THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 229

Record No. 2016/10

High Court Record No. 2008 No. 4753P

Irvine J.
Whelan J.
Barr J.

BETWEEN/

ACC LOAN MANAGEMENT LIMITED

PLAINTIFF/ RESPONDENT

- AND –

GERALD STEPHENS

1ST NAMED DEFENDANT / APPELLANT

- AND –

MARYANNE (OTHERWISE KNOWN AS MARY ANNE M.) STEPHENS

2ND NAMED DEFENDANT

JUDGMENT of Ms. Justice Irvine delivered on the 27th day of July 2017

1. This is the first named defendant's ("Dr. Stephens") appeal against the judgment and order of the High Court (Gilligan J.) dated the 11th November, 2015. By his order he declared, inter alia, that ACC Loan Management Limited ("ACC") was entitled to a first legal charge over the defendants' interest in the lands and premises comprised in Folio 11109F for the Register of Freeholders, County Mayo on foot of an agreement ("the loan facility") entered into by Dr. Stephens and his wife, Maryanne Stephens ("Mrs. Stephens") on the 6th February, 2004.

2. By his order the High Court Judge directed that Dr. Stephens complete an indenture of mortgage and charge dated the 18th February, 2004 and that, should he default in so doing, an officer of the court be directed to complete same on his behalf. He also made an order that ACC recover as against Dr. Stephens the costs of the proceedings, same to be taxed in default of agreement. An indenture of mortgage and charge was already executed on behalf of Mrs. Stephens pursuant to the Order of the High Court (Murphy J.) dated the 15th February, 2010 made in related proceedings and therefore, Mrs. Stephens is not a party to this appeal.

The High Court Proceedings

3. By proceedings commenced on the 12th June, 2008, ACC sought, inter alia, a declaration that on foot of a loan agreement for the sum of €400,000 made between the parties on the 6th February, 2004 it was entitled to a first legal charge over the defendants' interest in the lands and premises comprised in Folio 11109F of the Register of Freeholders, County Mayo. ACC sought an order for specific performance of that agreement and an order directing Dr. and Mrs. Stephens to complete an indenture of mortgage and charge dated the 18th February, 2004 in respect of the aforementioned lands and premises.

4. ACC maintained that it was a term and condition of the loan facility that Dr. and Mrs. Stephens provide security to it in the form of a first legal charge in respect of their interests in the lands and dwelling house comprised in the aforementioned folio. ACC claimed that in reliance on the representations of its customers in this regard, it had advanced the sum of €400,000 which Dr. and Mrs. Stephens drew down on 1st March, 2004. ACC further claimed that, in breach of that agreement, they had refused to furnish the security as agreed.

5. The bank claimed that as a result of the breach of contract and misrepresentation on the part of Dr. and Mrs. Stephens it had suffered loss and damage insofar as it had been left without the security intended to support the aforementioned borrowings, namely the first legal charge over Folio 11109F of the Register of Freeholders, County Mayo.

Relevant background facts

6. Apart from the details provided in the preceding paragraphs, the following uncontroverted facts are also material to the appeal.

7. On the 13th February, 2004, Mr. Philip Clarke, a principal in the firm of Ledwidge Solicitors, executed a solicitor's undertaking on behalf of his clients, Dr. and Mrs. Stephens, to issue, stamp and lodge for registration an indenture of mortgage and charge creating a first legal charge over Folio 11109F of the Register of Freeholders, County Mayo within one month following receipt of the loan cheque. In May 2004, Mr. Clarke paid out to Dr. and Mrs. Stephens the funds which had been drawn down on foot of the loan agreement. At that time, he believed his clients had signed the indenture of mortgage and charge. His retainer was later terminated in October 2004.

8. On 16th August, 2006, the bank's solicitors, G.J. Moloney and Co. wrote requesting that the deed of mortgage and charge be executed urgently. Mr. Clarke replied stating that the undertaking earlier given would be complied with.

