Neutral Citation: [2015] IEHC 100

THE HIGH COURT

[2012 No. 111215 P]

BETWEEN

TOM O'DRISCOLL

AND

SEAMUS DUNNE

PLAINTIFFS

AND

LARRY McDONALD, DEIRDRE McDONALD AND BARNEY McDONALD

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 11th day of February, 2015

1. There are a number of motions before the court brought by both the plaintiffs and the defendants, however, it has been agreed between the parties that this motion should be dealt with first.

2. This matter comes before the court by way of the defendants motion on notice for an order pursuant to the provisions of O.19, r.28 of the Rules of the Superior Courts striking out the proceedings on the grounds that the pleadings disclose no reasonable cause of action and are frivolous and vexatious, alternatively, for an order pursuant the inherent jurisdiction of the court to strike out the proceeding on the grounds that they are frivolous, vexatious, must fail, and are an abuse of process.

Background – Litigation History

3. In order to place this application in context, it is considered both useful and necessary to summarise the factual background giving rise to these proceedings and which includes the judgment and order of this Court made in a previous suit brought by the first and third defendants against these plaintiffs.

4. Historically, the parties to these proceedings were involved in a number of contracts which commenced in 2005 and which may be summarised as follows:

> (a) A contract for the purchase of land dated the 21st October, 2005 made between the first and third defendants as vendors and the first named plaintiff (in trust for himself and the second named plaintiff) at a purchase price of €1.3m. It was condition of that contract that the plaintiffs would build three dwelling houses on certain lands to a shell finish in accordance with certain plans and specifications on or before the 1st September, 2007. The sale was duly completed on the 30th November, 2005. Shortly after the completion the plaintiffs resold the lands to Rolan Homes Limited, that sale being concluded on the 12th May 2006.
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> (b) Subsequent to the resale of the lands, the plaintiffs agreed to purchase from the first and second named defendants a dwelling house and shed on 0.75 acres of zoned lands for €500,000. This contract was dated the 2nd June, 2006 and was to be completed on the 31st July, 2006. It was a term of that contract that on closing the first and second named defendants would enter into a caretaker's agreement with the plaintiffs allowing them to remain in possession of the dwelling house and lands for six months from the date of completion of the sale.
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> (c) By a further contract of even date, the plaintiffs agreed to purchase from the second and third defendants 26 acres of partially zoned lands for €2m. This sale was to be completed on the 13th April, 2006. The contract provided that the vendors would be entitled to the use of the lands for agricultural purposes from the date of completion of the sale until the land would be required by the purchasers for development or on the happening of other events specified in the contract and that the defendants would on closing execute a caretaker's agreement. This contract also provided that the plaintiffs were to bring the houses, to be built by them to a shell finish under the contract at (a) above, up to builder's finish within 36 months of the closing.
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> (d) By a further agreement made between the plaintiffs and the first and third defendants in or about the month of November 2007, it was agreed that the terms of the first and third contracts at (a) and (c) above would be varied by providing for the payment by the plaintiffs of €350,000 to the first and third defendants in lieu of the obligation to construct the three houses.

5. By the caretaker's agreement dated the 6th November, 2006, the first and second named defendants acknowledged that the dwelling house shed and adjoining lands of 0.75 acres were in good order, repair and condition and covenanted to keep the property in that condition during the pendency of the agreement.

6. A caretaker's agreement was also entered into between the plaintiffs and the first and third named defendants in respect of the lands the subject matter of the contract at 4. (c) infra.

7. It is common case between the parties that the second and third contracts at 4. (b) and (c) above were interconnected for the purposes of giving effect to a transaction for the sale of all of the property concerned for €2.5m.

8. Quite separately, the first and second defendants had hoped to complete the building of a house for themselves during the pendancy of the caretaker's agreement. This project was not realised and at the end of the term the first and second defendants failed to vacate the dwelling house and adjoining lands. Disputes and differences arose between the parties which led, amongst other

things, to the non-payment of €320,000 being the balance due by the plaintiffs to the first and third defendants on foot of the contract at 4. (d) infra, the sum of €30,000 having already been paid by the second named defendant.

9. In an attempt to secure payment of the balance, the first named defendant retained the services of a debt collection agency known as Viper Debt Recovery and Repossession Services Ltd., a firm controlled by one Martin D "Viper" Foley. This agency engaged in conduct which was described by the President of the High Court in his judgment in the previous proceedings as being absolutely despicable and of the most reprehensible kind and which, it appears, had been employed for the purposes of extracting payment but with the result that the gardaí became involved. Thereafter, the first named defendant dispensed with the services of that agency and, together with the third named defendant, instituted proceedings against the plaintiffs by way of plenary summons on the 16th December, 2009.

10. A statement of claim was delivered in those proceedings on the 10th March, 2010 in which reference was made to the contracts at 4(a), (c) and (d) infra. It was alleged that these plaintiffs were in breach of contract in failing to pay €320,000, being the balance of the monies due, and an order for judgment in that amount was sought. No reference was made in the statement of claim to the contract at 4(b) infra.

11. Retention of the debt collection agency and the subsequent withdrawal of instructions after contact from the gardaí was acknowledged by the first and third defendants in the statement of claim and in the subsequent replies to particulars given in the previous proceedings.

12. Separate defences and counterclaims were delivered by these plaintiffs in those proceedings requiring full proof of the contract at 4(d) infra.

11. Breaches of contract and the caretaker's agreement on the part of the first and second defendants in these proceedings (although the second defendant was neither a plaintiff nor a defendant on the counterclaim in those proceedings) arising out of their failure to vacate the dwelling house and adjoining lands at the end of the term resulting in the plaintiffs suffering loss, damage, inconvenience and expense were pleaded.

