lands without his knowledge or consent and that funds were drawn from the partnership account to assist with the acquisition of the said public house and this was done without his knowledge or consent

19. In these proceedings the appellant refrains from unequivocally disclosing the fact that he himself had received a direct payment in 2007 of €609,999.82 out of the net proceeds of the said site. This had been previously disclosed at paragraph 19 of his affidavit sworn on 15 March 2012 in the 2012 proceedings. Otherwise there is a substantial reiteration of the claims and allegations contained in the 2012 proceedings. In particular, it is claimed that as a result of the manner in which part only of the proceeds of sale were applied towards reduction of the mortgage debt on the Golf Links Road property and the 60% share of the balance that was made available to his deceased partner, the appellant lost the opportunity to profit from the development of the said lands and was unable to repay his debt to the bank.

The Bank's motion
20. The bank alleged a substantial overlap between the 2012 and 2014 pleadings as against it. On 30th June 2014 the bank issued a notice of motion seeking an order pursuant to Ord. 19, r. 27 striking out the proceedings against it on the grounds that same were unnecessary or scandalous or tending to prejudice or embarrass the bank. In the alternative an order was sought pursuant to Ord. 19, r. 28 of the Rules of the Superior Courts on the grounds that the statement of claim disclosed no reasonable cause of action against the bank and was frivolous and vexatious and bound to fail. Alternative relief was sought on the basis that the proceedings constituted an abuse of process and ought to be dismissed pursuant to the inherent jurisdiction of the court and further that dismissal was warranted in the interests of justice.

Hearing of the Motion
21. The motion came on for hearing before the High Court on the 26th, 27th and the 31st May 2016.

***Ex tempore* judgment**

22. Mr. Justice Mac Eochaidh gave his judgment, ex tempore, on 2nd June 2016. He noted that the primary arguments advanced on behalf of the bank dealt with the relationship between the 2014 proceedings and the earlier 2012 proceedings instituted by the same plaintiff and he took a view that the issue for decision involved a comparison between the respective proceedings "insofar as there is a commonality between them". The trial judge noted that injunctive relief had been sought in the 2012 proceedings and that no fraud was alleged in same. He was satisfied that the substance of the claim between the parties in the 2012 proceedings was discernible from an analysis of the large number of affidavits sworn by the parties in which the issues being agitated between them are clarified. He noted the variety of matters alleged in the 2012 proceedings against the bank. They included collusion and that financing was obtained by means of undue influence and unconscionable conduct on the part of the deceased and also servants of the bank.

23. It appears that the deceased partner, who by 2007 was ill with cancer, received independent legal advice from a solicitor Ms. Bríd Miller prior to entering into the loan agreement in December 2007.

24. The trial judge attached importance to a letter dated 14th December 2007 from Conleth Harlow & Co. to the bank and in particular the issue of when precisely the appellant became aware of its existence and contents. He noted that the said letter was exhibited in an affidavit sworn by Caroline Dervan of the respondent bank on 24th October 2012 and filed on 19th November 2012. The letter recorded that the deceased partner had received independent legal advice regarding his transfer of his 10% interest in the Golf Links partnership to Mr. Small. Also it made clear that €400,000 of the €500,000 being advanced by the bank would be applied to discharge debts of Mr. Raftery to the bank unconnected with the partnership. The judge noted that the appellant in the 2012 proceedings did not expressly make complaint of the fact that the loan granted to the partnership was one from which Mr. Raftery benefited in a way unknown to Mr. Small, neither did he expressly allege fraud in 2012.

25. The judge sought to establish when precisely the appellant became aware that his partner had received independent legal advice in connection with the November 2007 loan transaction. He sought to establish, in particular, when the contents of the letter of the partnership's solicitor, Mr. Harlow, to the bank dated 14th December 2007 first became available to Mr. Small. That letter had specifically stated:

> "…in respect of paragraph three of the conditions precedent to drawdown, we note the arrangements in respect of the disbursement of accounts to the accounts of F Raftery, Paddy Finns, Lisroyne, Raftery Civil Engineering and that €400,000 will be applied to the set of accounts and that the balance of the €400,000 is to be applied to the permanent debt reduction of the facilities of F. and H. Raftery. We are instructed by our clients that your bank will be disbursing the funds directly to the aforementioned accounts as outlined in paragraph number six of the letter of loan offer, dated the 21st of November 2007 and that your bank will arrange accordingly for all approved overdraft facilities in respect of the aforementioned accounts to be cancelled and the accounts of F Raftery, Paddy Finns, Lisroyne and Raftery Civil Engineering be closed by the bank." (p. 11 of the ex tempore judgment)

26. The judge noted that this letter, and the proposals therein contained, was not the subject of any expressed complaint in the 2012 proceedings but that over time in the affidavits sworn in the later 2014 proceedings the appellant raised complaints in relation to same. He noted that a constant refrain of the appellant in affidavits sworn in the 2012 proceedings was that it was inconceivable that he would have signed the six condition loan agreement had he been given independent legal advice.