9. On 15th July, 2007, Dr. Stephens provided reassurance to ACC that he and his wife would execute the deed of mortgage and charge. In early 2009 however, and on the advice of an U.S. attorney, Dr. and Mrs. Stephens indicated that they would not sign the deed of mortgage and charge unless ACC increased the earlier loan facility to 65% of the value of the property, an ultimatum which the bank rejected.

10. On 2nd December, 2008, Mr. Clarke commenced plenary proceedings against his former clients seeking an order for specific

performance directing them to execute the deed of mortgage and charge in favour of ACC. In the High Court, Murphy J. made such an order on 15th February, 2010 and further ordered that, in the event of default by the defendants in the execution of the deed, it should be executed by a named High Court Registrar on their behalf. Only Dr. Stephens appealed that order with the result that when Mrs. Stephens failed to execute the required deed of charge same was executed in her stead by Ms. Paula Healy, High Court registrar, as per the terms of the court order. ACC was not aware that the deed of mortgage and charge had been executed on behalf of Mrs. Stephens when it commenced these proceedings. It only became so aware in the course of the trial and as a result only sought the relief claimed against Dr. Stephens.

11. In May 2010, the Supreme Court set aside the order of Murphy J. insofar as it concerned Dr. Stephens and remitted Mr. Clarke's claim for specific performance back for hearing in the High Court. Mr. Clarke did not continue further with those proceedings.

12. The final matter that needs to be mentioned is the fact that Dr. and Mrs. Stephens did not honour their repayment obligations on foot of the loan agreement. As a result of their default, ACC commenced summary summons proceedings against them. In those proceedings (Record No. 2007/2253S) by order of the High Court (Ryan J.) dated 31st May 2012, ACC was granted judgment against Dr. and Mrs. Stephens in the sum of €775,234.57, together with an order providing for its costs of the proceedings when taxed. That decision is under appeal to this court in separate proceedings.

13. Having regard to the submissions made by Dr. Stephens on this appeal, I have decided to set out in a brief chronology some of the dates that are material to my decision.

Chronology

17th December 2007: ACC issues summary summons proceedings against Dr. and Mrs. Stephens.

12th June 2008: Plenary summons

2nd December 2008: Mr. Clarke commenced plenary proceedings.

15th February 2010: The High Court granted judgment in default of defence against Dr. and Mrs. Stephens.

May 2010: Supreme Court set aside the order of Murphy J. against Dr. Stephens and remits the matter to the High Court for hearing.

14th August 2012: Dr. and Mrs. Stephens appeal the judgment of Ryan J. to the Supreme Court.

10th December 2012: ACC issued a motion to renew the plenary summons.

10th January 2013: Appearance of first defendant.

18th January 2013: Appearance of second defendant

5th June 2013: Judgment of Laffoy J. on ACC's motion to renew its summons.

16th September 2013: Statement of Claim

2nd December 2013: Defence of first and second defendants

4th April 2014 Reply to defence

24th April 2015: Notice of trial

14th October 2015: Notice to produce

11th November 2015: Judgment of Gilligan J.

The issues in the within proceedings

14. It is important in the context of the present appeal to identify the issues which were live for the consideration of the High Court judge on the pleadings. Because the defence filed by Dr. and Mrs. Stephens was a limited one, for ease of reference I have decided to set it out full.

Defence: 2nd December 2013

1. The plaintiff is precluded from proceeding in this action under the doctrine of *Res Judicata* wherein:-

(a) judgment was given in favour of the Plaintiff in High Court 2007 No. 2253S precluding it from raising claims (in any future litigation) which were raised in (or could have been raised) in High Court 2007. No 2253S:

(b) the current High Court 2008 4753P and High Court No. 2007 to 2253S share a common at nucleus of operative fact:

(c) the parties in the above cases are identical:

(d) there is final judgment on the merits in the original litigation of High Court 2007 No. 2253S

2. The plaintiff is guilty of *Laches* wherein it exhibited a lack of diligence, inexcusable and unreasonable delay in its assertion of rights. The delay resulted in prejudice and economic injury to the Defendants. It precluded application of

assets that earlier could have been used to satisfy the claim but distributed in the interim.