13. In addition to the foregoing the second named plaintiff pleaded a case in negligence arising out of the use and occupation of the dwelling house as well as a case against all defendants for intimidation, assault and harassment arising as a result of the actions of the debt recovery agency.

14. The trial of the action came on for hearing before the President of the High Court who, having heard the evidence, gave judgment and made an order on the 17th July, 2012. In his judgment the President found that the first and third defendants herein had proved their case and ordered the payment of €320,000 by these plaintiffs.

15. These proceedings were commenced by way of plenary summons on the 6th November, 2012. The contracts at para. 4(a), (b), (c) and (d) infra are pleaded in the statement of claim as are the respective caretaker's agreements. It is alleged that the defendants were in breach of contract and in particular the caretaker's agreement in respect of the dwelling house, shed and adjoining lands by failing to vacate these on the expiry of the term. In addition it was alleged that the defendants were in breach of the terms of the caretaker's agreement and were guilty of negligence in causing the dwelling house to become dilapidated to the point where it was rendered derelict and uninhabitable with the consequence that these plaintiffs suffered loss damage and expense.

16. In addition to the foregoing, the second named plaintiff pleads, but now as against all defendants, a plea which he had made in his counter claim in the previous proceedings arising as result of the wrongful actions of the debt collection agency retained by or on behalf of the defendants.

17. A transcript of the evidence, the judgment and order of the President made on the 17th July, 2012 together with all of the pleadings in the previous proceedings were furnished at the hearing of the motion now being considered by the court.

18. The first named defendant swore an affidavit on his own behalf and on behalf of the second and third defendants for the purposes of the motion. This affidavit sets out the grounds upon which the defendants seek the relief sought and which may be summarised as follows:

> (a) These proceedings were not properly issued and are bad on their face insofar as they purport to relate to the first named plaintiff;
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> (b) That the matters which the plaintiffs are now seeking to litigate have already been litigated and determined in the previous proceedings;
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> (c) Insofar as there is some additional dimension to these proceedings, which the defendants do not accept, that ought to have been raised in the previous proceedings; and
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> (d) These proceedings are motivated solely to frustrate execution of the judgment obtained in the previous proceedings and that for these reasons the present proceedings are frivolous vexatious and an abuse of the process of the court.

19. The second named defendant delivered replying affidavits in which he takes issue with the averments contained in the affidavit of the first named defendant and which may be summarised as follows:

> (a) The issues and matters determined in the previous proceedings are not the same issues and matters the subject matter of these proceedings;
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> (b) The third named defendant was not a party to the previous proceedings in any capacity;
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> (c) No adjudication or order was made on the counterclaims;
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> (d) The President confined himself to determining the plaintiff's claim in relation to the fourth contract at 4(d) above; and
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> (e) The losses suffered by the plaintiffs arising from the alleged breaches of contract in the caretaker's agreement at para. 4 (b) above were not dealt with or determined.

20. It is apparent from a reading of the transcript of the evidence and judgment of the President in the previous proceedings that:-

(a) On the expiry of the caretaker's agreement the first and second named defendants overstayed in the dwelling house by at least 18 months and did not actually hand over the keys until 2010;

(b) The claim for losses arising as a result of the over holding and/or the deterioration of the dwelling house to the point where it was in an uninhabitable condition were expressly not dealt with but were considered by the President to be separate causes of action which were either not properly or at all pleaded in the counterclaim, but which could be made the subject matter of subsequent proceedings;

(c) These plaintiffs would not be precluded from pursuing an action in respect of such matters in the event that they should decide to bring such proceedings;

(d) The actions of the debt collection agency were absolutely despicable and of the most reprehensible kind but the court was not authorised to take that into account in reduction of the sum as claimed in those proceedings such being not relevant to the claim;

(e) The President otherwise confined himself to dealing with the plaintiff's claim to recover the balance of €320,000.

Judgment and order of the court 17th July, 2012.

21. The order of the court made the 17th July, 2012 is confined to adjudging that the first and third defendants herein were entitled to recover as against the plaintiffs herein €320,000 and costs. It is apparent from the judgment given and the order made by the President that no order was made as to the substance of or costs on the counterclaims, nor was any application made in relation thereto. The court was advised at the hearing of this application that no appeal was taken by any party against the judgment and order of the 12th of July, 2012.

22. It is also apparent from the transcript of the evidence given at the trial, particularly at pages 39, 81, 88 and 89, that the court, whilst recognising the existence of claims or potential claims and whether or not properly adequately or at all pleaded in the counterclaims, confined itself to the claim in those proceedings to recover the sum of €320,000. That this is so is also evident from the judgment of the court and in particular at page 99 of the transcript where the President stated

> *"…and I'm told in evidence that the house was left in a deplorable condition by Mr. McDonald when he left in breach of the terms of the caretaker's agreement. That seems to me – these are not matters that are detailed in the counterclaim, but which the defendants might wish to consider as a separate head of claim, if they wish to bring such proceedings."*

Submissions in relation to the Motion

23. The plaintiffs represented themselves and made oral submissions at the hearing. Submissions were also made both orally and in writing on behalf of the defendants. All of these submissions have been considered by the court and the substance of which may be summarised as follows.

The defendant's submissions.

24. The defendants submitted

(a) That the issues which the plaintiffs wish to litigate were precisely the same issues which were litigated in the previous proceedings.

(b) That as these plaintiffs had recovered nothing on their counterclaims in the previous proceedings and that as there had been no appeal against the judgment and order of the 17th of July, 2012, all of the issues which had been raised in the previous proceedings were concluded and that the matters therein adjudicated upon where *res judicata*.

(c) That the plaintiff's failure to apply to amend the proceedings by incorporating a plea that they had suffered serious losses consequent upon the over holding and alleged deterioration in the condition of the property could not now be made the subject matter of new proceedings having regard to the principle or rule enunciated in the case of *Henderson v. Henderson* [1843] 3 Hare 100.