27. The court goes on to observe that:

> "Nonetheless his repeated reference to the condition on which the loan was made is evidence that he was completely aware that the loan was given on the basis that some of it would be used for Mr Raftery's purposes and that he was absolutely aware that this was something that harmed his interests, that he believed harmed his interests, and he was absolutely aware that this was happening indeed had happened and that his solicitor had proceeded to give instruction to the bank to do exactly that, which offended him greatly. Notwithstanding his awareness of that he appears to rest his complaint on the fact that it's inconceivable that he would have agreed to it had he been given proper legal advice." (page 12 of *ex tempore* judgment)

28. Having reviewed the affidavit evidence in both sets of proceedings the judge stated:

> "I find as a fact that one of the matters raised in those proceedings was Mr. Small's extreme agitation at the content of the letter of Mr Harlow to the bank of the 14th of December [2007] which indicated in black and white that a loan… was to be used for Mr Raftery's and Mrs Raftery's purposes and for the persons associated with them and not for purposes associated with Mr Small." (pp. 13-14 of ex tempore judgment)

29. The judge concluded; "it seems to me that as between the bank and Mr Small, it's not possible for the bank to rely on either issue estoppel or cause of action estoppel because the matters which were litigated between them or sought to be litigated between them in the first set of proceedings were never adjudicated upon in any way by a judge because the matters were struck out on consent and in accordance with the authority of *Sweeney v. Bus Átha Cliath* which I think is a decision of the High Court and the Supreme Court in 2004, a cause of action estoppel or res judicata doesn't apply in circumstances where litigation was struck out on consent."

30. He continues:

> "The bank also asked that the proceedings be struck out on the basis of the rule in *Henderson v. Henderson* and … that rule postulates that a person shouldn't bring multiple proceedings, should bring his complaints or her complaints in one set of proceedings and a person should bring the proceedings on the basis of what they know or what they reasonably ought to have known. Given the amount of information that the Court has accumulated now of what Mr Small knew and when he knew it, it seems to me that it was at all times open to Mr Small to make a complaint about fraud against the bank prior to the institution of the proceedings because he had a copy of the letter of the solicitor of the… 14th December 2007 prior to the institution of proceedings and he ought to have known what it meant and if he believes that that letter is a fraud perpetrated by the solicitor, he had enough information to sue the bank based upon that, and he never did. And that is the first reason I accede to the application of the bank to strike out the proceedings against the bank." (page 15 of *ex tempore* judgment)

31. The judge continued at p. 16 of the judgment:

> "The second reason I agree to strike out the proceedings against the bank relate[s] to the terms in which the first set of proceedings were settled between Mr Small and Mrs Raftery. In that case, Mr Small promised that he wouldn't institute

proceedings which raise the issues in the first set of proceedings against Ms Raftery again and he did so but he has discontinued them."

32. Further he states:

> "When he, in these proceedings, accuses the bank of fraud in giving partnership monies to his late partner, late former partner, in my view although he has left Ms Raftery out of the case, it is not possible for such a claim to be made without her being brought back into the case because effectively he is accusing the bank of conspiring with the late Mr Raftery to harm Mr Small's interests. It's impossible for that case to be made against the bank without involving Ms Raftery again and re-litigating the allegations of the misuse of the partnership and the misbehaviour by his late partner with the bank and although she has been left out of the proceedings, it is a matter of certainty that the issues against the client couldn't be tried without her being joined to the proceedings again and the complaints being made all over again and this case -- this Court believes it would be first of all an obvious breach of contract as between Mr Small and Ms Raftery for Ms Raftery to have to face that litigation which she has settled, and it would be unjust for the Court to permit that settlement which it has received and filed and on the basis of which the earlier proceedings were struck out, for that to be undone and to be collaterally attacked in these proceedings and therefore it would be an abuse of process and unconscionable for the Court to allow the second proceedings to continue against the bank because of the effect it would have on Mrs. Raftery and the settlement that she reached. So, that's the second reason I accede to the bank's application." (page 16 of *ex tempore* judgment)

Grounds of appeal

33. The appellant's notice of expedited appeal relies on two grounds:

> (1) that the judge erred in striking out the appellant's proceedings against the bank on the basis of the rule in *Henderson v. Henderson*;
>
> (2) that the judge erred in striking out the said proceedings on the ground that the appellant had settled a claim against Helen Raftery, instituted in 2012, in which a condition of the settlement involved an agreement on the part of both the appellant and Helen Raftery that neither would issue proceedings in respect of matters raised in the settled proceedings and were the within proceedings allowed to proceed, it was likely that Helen Raftery would become a party to the proceedings which would amount to a breach of a condition of the settlement agreement aforesaid.