15. As can be seen from the aforementioned defence, the defendants did not seek to challenge the conditions that ACC maintained governed the drawdown of the loan for €400,000 nor their obligation to provide security for those borrowings in the form of a first legal charge over the lands and premises contained in Folio 11109F of the Register of Freeholders, County Mayo.

16. The proceedings, which were advanced solely as against Dr. Stephens, were heard before Gilligan J. over a period of four days in November 2015. Whilst Dr. Stephens cross examined a number of the witnesses called on behalf of ACC, he himself did not give evidence and neither did he call any evidence in support of his defence.

17. Also relevant to the within appeal is the fact that on the second day of the proceedings, the trial judge permitted Dr. Stephens to amend his defence to rely upon what he described as a "defence of no transaction". No amended defence was delivered but the making of an order in those terms is recorded in the High Court Order of the 11th November, 2015. It is also material to this appeal that on day three of the trial, Dr. Stephens requested the trial judge to recuse himself from further hearing the claim on the grounds that he had, by the manner of his approach to the proceedings up to that time, demonstrated bias.

Judgment of the High Court Judge

18. In his judgment, the High Court judge recorded that it was accepted by Dr. Stephens that it was a term and condition of the loan agreement of February 2004 that ACC would be provided with a first legal charge on the defendants' interest in the property and lands contained in Folio 11109F of the Register of Freeholders, County Mayo. He also referred to the fact that whilst ACC had, on the 31st July 2012, obtained summary judgment against both defendants for a sum of €775,234.57 it held no security in respect of that judgment.

19. Relevant to the order for specific performance claimed by ACC was the High Court judge's acceptance of the evidence of Mr. Clarke to the effect that he had been authorised by Dr. and Mrs. Stephens to give the undertaking to ACC concerning the provision of the first legal charge over their interest in the aforementioned property and also that his retainer had later been terminated.

20. Material to the defence of *laches* advanced by Dr. Stephens was the trial judge's acceptance of the evidence of Mr. Donnacha O'Donovan, solicitor of G.J. Moloney, that until 20th May, 2009 he had no reason to believe that the Stephens would not execute the deed of charge and that the reason he had not pursued the action on behalf of ACC seeking specific performance against Dr. and Mrs. Stephens was because Mr. Clarke had commenced an action looking for precisely that relief. However, when in 2012 those proceedings had not been progressed, he commenced proceedings on behalf of the bank.

21. The High Court judge rejected Dr. Stephens' claim that ACC had been guilty of *laches* such that it should be denied the equitable relief sought. In doing so, he referred to the fact that initially ACC had received promises from the Stephens that they would execute the deed of mortgage and charge. The trial judge also relied upon the fact that when making her order of June 2013 permitting ACC to renew the plenary summons which it had issued on the 12th June 2008 Laffoy J. had concluded that the reasons advanced by the bank for failing to serve the summons over the previous period had been reasonable. He expressed himself satisfied that it was reasonable for the bank to have refrained from issuing proceedings, which would have duplicated those which had been commenced by Mr. Clarke. The trial judge concluded that once the plenary summons had been renewed, the claim had been heard relatively promptly in November 2015. Allied to this conclusion, the trial judge noted that Dr. Stephens had not identified any prejudice as a consequence of the delay complained of.

22. The trial judge also rejected Dr. Stephens' defence to the effect that the claim of ACC was *res judicata* by reason of its pursuit of its summary summons proceedings in which it had obtained judgment. That was, he concluded, a separate claim arising out of the failure of Dr. and Mrs. Stephens to make repayments of their borrowings on foot of the loan agreement. It was the trial judge's view that the summary judgment did not create either cause of action or issue estoppel.