(d) That the previous proceedings were prosecuted to conclusion on all of the relationships between the parties centering around the sale of the lands and ancillary agreements, including the caretaker's agreements, and that any such dispute as arose from those proceedings was conclusively resolved in favour of the first and third defendants herein and that being so it was submitted that these matters are *res judicata* and/or that the present proceedings are an abuse of process.

(e) That whilst it was accepted by the defendants that in exercising its jurisdiction under O.19 r.28 the court is confined to dealing with the application on the basis of the pleadings alone it was also submitted that the court in exercising its inherent jurisdiction to strike out a pleading or to dismiss proceedings is not so confined but is entitled to take all relevant matters into account.

(f) That the second named defendant in these proceedings could have been joined as a co-defendant to the counterclaims in the previous proceedings but as that had not been done and having regard to the rule in *Henderson v. Henderson*, the plaintiffs are now estopped on that ground alone from maintaining a claim against her and are in any event estopped because her interest was the same as that of her husband who was the first named plaintiff in the previous proceedings and on foot of which he was successful against these plaintiffs.

(g) That the comments of the President in the course of the trial and in his judgment in the previous proceedings were not an authority which enabled the plaintiffs to proceed again on the issues which he had decided and which included all matters raised by these plaintiffs in their defences and counterclaims.

(h) That the President having indicated that he would consider an application to adjourn the proceedings at the expense of the plaintiffs so as to enable them to plead and particularise the case in respect of fiscal losses, the failure by these

plaintiffs to apply meant that they were now precluded from pursuing such a claim in these proceedings.

The plaintiff's submissions.
26. The plaintiffs submitted

> (a) That the President, although hearing evidence in relation to a number of matters, had in fact confined himself to the claim for €320,000.
>
> (b) That the claims which they wanted to make, including those comprised in their counterclaims and which were now the subject matter of these proceedings, were not determined and no order was made in respect of them.

When read in conjunction with the second named plaintiff's replying affidavit I took it to be a submission on behalf of the plaintiffs that as there had been no final and conclusive adjudication on the merits of their claims that the requirements necessary to satisfy a defence of *res judicata* were absent and that, as the court had expressly recognised not only the existence of their claims but also that the plaintiffs might wish to pursue those in separate proceedings, it was not an abuse of the process of the court to do so now.

27. These plaintiffs were unrepresented at the trial of the action before the President and, indeed, are not legally advised or represented in these proceedings. They are, therefore, lay litigants and to whom, in my view, the court should show some latitude especially when dealing with matters of law, practice and procedure and that this is particularly so, when, as in this case, the inherent jurisdiction of the court is invoked for the purposes of striking out their proceedings.

28. It is apparent from the transcript and from their submissions that the plaintiffs, as lay litigants, appear to have concluded, as they submit they did, that those matters which are now the subject of these proceedings, including their claims for fiscal losses and which they wanted to advance, were for another day. That no adjudication or orders were made in respect of the causes of action pleaded in their counterclaims would seem to be clear both from the transcript of the judgment and the order of the court of the 17th of July, 2012.

29. This brings me to the order which was made in the previous proceedings and to a further submission of the plaintiffs. It is accepted by the first named defendant in his affidavit grounding this application that no order was made by the President in relation to the counterclaims. The plaintiffs have submitted that this was because everybody knew that such claims were not being considered by the President and that it was a matter for the plaintiffs in these proceedings to decide whether such proceedings should be brought at a later date and that this was the reason why no order had been made nor sought in relation to the counterclaims.

The Law
30. As the reliefs in the notice of motion are sought in the alternative it is convenient to set out firstly the law in relation to an application under O. 19, r. 28 of the Rules of the Superior Courts.

31. Order 19, rule 28 of the Rules of the Superior Courts 1986, as amended, provides:-

> *"The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of an action or defence being shown by the pleadings to be frivolous or vexatious, the court might order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be just."*

32. When the court is exercising its jurisdiction on foot of an application pursuant to O.19, r. 28 of the Rules of the Superior Courts, it does so by reference to the pleadings alone. Its jurisdiction when exercised to strike out a pleading is to strike out the whole of the pleading and not part of it. The jurisdiction is one which the court should be slow to exercise; caution being required in utilising the jurisdiction, however, if a court is convinced that a claim will fail then such pleadings may be struck out.

33. A defence has yet to be delivered in these proceedings, the defendants deciding instead to bring this motion. Apart from the summons therefore the only substantive pleading is the plaintiff's statement of claim. Insofar as the application is for relief under O. 19, r. 28 that is to be decided on the assumption that the statements in the statement of claim are true and will be proved at the trial. Accordingly, the motion relates to and is grounded on the plaintiffs' statement of claim. The affidavits filed are relevant to the extent that they set out the factual situation as to the pleadings. They are not relevant insofar as they deal with matters extraneous to the pleadings in question and any such extraneous evidence should be ignored. As to the foregoing statements of the law see *Barry v. Buckley* [1981] I.R. 306; McCabe v. Harding [1984] ILRM 105; *Aer Rianta c.p.t v. Ryanair* [2004] 1 I.R. 506 and *Rayan Restaurant Limited v. Gerald Kean practising as Kean Solicitors* [2012] IEHC 29. It follows from these authorities that when entertaining an application under O.19, r.28 the court, in determining whether or not the pleadings disclose any reasonable cause of action or whether or not the action is frivolous or vexatious, does so by reference to the pleading in question and not otherwise.