Henderson v. Henderson

34. The appellant contends that the judge erred in striking out the proceedings against the bank based on the rule in *Henderson v. Henderson*. He relied on the decision of Mr. Justice Kelly (as he then was) in *McConnon v. President of Ireland* [2012] 1 I.R. 449 which was claimed to be authority for the proposition that to successfully rely on the *Henderson v. Henderson* doctrine, it must be shown that:

> (a) there was a previous decision of a judicial tribunal of competent jurisdiction;
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> (b) that decision must have been a final and conclusive judgment;
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> (c) there must have been an identity of parties; and
>
> (d) there must have been an identity of subject matter.

35. The appellant argued that in the 2012 proceedings there was no "decision of a judicial tribunal" rather there was a consent order made striking out the action against the bank The appellant points to the fact that in the first set of proceedings he had also sought an injunction in respect of the sale of a property known as Daltons Public House in Fuerty, Co. Roscommon.

36. Reliance was placed on the decision of the Supreme Court in *Vantive Holdings* [2010] 2 I.R. 118, p. 141, where Denham J., referring to the English Court of Appeal decision in *Barrow v. Bankside* [1996] 1 W.L.R. 257 in the context of the principal in *Henderson v. Henderson*, had stated:

> "It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

37. It was argued that the 2012 proceedings were instituted by the appellant with the primary objective at that time of preventing the sale by Helen Raftery of Daltons public house property. It is stated that "… the bank's interest in the transaction was peripheral as averred by Mr. Lavelle." It is noteworthy that in para. 20 of the affidavit sworn by the said Liam Lavelle, solicitor for the bank, grounding this motion and dated 30th June 2014, he asserted that the appellant had brought the initial claim against the bank "… as a device to attempt to secure meaningful order(s) for costs in circumstances where it played no meaningful role in the substantive matters upon which the claim was purportedly grounded."

38. Whether such be the case or not it goes to motive and the underlying motive of the appellant in regard to the institution of either set of proceedings is not material to any issue to be determined in this appeal.

39. The appellant contends that the issues were substantially different in the earlier proceedings when compared to the subject matter of the within proceedings. The appellant also sought to frame the 2012 proceedings as an action which principally concerned claims against Helen Raftery.

40. With regard to the alternative ground relied upon by the judge in granting the relief to the respondent and striking out the proceedings against the bank it was asserted on behalf of the appellant that:

> "This is a novel determination where the Appellant is prohibited from continuing with his proceedings by reason of possible applications, over which the Defendant has no control, by both or either Defendants to join Mrs. Raftery to the proceedings."

41. It was argued that the appellant could not be held in breach of the settlement agreement with Mrs. Raftery by reason of the mere possibility that either of the other defendants might apply to join Mrs. Raftery as a third party to the proceedings and that the rule in *Henderson v. Henderson* did not extend to cover such a possibility.

Arguments advanced on behalf of the bank
42. The bank contends that the principle issue to be determined in this appeal is whether the High Court judge was correct in finding that the 2014 proceedings constituted an abuse of process under the rule in *Henderson v. Henderson* insofar as they seek to advance claims which were or could have been made in the 2012 proceedings and were accordingly appropriately dismissed.

43. The bank argued that for the appellant to succeed he must establish either that:

> (a) the rule in *Henderson v. Henderson* was misapplied by the trial judge or
>
> (b) the facts do not support the findings of the judge.

44. Particular reliance was placed on *Culkin v. Sligo County Council and Ors* [2017] IECA 104 and the decision in *A.A. v. The Medical Council* [2003] 4 I.R. 302, it being contended that arising from the *Henderson v. Henderson* rule a litigant may not make a case in legal proceedings which might have been but was not brought forward in previous proceedings between the same parties. It was contended that insofar as the claims advanced in the 2014 proceedings were in all material respects identical to those advanced in the 2012 proceedings, the second set of proceedings *prima facie* constitute an abuse of process under the rule in *Henderson v. Henderson* and it then fell to be considered whether there were any special circumstances by which the appellant could avoid the application of the rule. Further, it was argued that it was appropriate that a comparison had been carried out between the two sets of proceedings with regard to the nature of the claims being advanced.