23. The High Court judge also rejected Dr. Stephens' submission that the rule in *Henderson v. Henderson* (1843) 3 Hare 100 had any applicability to the facts of the present case and that being so, it could afford Dr. Stephens no defence to the relief sought.

24. Finally, Gilligan J. expressed himself satisfied that a valid and enforceable contract existed between the parties for which consideration had been provided and the written terms set out in the letter of loan sanction were sufficient for such purpose. That being so, ACC was entitled to the relief claimed with the result that he granted the declaratory relief sought and made the orders for specific performance as claimed.

The appeal and the submissions

25. By notice of appeal dated the 5th January 2016, Dr. Stephens seeks to challenge the judgment and order of Gilligan J. on seventeen stated grounds. Unfortunately, notwithstanding the fact that he was afforded several opportunities so to do, Dr. Stephens decided against filing any written submissions. For this reason it is more difficult to summarise the arguments he pursued on the appeal. That notwithstanding, what follows is what I consider to be a fair and reasonable synopsis of his submissions.

26. Dr. Stephens submits that the trial judge erred in law in the approach he took to his defence of *laches*. In particular, he complains that he failed to have regard for the delay on the part of ACC from the time it was aware it had a valid cause of action arising out of his failure to execute the deed of mortgage and charge in 2004. There was, according to Dr. Stephens, no justification for ACC's failure to process its claim between 2004 and 2007. Likewise, Dr. Stephens submits that the ACC was not entitled to delay the pursuit of its claim against him for his failure to execute the deed of mortgage and charge based upon the hope that the proceedings commenced by his former solicitor, Mr. Clarke, would achieve that result on its behalf.

27. Dr. Stephens further submits that the trial judge erred in his treatment of his defence in reliance upon the doctrine of *res judicata* and based upon the rule in *Henderson v. Henderso*n (1843) 3 Hare 100. Dr. Stephens argues that ACC should have brought all of its claims, including its claim for specific performance of his agreement to provide a first legal charge over the lands and premises contained in the relevant folio at the time it commenced its summary summons proceedings seeking judgment for the sum outstanding on the loan agreement. The parties to the summary summons proceedings were the same as those in the present proceedings and, according to Dr. Stephens, the facts and issues concerned therein were the same. That being so, in circumstances where ACC chose to pursue its action for summary judgment and at the same time did nothing to advance its claim seeking specific performance in respect of the deed of charge, it should in equity be precluded from maintaining the later claim. It is Dr. Stephens' position that the judgment which ACC obtained in the summary summons proceedings put an end its entitlement to litigate the same issue again in the present proceedings.

28. Dr. Stephens also claims that he was not afforded a fair hearing by the High Court judge. He maintains that the High Court judge

interfered with his cross examination of the witnesses called on behalf of ACC such that he was not in a position to bring to the court's attention all of the facts which he considered material to the proper and just determination of the proceedings.

29. Finally, Dr. Stephens maintains that the trial judge, by the manner in which he conducted the proceedings, demonstrated bias with the result that he should have acceded to the application which he made that he discharge himself from hearing the case.

30. Written submissions were filed on behalf of the bank which may be summarised as follows. Counsel for ACC highlighted the fact that Dr. Stephens has not disputed the fact that he received the moneys and that he has not met his obligations in repaying that debt.

31. In response to Dr. Stephens' argument in relation to *laches* in the period from 2004 to 2007, counsel for the bank submitted that they did not seek to commence proceedings as they had been given every indication from Dr. and Mrs. Stephens that they would execute the deed of charge. With regard to the alleged delay between 2008 and 2012 this was explained by the respondents as being due to the fact that Mr. Clarke had instituted proceedings seeking specific performance of the deed of charge and they felt it would be an unnecessary duplication for the bank to launch proceedings at that time. Once ACC became aware that Mr. Clarke was not continuing to pursue his claim, they did not delay in reactivating their own proceedings. The primary submission of the respondent in relation to the charge of laches is that this issue has already been decided by the High Court (Laffoy J.) when she allowed the bank to reissue the plenary summons and that decision has not been appealed. It was further submitted that Dr. Stephens cannot succeed in his claim of *laches* as any delay that may be established has not caused him any prejudice, he did not alter his position and he did not suffer any detriment.