34. Reference has already been made earlier in this judgment to the content of the statement of claim and the case as pleaded by the plaintiffs, accordingly, it is not necessary to repeat the content here: suffice it to say that the causes of action which are pleaded on behalf of both plaintiffs are in contract and negligence; in addition the second named plaintiff also pleads additional torts arising out of the retention and conduct of the debt collection agency retained by the first named defendant.

Conclusion on the Application to strike out under Order 19, Rule 28
35. Applying the law and approaching the determination of the questions raised by reference to the pleadings alone, it is my view that the statement of claim pleads sufficient facts so as to disclose causes of action both in the law of contract and in the law of tort. Moreover, in my view the statement of claim does not, in the words of O'Higgins J. in *McCabe v. Harding*, alone disclose "vexation or frivolity"; nor could it be concluded that the plaintiff's claims are bound to or must fail; on the contrary the matters pleaded are potentially of grave import and consequence. Accordingly, the court will make an order refusing the defendant's application under O.19, r.28.

Inherent Jurisdiction on an Application to Strike Out - The Law
36. The second leg of the applicant's motion proceeds by way of an application which invokes the inherent jurisdiction of the court to strike out the plaintiffs' proceedings on the grounds that the proceedings are frivolous, vexatious, must fail and further are an abuse of process of the court.

37. It is acknowledged by the defendants in their submission that the inherent jurisdiction of the court to strike out proceedings is one to be exercised with restraint and should be on the basis of agreed facts. It was submitted that for the purposes of this application that the material agreed facts were the previous proceedings prosecuted to a conclusion on the relationships between the parties centring on the sale of the lands and ancillary agreements. The defendant's submit that whereas the facts pertaining to the relationship between the parties were disputed, the dispute was, nevertheless, conclusively resolved in favour of the first and third defendants (being the plaintiffs in the previous proceedings) by the judgment and order of the President of the 17th July 2012. Accordingly, it is submitted, that the present proceedings are *res judicata* and are an abuse of process.

38. Apart altogether from the jurisdiction of the court as provided for under O.19, r.28 of the Rules of the Superior Courts 1986, there is unquestionably an inherent jurisdiction in the court to strike out an action if it is clear that it must fail. That jurisdiction was described by Costello J., in *Barry v. Buckley* [1981] I.R. 306 at p. 308 where, in his judgment he observed that

> *"Basically its jurisdiction exists to ensure that an abuse of process of the courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail…"*

As to the exercise of that jurisdiction, Costello J. stated that it was to be "…exercised sparingly and only in clear cases".

39. In *Fay v. Tegral Pipes* [2005] IESC 34, [2005] 2 I.R. 261 at p.266 McCracken J. described the purpose of the jurisdiction in the following terms:

> *"While the words 'frivolous and vexatious' are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed."*

See also the judgment of McGovern J. in *Doherty v. Minister for Justice, Equality and Law Reform* [2009] IEHC 246.

40. The rationale for this approach by the court was explained by McCarty J. in his judgment in the unanimous decision of the Supreme Court in Sun Fat Chan v. Osseous Limited [1992] 1 I.R. 425 at p. 428 were he said

> *"Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought.*
>
> *Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceeding; often times it may appear that the facts are clear and established but the trial would disclose a different picture. With that qualification, however, I recognise the enforcement of a jurisdiction of this kind as a healthy development in our jurisprudence and one not to be disowned for its novelty though there may be a certain sense of disquiet at its rigour."*

41. It follows from this statement that the court should be particularly cautious when its inherent jurisdiction is invoked at an early stage in proceedings such as in this case. In that regard McCarthy J. in the same judgment at p. 428 stated

> *"By way of qualification of the jurisdiction to dismiss an action at the statement of claims stage, I incline to the view that if the statement of claim admits of an amendment which might, so to speak, save it and the action founded upon it, then the action should not be dismissed."*

42. In the same vein, when invited to exercise its jurisdiction by striking out proceedings on the basis that the plaintiff's claim cannot succeed Keane J., in *Lac Minerals v. Chevron Corporation* [1993] (unreported 1993) held that before making such an order the court had to be confident that no matter what might arise on discovery or at the trial of the action, the plaintiff's claim could not succeed.

43. When the court is exercising its inherent jurisdiction to strike out pleadings or dismiss proceedings whether on the basis that no cause of action is disclosed or that the proceedings are frivolous and vexatious or are otherwise an abuse of process, the court is not confined to determining such questions by reference to the pleadings alone, rather, it is entitled to take into account all matters which may be relevant including matters of evidence as are necessary for the purposes of determining such questions.

Frivolous or vexatious claims.

44. Given the nature of the jurisdiction and the individual and different circumstances which might give rise to any particular proceedings being considered frivolous or vexatious, it is neither desirable nor practical to provide a comprehensive list of such cases or matters, however O'Caoimh J. in his judgment in *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463, p.46 cited a decision of the Ontario High Court in Canada in *Re Lang Michener and Fabian* (1987) 37 D.L.R. (4th) 685 at p.691 that categorised a series of matters which tended to show proceedings as being vexatious in the following terms:

> *"(a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;*
>
> *(b) Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain reliefs;*
>
> *(c) Where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;*
>
> *(d) Where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;*
>
> *(e) Where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;*
>
> *(f) Where the respondent persistently takes unsuccessful appeals from judicial decisions".*

Proceedings which have been brought without reasonable grounds may also be considered by the court to be vexatious or frivolous, moreover, if a litigant habitually or persistently institutes vexatious or frivolous proceedings the court may make an order restraining the institution of further proceedings against parties to the earlier proceedings without prior leave of the court, sometimes referred to as an *Isaac Wunder* order.