45. The bank contended that if there were fresh claims advanced in the second set of proceedings the Court must consider whether these fresh claims could or ought to have been advanced in the first proceedings. It was contended that where fresh claims are set out in the second set of proceedings as ought to have been or were capable of being advanced in the first proceedings, the second proceedings *prima facie* constitute an abuse of process under the rule in *Henderson v. Henderson* and thereafter it must be considered whether there are special circumstances by which the appellant could avoid the application of the rule.

46. In their written submissions counsel for the bank contend that the 2012 proceedings are identical in all material respects with the 2014 proceedings. In particular, reliance was placed on the affidavit of Liam Lavelle dated 30th June 2014 and the exhibits thereto as well as the pleadings and affidavits sworn in both sets of proceedings.

47. An issue raised in the course of the hearing was when precisely the appellant had become aware of the existence of the letter dated 14th December 2007. Reviewing the evidence and exhibits from the 2012 proceedings it was contended on behalf of the bank that the appellant was aware of the six condition letter of loan offer in the month of November 2012 and was aware of the solicitor's letter to the bank dated 14th December 2007, at the latest, in March 2012. It was also contended that there was evidence to suggest that the appellant was possibly even aware of the said letters in the month of January 2011 which would have been prior to the death of his business partner.

48. The bank asserted that there is a fundamental difference between the proofs required to satisfy the rule in *Henderson v. Henderson* compared to the doctrine of *res judicata* and that the submissions advanced on behalf of the appellant based on *McConnon* were erroneous in that regard.

49. It was contended on behalf of the bank that the only new element in the present proceedings is the inclusion of an allegation of fraud. Further, this allegation is based on facts which were likely known to the appellant for some time prior to the institution of the first proceedings in 2012. At a minimum, it was argued that the appellant knew of the relevant facts which he relies upon now to advance an allegation of fraud during the currency of the first proceedings and prior to their compromise in May 2013. It was argued that the inclusion of a fraud plea in the absence of any fresh information to base such a plea does not avoid the operation of the rule in *Henderson v. Henderson*.

50. An alternative argument advanced was that were the appellant to be permitted to proceed with his claim in these proceedings, it would constitute a collateral attack on the order of the High Court striking out his claim against the bank in the 2012 proceedings on foot of which the order was made on 16th May 2013.

51. It was also contended that an inference could be drawn from the proximity in respect of dates between the first return date in the bank's High Court summary proceedings against Mr. Small and the institution of the present proceedings on 16th January 2014 and in light of the volume of affidavits and documentation generated and time taken up by the within proceedings which made it reasonable to conclude that the within proceedings were issued by Mr. Small primarily in order to frustrate the bank's separate summary proceedings.

The law
52. The principle first formulated by Wigram V.C. in *Henderson v. Henderson*, at 115, precludes a party from raising in subsequent proceedings matters which were not but could and should have been raised in an earlier suit.

53. *Henderson v. Henderson* concerned an action by a former business partner against the estate of his deceased brother and partner for the taking of an account with regard to sums alleged to be due to him by the estate. Previously, there had been similar proceedings between the parties in the state of Newfoundland where an account had been ordered to be taken and a final decision had been made by that court. The widow of the deceased partner subsequently brought enforcement proceedings against her brother-in-law before the courts in England and Wales. Her brother-in-law launched separate proceedings aimed at resisting enforcement of the Newfoundland order. At issue in the latter proceedings was whether the brother-in-law could re-litigate the issue once more before the courts of England by introducing transactions and matters which had not been considered by the Newfoundland court when it took its account in the earlier proceedings.

54. Wigram V.C.'s exposition of the law on this issue is now very well-known:

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the

> subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and to pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time… Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and *prima facie*, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

55. Over one hundred and thirty years later the law on the subject of this aspect of *res judicata* was developed by the adoption of the said statement of principle by the Privy Council in an appeal from Hong Kong in *Yat Tung Investment Co. Ltd.v Dao Heng Bank Ltd.* [1975] A.C. 581. In the proceedings the appellant had sought to avoid the exercise by a mortgagee of a power of sale in two successive suits arguing in the first action that the sale was a sham and on the second that the sale was fraudulent. The decision of Lord Kilbrandon marks a significant evolution in the development of the doctrine of *res judicata* wherein he distinguished between *res judicata* and abuse of process in the following terms at pp. 589-590:

> "The second question depends on the application of a doctrine of estoppel, namely *res judicata*. Their Lordships agree with the view expressed by McMullin J. that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been …any formal repudiation of the pleas raised by the appellant (previously)… But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings."

56. The decision of Wigram V.C. in *Henderson v. Henderson* was relied upon as authority for the wider sense of *res judicata* classifying it in effect as part of the law of abuse of process.