32. In relation to Dr. Stephen's *res judicata* argument, counsel for ACC submitted that the summary judgment proceedings (Record No. 2007/2253S) concerned the recovery of a debt while the instant proceedings relate to the different issue of the execution of a first legal charge over the relevant property. Counsel for the respondent submitted that Dr. Stephens' submission in this regard may more properly fit under the rubric of the rule in *Henderson v. Henderson* (1843) 3 Hare 100. He outlined that the rule in *Henderson v. Henderson* is intended to prevent a situation where defendants would be subjected to recurrent litigation and that the facts of the instant case could not be characterised as such where the bank sought to recover its debt and when Dr. Stephens continued to refuse to pay they felt obliged to enforce his obligations in respect of the provision of the first legal charge over the property.

33. With regard to the "no transaction" defence, counsel for the bank submitted that Dr. Stephens' argument is misconceived as "no transaction" cases are concerned with the issue of quantum where a court is asked to measure damages as if the transaction had not occurred. It was further submitted that the case relied upon by Dr. Stephens of *ACC Bank plc v. Johnson* [2010] 4 I.R. 605 was an action by the bank against its own solicitor arising out of his contract of retainer and it bears no resemblance to the present case.

34. In response to Dr. Stephens' claim that he did not receive a fair hearing, counsel for the respondent accepted that the High Court judge did limit the issues that could be raised by Dr. Stephens during the trial. However, it was submitted that this was well within the authority and the function of the trial judge in order keep the appellant to the pleaded defence. Counsel for the bank submitted that the test to be applied in relation to bias on the part of the court is whether the reasonable person who is not unduly sensitive and has knowledge of the relevant facts would have a reasonable apprehension that the decision maker would not be fair and impartial. He further submitted that the High Court judge correctly applied this test upon the application for his recusal by Dr. Stephens and was correct in finding that Dr. Stephens had not met it.

Discussion and Decision

Laches

35. Having carefully considered the submissions of the parties, I can find no fault on the part of the trial judge in the manner of his approach to the defence raised by Dr. Stephens based upon the doctrine of *laches*.

36. *Laches* is of course an equitable doctrine open to a defendant who can establish that the plaintiff's delay in the manner of their approach to their claim is unfair and unconscionable to the point that they should be denied the relief to which they would otherwise be lawfully entitled. For my part, I am quite satisfied that the trial judge was correct, as a matter of law and fact, when he concluded that Dr. Stephens could not benefit from the application of this doctrine on the facts of the present case.

37. First, insofar as Dr. Stephens relies upon the period 2004 to 2007, the court had evidence that throughout that period Dr. Stephens and his wife had reassured the bank that they were willing to execute the deed of mortgage and charge. The evidence from Mr. O'Donovan was that, as late as the 16th December, 2007, the bank had been given to understand that the defendants would discharge their indebtedness. That, of course, would have released Dr. and Mrs. Stephens of their obligations to execute the deed. As we know, however, they did not discharge their liabilities. Further, by letter dated the 15th July, 2008 the bank received written assurance that the deed of charge would be executed. Thus, Dr. and Mrs. Stephens can hardly complain that the bank did not pursue them in an action for specific performance over this period.

38. That this was the state of affairs between the parties in late 2008 is evidenced by a letter of the 15th December, 2008 written by Mr. O'Donovan of G.J. Moloney noting the preparedness of Dr. Stephens and his wife to execute the deed of charge in accordance with the agreement reached with ACC. In that letter, which enclosed the original deed of charge in duplicate together with the draft Family Home Declaration, Mr. O'Donovan had quite properly reminded Dr. Stephens to take advice on the documents prior to their execution. No issue was taken with that statement by Dr. Stephens in his letter of reply dated the 26th January, 2009 in which he reported having sent the documentation to his Attorney-at-Law for review following which he would revert.