Matters of fact.
45. With regard to the approach which the court should take in relation to factual matters evidence on affidavit may be received. Uncertainty as to trivial or non critical facts may be ignored in practice. See *Price v. Keenaghan Developments Limited* [2007] IEHC 190. Where, however, there is a conflict and dispute between the parties concerning crucial matters of fact and that the resolution of those facts is necessary in order to determine the issue, the court should generally refrain from exercising its jurisdiction. See *Doe v. Armour Pharmaceutical Inc.* [1997] IEHC 139. There is, however, more recent authority for the proposition that where a conflict of facts appears from affidavits the court may proceed by resolving the conflict, for the purposes of the motion, in favour of the party against whom the application to strike out has been brought. See *Kennedy v. Minister for Agriculture, Fisheries & Food* [2011] IEHC 187. Moreover, on such an application the court must treat the plaintiff's claim at its high water mark. See *McCourt v. Tiernan* [2005] IEHC 268 and *O'Keeffe v. Kilcullen* [1998] IEHC 101.

Onus of proof.
46. As to the onus of proof on an application to strike out, that follows the general rule that he who alleges must prove so that the onus is on the moving party to establish that the plaintiff's claim is frivolous, vexatious, or bound to fail. It is not for the plaintiff to establish a *prima facie* case in order to be successful in resisting the application. See *Salthill Properties Limited v. Royal Bank of Scotland* [2009] IEHC 207.

Claims that are bound to fail
47. It has long been recognised that where claims are bound to fail when an application is brought under O.19 r.28 or by way of application invoking inherent jurisdiction, the court may, if satisfied that the claim will fail, strike out the proceedings such as where the proceedings are unenforceable as a matter of public policy, see *Ennis v. Butterly* [1996] 1 I.R. 426 and *AA v. The Medical Council and Attorney General* [2003] 4 I.R. 302 or where the proceedings are scandalous and unsustainable both in law and in fact see *Lopez v. Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 246.

Abuse of Process
48. The institution of proceedings which are frivolous, vexatious, or brought for a purpose which is ulterior or extraneous to them or in circumstances where a party has blatantly and persistently refused to comply with an order of the court even if constituted in proper form but lacking in *bone fides* or which are *res judicata* may properly be described as an abuse of the process of the court.

49. Reference has already been made to Fay v. Tegral Pipes and *Doherty v. Minister for Justice, Equality and Law Reform* in connection with the purpose of the court's inherent jurisdiction. With regard to the meaning of the term "abuse of process" Isaacs J. in *Varawa v. Howard Smith Co. Limited* [1911] 13 CLR. 35, 91 stated:

> *"It…connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of legal claim upon which the court has to adjudicate, they are regarded as an abuse of process for this purpose…"*

50. In this jurisdiction Costello J. in *McSorley v. O'Mahony* (High Court unreported 6th November, 1996 when describing the test to be applied when considering whether any given set of proceedings constituted an abuse of process stated

> *"It is an abuse of the process of the courts to permit the court's time to be taken up with litigation which can confer no benefit on a plaintiff. It is also an abuse to permit litigation to proceed which will undoubtedly cause detriment to the defendant and which can confer no gain on the plaintiff."*

Improper claims.
51. The bringing of proceedings for an improper purpose or in which serious allegations are made against a party without any or any adequate foundation or where there is impropriety or misconduct in the issue or prosecution of proceedings may all constitute an abuse of process of the court. See *Sean Quinn Group Limited v. An Bord Pleanala* [2001] 1 I.R. 505, [2001] 2 ILRM 294; Grant v. Roche Products (Ireland) [2005] IEHC 161; as well as *O'Siodhachain v. O'Mahoney* (unreported, Supreme Court, 7th December, 2001), *Cavern Systems Dublin Limited v. Clontarf Residents Association* [1984] ILRM 24; *Carroll v. Law Society of Ireland*, unreported Kelly J. 2 May 2001; *Shelley-Morris v. Bus Atha Cliath* [2003] 1 I.R. 232 *O'Connor v. Bus Atha Cliath* [2003] 4 I.R. 459.

Requirements and time.
52. The exercise of the jurisdiction by the court to dismiss proceedings on the grounds of an abuse of process requires the unequivocal identification of the potential facts on which the plaintiff's claim is based. Accordingly, in order that this requirement be satisfied, the bringing of an application at a very early stage in the proceedings should generally result in a refusal to grant the order sought since to do anything else runs the risk of interfering with the plaintiffs' constitutional right of access to the courts. See *Sun Fat Chan v. Osseous Limited infra; J O'D v. Fitzgerald* [2000] 3 I.R. 321 and *Finnegan v. Richard* [2007] 3 I.R. 671. This is not, however, a charter for delay on the party moving such an application. See *S.M. v. Ireland* [2007] 3 I.R. 283, [2007] 2 ILRM 110 and the rule in *Henderson v. Henderson*

Res Judicata.
53. The inherent jurisdiction of the court can be invoked to dismiss or strike out proceedings *in limine* as an abuse of the court's process where one party to the proceedings attempts to re-litigate the matters which have already been conclusively adjudicated upon by a court or judicial tribunal of competent jurisdiction. The final and conclusive determination, therefore, of the same issue or the same cause of action are said to be *res judicata* and by this doctrine may not be again re-litigated between the same parties or their privies at law, nor may evidence be given to contradict them in subsequent proceedings.

54. In relation to the application invoking the inherent jurisdiction of the court, the defendants submitted that these proceedings should be struck out on the grounds that they are *res judicata* or, if there is any part of them that are not *res judicata*, then those matters are caught by the so called rule in *Henderson v. Henderson*.

55. The defendants cited in support of their submissions *McConnon v. President of Ireland & Ors* [2012] I.R. 449, *Mount Kennett Investment Company v. O'Meara* [2011] 3 I.R. 547 and *AA v. The Medical Council and Attorney General infra.*

56. *Res Judicata* is a matter of defence and must be raised in the proceedings. In order to succeed in this defence the party relying upon it must establish and satisfy the following criteria:-

(a) That there was a judgment of a court or tribunal exercising a judicial function of competent jurisdiction;

(b) That the decision must have been a final and conclusive judgment;

(c) That there be an identity of the parties or their privies; and

(d) That there is an identity of subject matter.