57. Subsequently, the statement of Wigram V.C. came to be considered in detail by the House of Lords in *Arnold v. National Westminster Bank PLC* [1991] 2 A.C. 93.

58. The partly obiter judgment of Lord Keith of Kinkel stated 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. The discovery of [a] new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened."

59. The judgment continues at p. 105:

> "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."

60. 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)

61. 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)

Special Circumstances

62. His analysis suggests that where cause of action estoppel arises, in principle the plaintiff continues to have a right to challenge a prior decision as to the existence or non-existence of the cause of action by raising a new point which could not reasonably have been raised in the first proceedings, whereas in the case of issue estoppel it is, in principle, possible to challenge the earlier decision on the relevant issue not just by raising a new point which could not reasonably have been taken in the earlier occasion but to re-argue in materially altered circumstances an old point which had previously been rejected. The principle is set forth at p. 109 of the judgment where Lord Keith states:

> "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has been available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result..."

63. In *Virgin Atlantic v Zodiac and Ors* [2014] A.C. 160, Lord Sumption delivering the lead judgment of the UKSC supported this analysis stating at para. 22:

> "*Arnold*… is accordingly 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."

64. Lord Sumption stated:

> "The principle in *Henderson v. Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There is nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in the *Yat Tung* case... The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, *Johnson v Gore-Wood and Co.* [2002] 2 AC 1, in which the House of Lords considered their effect. This appeal arose out of an application to strike out proceedings on the ground that the plaintiff's claim should have been made in an earlier action on the same subject matter brought by a company under his control. Lord Bingham of Cornhill took up the earlier suggestion of Lord Hailsham of St Marylebone LC in *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 146, 157 that the principle in *Henderson v Henderson* was "both a rule of public policy and an application of the law of res judicata."

65. In *Johnson v. Gore-Wood* [2002] 2 A.C. 1 Lord Bingham had characterised the inter-relationship between the rule in *Henderson v. Henderson* and the law of *res judicata* at p. 31 as follows:

> *"… Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, 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 later proceedings necessarily abusive. This 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, focusing 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."

66. Lord Sumption points out at para. 25 of his judgment:

> "The focus in *Johnson v Gore-Wood* was inevitably on abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run… *Res judicata* and abuse of process are juridicially very different. *Res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both causes of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank* [1991] 2 AC 93, 110G, "estopped per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process."

67. The doctrine in *Henderson v. Henderson* has acquired significant flexibility in recent decades and its principles inform the exercise of the procedural powers of the courts in this jurisdiction and has been endorsed by this Court and the Supreme Court in several significant decisions.

Position in this Jurisdiction

68. The jurisprudence is helpfully reviewed in *Delany and McGrath on Civil Procedure*, 4th Edition, Round Hall, 2018 at 16-91 et. seq. The authors consider the judgment of Hardiman J. in the Supreme Court in *A.A. v. The Medical Council* [2003] 4 I.R. 302 where he explained the rationale of the *Henderson* rule against its jurisprudential background thus at p. 317:

> "In Woodhouse v. Consignia p.l.c. [2002] 1 W.L.R. 2558, Brooke L.J. referred to the public interest in the efficient conduct of litigation and continued at p. 2575:-
>
> > "But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale of the rule in *Henderson v. Henderson* (1843) 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all, is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do."

The position is still more succinctly expressed in *Gairy v. Attorney General of Grenada* [2002] 1 A.C. 167, where, speaking of the principle in *Henderson v. Henderson*… and its offshoots Lord Bingham said at p. 181:-

> "these are rules of justice, intended to protect a party (… not necessarily a defendant) against oppressive and vexatious litigation."

Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the Courts for the determination of his civil rights or liabilities. This point has a particular resonance in terms of article 6 of the European Convention on Human Rights and Fundamental Freedoms 1950."

69. In reviewing the *Henderson* jurisprudence in the context of abuse of process in *Culkin v Sligo County Council & Others* [2017] IECA 104 Hogan J. in this Court observed at para. 13:

> "The general approach of the courts to the issue of a multiplicity of proceedings has been, broadly speaking, to adopt a merits-based approach. In other words, doctrines designed to prevent a multiplicity of proceedings and thereby ensuring the administration of justice is not abused – such as the rule in *Henderson v. Henderson* – are applied flexibly and not by reference to some inexorable and unforgiving logic. The courts have generally fought shy of adopting an ex ante, automatic exclusion of any second set of proceedings and much will depend upon whether the second proceedings raise questions which might sensibly and reasonably have been raised in the first proceedings."