39. It cannot therefore be asserted that ACC was guilty of any culpable delay in failing to issue proceedings seeking specific performance at a time when it appeared likely that the deed of charge would be completed without the necessity to resort to expensive litigation.

40. Second, I am satisfied that the High Court judge cannot be faulted for his conclusion that ACC had not acted unfairly in its failure to pursue Dr. and Mrs. Stephens for specific performance at a time when it was aware that Mr. Clarke was pursuing them for precisely the same relief and that if he was successful in that action it would, without further proceedings, obtain the security to which it was entitled. If the bank had taken a different view and had decided to pursue its own claim for specific performance, Dr. and Mrs. Stephens might well have felt rightly aggrieved in so far as they would have been exposed to the cost and inconvenience of defending two High Court actions destined to achieve precisely the same result, i.e. the execution of the deed of charge.

41. Third, I accept the submission made on behalf of ACC that the High Court judge was correct as a matter of law when he concluded that he was not entitled, when considering the defence laches, to go behind the judgment of Laffoy J. (*ACC v. Stephens*

[2013] IEHC 264, 5th June 2013) wherein, in the context of the bank's application to renew its plenary summons, she concluded that ACC had good reasons to hold back serving its proceedings until such time as it became aware that Mr. Clarke did not intend to pursue his High Court action against the Stephens any further. The judgment of Laffoy J. was not appealed by Dr. and Mrs. Stephens and was, in such circumstances, binding on Gilligan J. concerning the delay on the part of ACC between the issue of the plenary summons and its renewal.

42. Fourth, relevant also to the correctness of the decision of the High Court judge concerning the defence of *laches* is the fact that once ACC was made aware of the fact that Mr. Clarke was not pursuing the High Court proceedings against the Stephens following the remittal of the action to the High Court by the Supreme Court, the bank moved with reasonable expedition. That was a finding that was well supported by the evidence.

43. Finally, before concluding on this issue, I should say that even if Dr. Stephens was in a position to establish some error on the part of the High Court judge in his treatment of the delay on the part of ACC in pursuing its claim for specific performance, he could not in any event have succeeded on this aspect of his appeal as his submission is fundamentally flawed. For the purpose of determining whether a defence of laches can be sustained not only must a defendant prove that the plaintiff has delayed unreasonably in bringing their claim, but they must also be in a position to establish that as a result of that delay they have suffered some prejudice or detriment. (See for example Biehler, *Equity and the Law of Trust in Ireland*. 6th Ed., (Dublin, 2016)).

44. For the purposes of considering whether there was evidence upon which the trial judge could have concluded that Dr. Stephens suffered prejudice as a result of the bank's delay, I have considered the transcript of the evidence of the High Court hearing. Having done so, I am fully satisfied that there was no evidence upon which the High Court judge could have found that Dr. Stevens had satisfied this necessary element of the laches test. Not only did Dr. Stephens not give any evidence or call any evidence for the purpose of seeking to establish prejudice resultant upon the bank's delay but neither did he manage in the course of his cross examination to obtain any concession in this regard from the plaintiff's witnesses.

45. In these circumstances I am quite satisfied that the High Court judge was correct in law when he concluded that the defence of laches as per para. 1 of Dr. Stephens' defence had to fail.

***Res Judicata*: Consequences of Summary Summons Proceedings**

46. As to Dr. Stephens' submission that the High Court judge erred in law in failing to conclude that, because the summary summons proceedings had the same "nucleus" and the same parties as the specific performance proceedings, the doctrine of *res judicata* applied such that ACC had no entitlement to maintain the present proceedings, that is a submission which I must reject.