See *McConnon v. President of Ireland & Ors infra*.

Cause of action estoppel.
57. *Res Judicata* in its strict sense is best understood as applying to or consisting of cause of action estoppel and issue estoppel. The former was described by Diplock L.J. in *Thoday v. Thoday* [1964] 2 WLR 371 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 existent or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties".*

See also the decision of the Supreme Court in *White v. Spendlove* [1942] IR 22.

Issue estoppel.
58. As to the latter, issue estoppel is said to arise from the fact that an adjudication upon a cause of action may involve the determination of many different issues. This form of estoppel involves the determination of the same issues as are sought to be litigated in subsequent proceedings and was described by Gibson L.J. in *Shaw v. Sloan* [1982] N.I. 393 in the following terms

> *"Before estoppel of an issue can arise there must have been a final determination of the same issue in previous proceedings by a court of competent jurisdiction and the parties bound by this earlier decision must have been either the same parties as are sought in the later proceedings to be estopped or their privies."*

See also *Donoghue v. Browne* [1986] I.R. 90; *Gilroy v. McLoughlin* [1988] I.R. 44; *McCauley v. McDermott* [1997] 2 ILRM 486; *McGuinness v. Motor Distributors* [1997] 2 I.R. 171. The doctrine applies and the defence of *res judicata* may be raised even though there is an appeal pending from the judgment and order of the court relied upon to give rise to the defence. See *McConnon v. President of Ireland & Ors infra*.

Requirements.

(A) Judgement of a court or tribunal.
59. In relation to the first of the requirements which must be satisfied, the doctrine will apply not only to a court of competent jurisdiction but also to a tribunal exercising a judicial function with jurisdiction to enter upon the adjudication and to make the order or declaration sought.

(B) Final and conclusive judgement.

60. As to the second of the requirements, the judgment must be final, conclusive and made on the merits even though it be the subject of an appeal. See *McConnon v. President of Ireland & Ors infra* and *Bradshaw v. M'Mullan* [1920] 2 I.R. 412 at p.424. Where Lord Shaw stated

> *"…the overruling consideration with regard to res judicata is that there should have been a judicium. That is to say, that the merits of the identical dispute between the identical parties, on the identical subject matter, and on the same media, should have been settled by judgment. The judicial mind should have been applied to it. This is the principle, familiar and fundamental".*

The discontinuance of an action in accordance with O.26 of the Rules of the Superior Courts will not give rise to an estoppel nor is a bar to fresh proceedings created by the dismissal of an action for want of prosecution or because it is premature. Though an estoppel per *res judicata* may be raised on foot of a default or consent judgment the written consent of the parties which is received by and made a rule by order of the court with further proceedings being stayed does not operate as an estoppel since there is an absence of an adjudication of the court upon the issues raised by the parties. See *Kinsella v. Byrne* [1940] 74 ILTR 157 and *Kinsella v. Connor* [1942] 76 ILTR 141. The order of the court determining an action but without proceeding to the merits will not constitute a final judgment. See *Murrin v. Sligo County Council* [2005] IEHC 405 where a plea of *res judicata* failed in circumstances where although the defendants had both been parties to an earlier action brought by the driver of a lorry, the issue between them in relation to liability remained to be dealt with, the previous action having been struck out against the second named defendant but without a determination of that issue on the merits.

(C) Identity of parties

61. As to the third requirement that the parties or their privies in law must be the same and must sue and be sued in the same capacity, O'Donnell L.J. in *Shaw v. Sloan infra* stated that:-

> *"Privity means something more than being interested in the outcome. It must involve such interest as would enable the privy to have a voice or say in how the proceedings are, or will be conducted or concluded. Any other meaning could operate to cause grave injustice to servants or agents, who while not parties to the proceedings, and having no voice in their conduct, could be held to be bound by them."*

In the same case Lowry L.C.J. at p. 396 stated that a person was a privy of a party

> *"…by blood, title or interest when he stands in his shoes and claims through or under him".*

See also *Reamsbottom v. Rafferty* [1991] 1 IR 531, *Lawless v. Bus Eireann* [1994] 1 IR 474 *McCauley v. McDermott* [1997] 2 ILRM

486.

(D) Identity of subject matter

62. There must be an identity of subject matter so that in the case of cause of action estoppel this will arise only arise where the causes of action are exactly the same, likewise, issue estoppel can only be successfully pleaded where the same issue has previously been decided on the merits. The fact that an issue may have been raised in the pleadings is insufficient if that issue is not in contention between the parties and it has not been adjudicated upon.

Application
63. Finally, even where all of the requirements would, on the face of it, appear to be met, it does not necessarily follow in every case that this doctrine will operate as a bar to proceeding with the action or on the issue. Having regard to the terms of Article 6 of the European Convention on Human Rights and given that the citizen has a constitutional right of access to the courts as regulated by law the court when applying the doctrine in any given case is authorised by the existence of such rights and where warranted on the facts to abstain from a rigorous application of the doctrine in circumstances where to do so would work a manifest injustice. See *McCauley v. McDermott infra* and *Foley v. Smith* [2004] IEHC 299.

The rule in Henderson v. Henderson.
64. The defendants have submitted that insofar as the plaintiffs are seeking to reframe an issue which was raised in the previous proceedings or are seeking to litigate on a matter which was not determined or raised then those are issues or matters which come within the parameters of or are otherwise caught by the so called rule in *Henderson v. Henderson*.