70. I am satisfied that the motives underpinning the joinder by the appellant of the bank as a defendant in the first proceedings are not material. The rule operates for the benefit of all parties to litigation. The making of an order under the rule in *Henderson v. Henderson* is never automatic. Consideration must be given to all reasons identified for not bringing forward all aspects of the claim in the first litigation. The *Henderson* doctrine on its true construction is concerned with those points and issues not considered by the court in the first litigation because they were not raised in the said proceedings. Where an issue was not raised in the prior proceedings the Court must exercise considerable restraint and scrutinise the reasons offered for this state of affairs when reaching the conclusion that the appellant ought to be prevented from now raising a point - he having failed to do so on the prior occasion.

71. It is erroneous to treat any judicial statement as if it had statutory effect. 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. It is important not to lose sight of the juridical roots of *Henderson v. Henderson*. There is no suggestion that in 1843 the decision of Wigram V.C. was ground-breaking or otherwise than an application of the rules of the courts of equity as they then stood. In fact, the judge cites prior authorities including the observations of Lord Cottenham in the House of Lords in *Marquis of Breadalbane v. Marquis and Marchioness of Chandos* (1836) 7 E.R. 17 and the House of Lords decision of the former Chancellor of Ireland, Lord Redesdale, in *Chamley v. Lord Dunsany* 2 Sch. & Lef 690 in support of its decision. Chamley is a decision of 1807 applying the practices of the courts of chancery where one defendant seeks to subject a co-defendant to collateral litigation. It precludes a party from raising in subsequent litigation points or issues which were not, but should have been, raised in the earlier proceedings.

72. The *Henderson* principle is concerned with an aspect of abuse of process but that does not preclude it, strictly speaking, from also being characterised as an aspect of *res judicata*. Rather it is closely connected with the principles of cause of action estoppel which precludes raising in subsequent litigation issues essential to the existence or non-existence of a cause of action in circumstances where these issues were not decided upon by reason that they were not raised in the earlier proceedings.

Plea of fraud

73. The key new point not raised in the earlier proceedings by the appellant in the instant case is fraud. Provided it can be shown that with reasonable diligence the issue could and should have been raised in the prior litigation, the decision in *Henderson* in its modern formulation provides that, except in special circumstances and where it can be demonstrated that an injustice would be caused, the appellant is precluded from raising in subsequent proceedings points which were not raised in the earlier litigation. In the instant case the appellant has not identified any reason or special circumstance why he did not specifically plead fraud against the bank in the 2012 proceedings. It is clear from the affidavits and from the exhibits that Mr. Small had all the documentation and material available to him to frame such a claim at that time. He does allege various improprieties against the bank in the 2012 proceedings.

74. It is accepted that circumspection and prudence are to be expected before making a claim in fraud. However, the appellant has identified no basis why fraud could not properly have been included in the first action. There is no suggestion that significant - or any - new evidence has now come to light which materially strengthens the appellant's claim based on fraud. The potential reputational consequences for any party -especially a bank- of a pleading of fraud against it are especially serious. The High Court judge was at pains to establish and confirm that the letter of 14th December 2007 had been in the possession of the appellant in 2012. Hence the appellant has failed to demonstrate that any new evidence came into his possession to support a claim of fraud after he compromised with the bank in May 2013. It is reasonable to infer from the facts that the appellant had deliberately decided for his own reasons not to launch the allegation of fraud at that time.

75. Accordingly, I am satisfied that the trial judge was correct in determining that the allegations of fraud now being advanced against the bank in the context of the current proceedings were based on facts which were or ought reasonably to have been known to the appellant in 2012.

76. I am satisfied that the appellant has failed to identify any special circumstances which obtained and which precluded him from bringing the entirety of his claims before the court as against the first-named respondent bank in the 2012 proceedings.

77. I am further satisfied that all such new issues now sought to be litigated could readily, and should, have been incorporated into the 2012 litigation. The appellant has not offered any cogent reason to justify the approach he has taken to the litigation particularly with reference to the Golf Links partnership arrangement and its underlying mortgage and loan transactions as well as the earlier Knockcroghery site partnership and the mortgages and loan agreements and partnership arrangements that subsisted in relation to same and further with regard to the Daltons public house property.

78. As was pointed out by Hogan J. in this Court in *Culkin v. Sligo County Council & Another* [2017] IECA 104 at para. 21:

> "The rule in *Henderson v. Henderson* is… closely linked with the doctrine of issue estoppel and estoppel *per rem judicatam*. In fact, the rule might be said to represent a potentially wider application of both of these doctrines in that it captures both the strategic withholding of claims which might have been usefully brought forward in the first set of proceedings (along with the negligent failure to do just that) as well as subsequent litigation which amounts either to a direct or collateral attack on the earlier judgment."