47. I fear from his submissions made in the course of this appeal that Dr. Stephens does not truly understanding of the doctrine of *res judicata*.

48. *Res judicata* is a doctrine that exists for the purposes of precluding the same parties from re-litigating an action that has already been finally determined by a court of competent jurisdiction. There are two aspects to the doctrine. The first concerns what is commonly called a "cause of action" estoppel which is destined to deny a party from re-litigating an action which has already been finally determined by another court. The second concerns "issue estoppel" which prevents parties to earlier proceedings litigating an essential feature or material issue, the subject matter of an earlier decision.

49. Accordingly, the starting point for this Court in relation to this aspect of Dr. Stephens' appeal is to consider whether the cause of action and/or any issue decided in the summary summons proceedings are the same as the cause of action and/or any issues in these proceedings. The answer is a resounding "no".

50. ACC's cause of action in the summary summons proceedings is completely different from that which is the subject matter of the present proceedings. In the summary summons proceedings, the claim of ACC was for judgment in the sum to which it maintained it was entitled by reason of the failure of Dr. and Mrs. Stephens to meet their repayment obligations under the loan agreement. In contradistinction, in the present proceedings ACC claims to be entitled to seek the court's assistance to procure compliance by Dr. and Mrs. Stephens with their obligation to provide it with a first legal charge over the lands and premises in Folio 11109F of the Register of Freeholders, County Mayo as security for the loan hereinbefore referred to.

51. It is undoubtedly true that common to both sets of proceedings was the loan agreement of the 6th February, 2004. However, that is where the overlap in the proceedings begins and ends. Not only are the causes of action different in both sets of proceedings, but the issues are entirely different. The summary summons proceedings did not touch upon any of the issues that required determination in these proceedings. The court was not asked to consider whether there was a binding agreement that required Dr. and Mrs. Stephens to provide security for the loan and if so, whether they were in default in that regard. Neither was it asked to make any orders requiring them to perform their obligations thereunder.

52. For these reasons, I am satisfied that the High Court judge was correct as a matter of law to conclude that the doctrine of res judicata had no application on the facts of the present case.

53. I also reject Dr. Stephens' submission that the High Court judge erred in law in failing to conclude that the bank was not entitled to pursue the within proceedings because it had not sought an order for specific performance of the agreement concerning security for the loan transaction in its summary summons proceedings. This was an argument which Dr. Stephens sought to pursue in reliance upon the doctrine in *Henderson v. Henderson*. Once again, I am drawn to the conclusion that Dr. Stephens' submission is based upon a misunderstanding of the legal principle upon which he seeks to rely.

54. The rule in *Henderson v. Henderson* (1843) 3 Hare 100 has its origins in the following extract from the decision of Wigram V.C. in that case were he stated as follows:-

> "[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, inadvertent, 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."

55. Where the doctrine of res judicata differs from the rule in Henderson v. Henderson was set out by Clarke J. in *Moffitt v. Agricultural Credit Corporation plc* [2007] IEHC 245 at paras. 3.7 to 3.9:-

> "*Res judicata* per se applies where the matter sought to be litigated has already been decided by a court of competent jurisdiction. (…) 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 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, 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 an 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 adopts a more broad-based approach."

56. Bearing in mind the limited circumstances in which the rule in Henderson v. Henderson may be deployed, the question that this Court must consider is whether the High Court judge was correct when he concluded that the claim made by ACC in the present proceedings is not one that could and ought to have been made in the summary summons proceedings.

57. I have no doubt that the High Court judge was correct in the conclusion which he reached. First, only a limited class of claim may be pursued by way of summary summons (see Ord. 2 of the Rules of the Superior Courts). A plaintiff may not pursue declaratory relief or a claim for specific performance on a summary summons. Accordingly, it was not possible for the bank, in pursuing its summary summons proceedings, to have included a claim for the relief that has been sought in the present action.