65. The rule was stated in the following terms by Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100 in the following terms:

> *"(W)here 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 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 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."*

See also the judgment of Palles CB in *Cox v. Dublin City Distillery Co. Ltd* (No. 2) [1915] 1 I.R. 345.

The Rule and Res Judicata distinguished.
67. There is a distinction to be drawn between *res judicata* and the rule in *Henderson and Henderson* which was described by Clarke J. in *Moffitt v. Agricultural Credit Corporation Plc* [2007] IEHC 245, [2008] 1 ILRM 416 as follows

> *"Res Judicata per se applies where the matter sought to be litigated has already been decided by a court of competent jurisdiction. Res Judicata can relate to the cause of action (which may involve a consideration of whether two separate causes of action arise) or an individual issue (issue estoppel). In the latter case the issue sought to be litigated must be identical to the issue decided in the previous proceedings…the rule in Henderson v. Henderson, on the other hand, applies where a new issue is raised which was not, therefore, decided in the previous proceedings but is one which the court determines could and should have been brought forward in the previous proceedings.*
>
> *The importance of the distinction lies in the consequences. If a matter is res judicata then, in the absence of a defence to the application of the doctrine such as fraud, the availability of fresh evidence in respect of issue estoppel only, estoppel, or other special cases, the plea will necessarily succeed.*
>
> *On the other hand, where reliance is placed on the rule in Henderson v. Henderson to the effect that it would be abuse of process to now allow the party concerned to raise a different issue which could have been raised in the original proceedings, it is well settled that the court adopt a more broad based approach."*

68. The material difference between the two is that in the case of strict *res judicata* so called the court has no discretion whereas under the rule in *Henderson v. Henderson* the court retains a discretion to take into account any relevant circumstances necessary for the purposes of assessing whether the maintenance of the relevant claim amounts to an abuse of process.

69. In his judgment in *Mount Kennett Investment Company and Others v. O'Meara and Others infra* Clarke J. dealt with the situation which arises from a claim which was before the court in previous proceedings but which was not dealt with in the final order of the court as follows:

> *"A claim which was before a court and is not dealt with in the courts order, needs careful consideration before it is placed in one or other category. If the appropriate inference in all the circumstances of the case is that the issue is considered by the judge and found against the relevant party (even, perhaps, in the absence of an express statement in the judgment or order to that effect), then it seems to me that it would be appropriate to place such a claim in the strict res judicata box. The claim has, by inference, been considered and rejected by a court of competent jurisdiction. It cannot be reactivated without setting aside the original order in material part and that can only be done on the basis of fraud or other similar serious wrong doing.*
>
> *On the other hand, where an aspect of a case is before the court and is not dealt with, it may be appropriate to infer that the relevant party had abandoned that aspect of their claim. In those circumstances it seems to me that, strictly speaking, it is not appropriate to consider an attempt to re-litigate that aspect of the case under the heading of res judicata. It would, however, fall under very careful scrutiny under Henderson v. Henderson [1843] 3 Hare 100. The fact that the case has been brought and abandoned would be a very significant consideration leaning heavily against the court exercising any discretion it might have to allow it to be re-litigated. In those circumstances it would seem to me that a case brought and abandoned would face an even greater struggle than a case not brought in the first place.*
>
> *However, where, as here, the proper inference to draw is neither that the claim was dismissed or that it was abandoned but rather that the judge agreed that it be deferred, then it is hard see how it would be an abuse of process to allow it to be reactivated."*

70. With regard to rules of justice intended to protect a party against oppressive and vexatious litigation such as that in Henderson v. Henderson

Hardiman J. in his judgment *A.A. v. The Medical Council and the Attorney General infra* stated

> *"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."*

71. In the same judgment Hardiman J. also appears to have approved of the approach of Lord Bingham to the rule in *Johnson v. Gorewood and Co*. [2002] 2 A.C. 1 where he said at p. 31 para

> *"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 early proceedings it should have been, so as to render the raising of it in 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, 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. 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."*

72. It follows from the foregoing authoritative statements in relation to the rule, how it should be applied, and which I adopt, that it must not be applied in a way or manner which would have the effect of depriving or fettering the court in the exercise of its inherent jurisdiction to make an order on an application where the rule is invoked, as it has been here, and that that is particularly so where special circumstances exist and which, having due regard to those, the application of the rule in a rigid or mechanical manner would in the result be unjust.

Application of the law and decision.
(72). On the evidence before the court it is clear that the second named defendant was not in any capacity a party to the previous proceedings. It follows that one of the essential ingredients necessary to constitute a plea of *res judicata* in any proceedings, namely the identity of the parties in the same respective interests or capacity is, on the face of it, absent. As to that the defendants submitted that the joining of the second named defendant in these proceedings was, in essence, nothing more than a device to defeat the application of the doctrine of *res judicata* but even if that were not so they submit that the second named defendant was the privy of the first defendant and that, accordingly, the doctrine applies and the plaintiffs are now estopped.

73. It is quite apparent from a reading of the statement of claim in the previous proceedings that that action was brought to recover the balance of €320,000 on foot of an agreement pleaded to have been made between these plaintiffs and the first and third defendants in the previous proceedings. Deirdre McDonald, the second named defendant in these proceedings, was not a party to the contract at para. 4 (a) infra, being the agreement which had been varied by the agreement at 4(d) infra, and which had provided for the building of three houses by these plaintiffs, nor did she have any interest in nor was any claim made to that effect in those proceedings.