79. It is no answer to assert that merely because a statement of claim was not delivered in the first proceedings the doctrine does not apply.

80. Indeed, certain of the matters pleaded in the current statement of claim are at least in part contradicted by affidavits sworn in 2012 by the appellant and are significantly misleading. For instance, the statement of claim at para. 13 states that:

> "The plaintiff is now aware that the defendants to these proceedings entered an agreement with the knowledge and

> consent of the plaintiff to discharge a mere €1m. out of the sale proceeds of €3m. towards the plaintiff's loan agreement with the first-named defendant. The first-named defendant agreed to this course of action, despite being aware that cash flow was tight and needed close management."

81. The subject-matter of this plea was already the subject of claims and averments in the 2012 litigation. The plea implies a very recent discovery of a key fact. However, it is fundamentally at variance with the sworn affidavit of the appellant in the first proceedings wherein he acknowledges that he received the sum of almost €610,000 in early 2007 out of the proceeds of sale. Hence, he was at all material times, and in particular at the time of the OPW sale transaction early in the year 2007, fully cognisant that out of the €3m proceeds of sale a pro rata disbursement of part of the proceeds was being made to both himself and his business partner. He actively participated in the transaction. The statement of claim, when read against the backdrop of affidavits sworn by him in the earlier proceedings, amounts to little more than a retrospective rationalisation of events and a highly selective deployment of facts which, however, should and could readily have been dealt with in the first proceedings. Had he wished to pursue the issue to a trial in 2012-2013 he had the option of doing so at that time.

82. It is clear from his affidavits in the 2012 proceedings, including the affidavits sworn by him in the interlocutory application on 15th March 2012, that far from a conspiracy or any collusion having taken place as he now contends between the bank and the deceased regarding the distribution of the proceeds of sale arising from the disposition of part of the lands at Golf Links Road to the Office of Public Works in early 2007 for the sole benefit of the bank and the deceased's partner, the facts are significantly different. For instance, Mr. Small deposed at para. 19 of his said 2012 affidavit:

> "In an around 2007 the Office of Public Works purchased 1.693 hectares of the 4.73 hectares at Golf Links Road owned jointly by your deponent and the deceased. The property, the subject matter of the sale, comprised a part of the land's owned by partnership 2. After €1,350,000 of this sale was utilised to discharge the bank borrowings of partnership 2, the net proceeds thereafter were divided 60/40 in favour of the deceased. As a result of the foregoing the deceased received €914,999.74 and I received €609,999.82. I say and believe that at a minimum I would be entitled to an appropriate adjustment in the accounts of the partnership to reflect this and the aforegoing matters and/or to damages."

83. Therefore, Mr. Small was fully aware of that transaction and the apportionment of the proceeds between the bank and the two partners at the time of the sale in early 2007. His complaint in 2012 was that he should have received a greater share of the proceeds. Furthermore, he was contending in 2012 that the apportionment amounted to a deceit. This material fact is not clearly disclosed in any of the affidavits sworn by Mr. Small in the 2014 proceedings in opposing the bank's motion.

84. When the appellant compromised the proceedings in May 2013 with the bank and thereafter in January of 2014 launched a fresh action which seeks substantially the same reliefs, in matters which ought properly and fairly to have been raised in the 2012 proceedings, he behaved in such a manner as entitles the bank to an order striking out the proceedings as constituting an abuse of process.

85. Insofar as the appellant seeks to assert that the issue of fraud is new, it is clear that the issue of deceit was agitated in the first proceedings and all the facts and circumstances now relied upon to support his allegations of fraud as well as conspiracy and collusion were or could with reasonable diligence have been ascertained by him prior to the compromise of the 2012 proceedings.

Abuse of Process; Pursuit of same claims twice

86. No party should be expected to prosecute or defend the same proceedings or substantially identical claims repeatedly. Further it is in the public interest to ensure that court time is not wasted and that access to justice is managed fairly and with efficiency and abuse is minimised. Where, as here, the degree of overlap is very significant between both claims it is open to the court in the exercise of its discretion to strike out duplicative proceedings based on the inherent power of the courts in relation to abuse of process. Strictly speaking, an overlap between claims pursued in prior litigation and those in later proceedings does not engage the doctrine in *Henderson v. Henderson* in its pure sense. It is equally clear in this jurisdiction that a judge in determining an abuse of process application should not approach the application of the rule in an overly rigid or mechanistic fashion. It is appropriate that an evaluation be carried out as to whether in all the circumstances of the case the second proceedings can be fairly characterised as tantamount to unjust harassment of the other party to the suit. Contrary to the contentions advanced on behalf of the appellant, it is not conclusive that there was no decision of a judicial tribunal in the first proceedings. All the other grounds raised, apart from fraud, are wholly duplicative with the 2012 litigation. As such, the pleas, apart from fraud, fell to be dealt with under the principles governing abuse of process.