74. Whilst the first and second named defendants are husband and wife neither in law is the privy of the other by virtue of that relationship nor is she a privy by blood. The second named defendant had no legal title or interest in the contract at 4 (a) above. She was not in any way a party to nor was it asserted that she benefited or was entitled to benefit from the agreement at 4. (d) infra. Whilst the first and second defendants were clearly possessed of the same interest in the agreement at 4 (b) infra, it was not in respect of that contract that the first and third named defendants in those proceedings sought payment of €320,000 but, rather, on the basis of the contract at para. 4 (d) infra, moreover, it is my view on the evidence that the second named defendant did not possess in law an interest in the outcome of the claim of the first and third named defendants as plaintiffs in the previous proceedings such as would have enabled her to have a voice or say in how those proceedings were to be conducted or concluded, accordingly, the requirements to be satisfied in order to render her a privy of the first or third named defendants in law are not satisfied.

75. Whilst the judgment and order of the 17th July 2012 in the previous proceedings constitutes a final and conclusive judgment and decision of the plaintiff's cause of action in those proceeding to recover payment of €320,000 there was not, in my view, any adjudication on the merits of the second named plaintiff's cause of action arising as a result of the alleged negligence on the part of the first and second named defendants and pleaded in his counterclaim.

76. No cause of action in negligence was raised in the defence or counterclaim of the first named plaintiff in the previous proceedings so the doctrine of *res judicata* in the strict sense does not arise. Whether it should have been pleaded, as it was by the second named plaintiff in the these proceedings, is a matter to which I will return later in this judgment and which necessarily arises as a consequence of the inclusion of a plea of negligence by these plaintiffs against the first and second named defendants in the statement of claim herein and arising as a result of their use and occupation of the dwelling house.

77. Whilst the plaintiffs pleaded breaches of the contract and of the caretaker's agreements in the defences and counterclaims which they delivered in the previous proceedings, it is in my view abundantly clear from the transcript and from the judgment of the President that there was no adjudication on the merits of these claims either, a conclusion also consistent with the final order of the court.

78. Even if there had been a final and conclusive judgment on the merits in respect of the second named plaintiff's action in negligence or the claim of both plaintiffs for breach of contract, that would not be *res judicata* as between the plaintiffs and the

second named defendant since she was neither a party nor a privy of the defendants in the previous proceedings or either of them. Furthermore, there was no adjudication on the merits in relation to the losses alleged to have been suffered by the plaintiffs as a result either of the breach of contract arising from the failure to deliver up possession of the dwelling house or as a result of it being rendered uninhabitable and that this is so is also consistent with the judgment and order of the 17th of July, 2012, accordingly, insofar as those issues were raised on the pleadings in the previous proceedings they too are not *res judicata*.

79. Turning to the claim of the second named plaintiff in these proceedings against the defendants for damages for assault, intimidation, harassment and loss of earnings and arising as a result of the wrongful actions of Viper Debt Recovery and Possession Services Ltd as agents of the defendants and in respect of which the second named plaintiff seeks to make the defendants vicariously liable, that case was pleaded by the second named plaintiff in his counterclaim in the previous proceedings. Whilst some evidence was heard in relation to that matter it is apparent not only from the transcript of the evidence but also from the judgment and order of the court that that claim could not and was not being considered or taken into account in diminution of the plaintiff's claim.

80. Whilst there was a finding of fact as to the conduct of the debt collection agency there was no final and conclusive judgment on the merits of the second named plaintiffs counterclaims in those proceedings and arising as a result of that conduct. Moreover, there was no adjudication in relation to the issue as to whether or not the first and third named defendants or either of them were vicariously liable for the actions of the debt collection agency in law, nor was there any evidence given in relation to or an assessment made in respect of the losses and damage alleged to have been suffered consequent upon the conduct in question and all of which is again consistent with the fact that no orders were sought or made on the counterclaims. Accordingly, it is the judgment of the court that as the requirements necessary to be satisfied have not been met in respect of the claim of the second named plaintiff against the defendants that claim is also not *res judicata*.

81. With regard to the question as to whether or not these claims should be struck out as an abuse of process pursuant to the rule in *Henderson v. Henderson*, it seems to me to be unnecessary to determine whether the second named defendant in these proceedings ought to have been joined as a defendant to the counterclaim in the previous proceedings or whether the first named plaintiff in these proceedings ought to have pleaded a case in negligence since, on the findings made and the conclusions to which I have come, the court in the previous proceeding confined itself to determining the plaintiff's claim to recover payment of €320,000, and more particularly because it was not mute in relation to these plaintiff's claims whether or not pleaded properly or at all.

82. A reading of the transcript judgment and order of the court does not permit a conclusion that the plaintiffs intended to or that they abandoned any of the causes of action pleaded in their counterclaims or otherwise which they wanted to pursue; the contrary is the case. The court was quite entitled to confine itself to a determination of the claim for €320,000. The plaintiffs, particularly having regard to the fact that they were neither legally advised nor represented in the previous proceedings, were entitled to conclude, as the evidence shows that they did, that those matters whether or not pleaded or particularised in their counterclaims were for another day not only because of what was said in the judgment but also because of what was said by the President in the course of the trial when the plaintiffs sought to introduce or otherwise lead evidence in relation to those matters .Accordingly , and insofar as it is necessary to do so, these are considered by me to constitute special circumstances within the meaning of the rule in *Henderson v. Henderson*, as it is now understood, and warrants the court in exercising its discretion by declining the relief sought on that ground; the court will so order.

83. Finally, having regard to the foregoing findings and conclusions there is not in my view any proper basis upon which the court could exercise its inherent jurisdiction to strike out these proceedings or any part of them on the grounds of either being frivolous or vexatious or otherwise as an abuse of the process of the court. Although not pursued at the hearing insofar as there may be non compliance with the Rules of the Superior Courts in connection with the endorsements on or form of the pleadings this is susceptible to remedy by order on application to the court.

84. I will discuss with counsel the final form of the order to be made and will entertain such applications as the parties may wish to make in relation to the other motions before the court having due regard to this judgment.