87. It will be recalled that the order made by consent on 16th May 2013 by Laffoy J. in the High Court was made in the context of an interlocutory application. I am satisfied that the order of the court does not of itself amount to a res judicata. There was no judicial decision after the hearing of evidence. The orders were made without any hearing or consideration of the respective merits of the claims. The High Court judge correctly referenced *Sweeney v. Bus Atha Cliath* [2004] 1 I.R. 576 in this regard. In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated.

88. The burden rests with the bank, as defendant, to identify reasons why the bringing of the second proceedings in 2014 is manifestly unfair. The Court should not lightly shut out the appellant from pursuing a genuine claim unless abuse of process can be clearly established. I am satisfied in the circumstances that the judge was entitled to reach a conclusion as regards claims which had been articulated against the bank in the 2012 proceedings that the re-litigating of those issues in the 2014 proceedings gives rise to an abuse of the process of the High Court. The judge was entitled in the exercise of the inherent power which any court of justice possesses to prevent misuse of its procedure in a way which, although not inconsistent with a literal application of procedural rules, would nevertheless be manifestly unfair to a defendant in the litigation before it, to make the orders which he did.

89. The abuse of process exemplified in the instant case was the initiation of the 2014 proceedings for the purpose of mounting a collateral attack upon the compromise concluded with the bank embodied in the orders made by Laffoy J in May 2013. The said order was made by a court of competent jurisdiction in the 2012 proceedings in which the appellant had a full opportunity, had he chosen to do so, to pursue the litigation further and not enter into the compromise as he did. In the absence of any legitimate basis sufficient to demonstrate that the appellant in pursuing again the same claims against the same defendant was neither abusing or misusing the process of the court, the orders made were reasonable and warranted on the particular facts of this case.

90. From a review of the pleadings and proceedings in both suits brought by the appellant it appears that the claims against the bank are substantially similar arising as they do out of the partnership relationship which the appellant had with the late Fionan Raftery and allegations of various acts of collusion, deceit, dishonesty and impropriety including inappropriate withdrawals of partnership monies by

the deceased being facilitated by the bank.

Banks conduct August 2007 – December 2007
91. The bank was aware that Fionan Raftery was ill with cancer from the month of August 2007. On 11th October 2007 the bank's credit application system contains the following comments "F.R. ill health, no financials. Arrears, hardcore and excesses a feature. Meeting with customer and accountant for proposals to clear. Will need asset disposal.… Development sites in sole and joint names. Multi banked. Full details to be obtained." There is an entry in the bank's credit application system dated 8th November 2007 which states; "FR & MS +500k site LN to 2164K to increase MS share of land from 40 to 50%. Funds to be used to clear H/core ODFTS, RED LNS & 100K to FR… MS good ACC OP. LOW LTV, SMALL INC OVERALL."

92. In the course of the 2012 litigation, all of this material was in the possession of the appellant on foot of a data access request made by him to the bank in late 2010. It appears the documentation was furnished to him circa January 2011. Thus it was available to him prior to the death of his partner Fionan Raftery in April 2011. It was to hand prior to the institution of the 2012 proceedings and prior to the compromise with the bank of the said proceedings in May 2013. He was represented by solicitors and counsel in the 2012 proceedings as the order of Ms. Justice Laffoy dated the 3rd May 2013 records. He reached a settlement not only in the motion but also in the action with the bank and the said action was struck out.

93. The claims now being pursued against the bank are abusive and unfair. This does not however preclude the appellant from raising such issues as he may be advised relative to the aspect of the bank's summary proceedings in respect of the Loan Agreement of November 2007 and funds drawn down on foot of same which has been remitted to plenary hearing and the events surrounding same. Only issues as post-date August 2007 can reasonably be agitated in respect of same confined to the loan transaction of November 2007.

94. Accordingly, I am satisfied that the 2014 proceedings prima facie constituted an abuse of process and all new aspects including the claim in fraud could and should have been advanced in 2012 or prior to the compromise of the litigation in 2013 under the rule in *Henderson v. Henderson*. There are no special circumstances identified whereby the appellant could avoid the application of the rule. I would dismiss the appeal and uphold the judgment of the court below.

Motion to Amend Statement of Claim - Appeal 2016/301
95. It follows in the circumstances that the motion to amend the statement of claim as against the bank falls to be struck out as no maintainable cause of action subsists as against the bank in the manner framed in the within proceedings.