58. Second, there was no obligation on the bank to bring forward its claim for specific performance at the time it issued its summary summons proceedings. If Dr. and Mrs. Stephens had responded to those proceedings and had decided to honour their agreement with ACC and discharge the judgment obtained against them, there would have been no need for the within proceedings. The bank was not obliged to anticipate that they would not repay their indebtedness once judgment was obtained. Further, it cannot reasonably be contended that these two actions taken by ACC against Dr. and Mrs. Stephens could ever be characterised as recurrent litigation because the claims are entirely different and the second being an action necessitated only by the default of the Stephens in their contractual obligation to pay the debt in the first instance and then to provide the legal charge by way of security. Further, Dr. and Mrs. Stephens appealed the summary judgment to this Court thus giving the bank further justification for pursuing its entitlement to the security agreed between the parties in 2004.

59. As to Dr. Stephens' submission that ACC should have brought all possible claims open to them at the time they issued the summary summons proceedings, that is a submission for which there is no legal authority. What the rule in *Henderson v. Henderson* required is that a party who makes a particular claim and launches a particular cause of action will advance all of the arguments in support of that proposition in those proceedings. In other words, if a plaintiff seeks summary judgment against a defendant it behoves the plaintiff to put forward all of the facts and legal arguments in that action. Having lost the action, they may not commence a fresh summary summons action relying upon different grounds that might and ought to have been advanced in the first proceedings.

60. What we are concerning on this appeal are two entirely different causes of action. The first concerns the recovery of a debt and the second the bank's right to obtain a first legal charge over certain property. There is no legal basis upon which it can be argued that the bank was under any obligation to pursue its claim for specific performance at the time it pursued the defendants for summary judgment.

61. It has to be said that there are many reasons why a bank, in circumstances such as those that pertained in the present case, may decide first to commence summary summons proceedings before considering whether it will take steps to enforce any security it may have. Often times, following a quick summary judgment, a defendant may discharge the entirety of the sum due in which case it is not necessary for the lender to pursue such rights as they may have on foot of any security they hold. Or, if the lender considers that its security may not cover the customer's indebtedness, it may seek to obtain an expeditious summary judgment in order to register that judgment as a charge against some other property of the debtor.

62. My conclusions on this particular issue can be supported by reference to the decision of the English Court of Appeal in *Securum Finance Ltd v. Ashton* [2001] Ch 291 at 302 where Chadwick LJ. stated that it could not:-

> "be argued that a secured creditor who chooses, in the first place, to sue for payment alone, is thereafter precluded from seeking to enforce his security in a separate action on the grounds that that was a claim that could have been advanced in the first action."

63. The trial judge was in my view, correct when at para. 39 of his judgment he concluded that the legal rights and obligations of the parties, as voiced in the present proceedings, were not determined in any other earlier judgment.

"No Transaction" Defence

64. Dr. Stephens submits that the trial judge erred in law in failing to dismiss the claim of the ACC based upon his "no transaction" defence. He relies in this regard, as he did in the High Court, on the decision in *ACC Bank v. Brian Johnston* [2010] 4 I.R. 605. Dr. Stephens argues that the bank had no entitlement to the relief sought against him in these proceedings in circumstances where it had permitted the loan monies to be drawn down at a time when the security documentation had not been put in place by Mr. Clarke. ACC had made the loan monies available at a time when the paperwork, namely the security, was not in order. The transaction had not been completed as agreed as a result of Mr. Clarke's default. Thus, ACC could not seek to enforce the agreement as against them and were left to pursue a remedy against Mr. Clarke for parting with the loan monies without first ensuring that the intended security was in place.

65. I have no difficulty in rejecting the submission made by Dr. Stephens based upon his "no transaction defence". The decision in *ACC Bank plc v. Johnson* is of no relevance to the facts under consideration in these proceedings. That was a case in which the ACC sued its own solicitor arising out of his contract of retainer with the bank in circumstances where he had negligently released monies to a client of the bank prior to ensuring the security required was in place. It is a decision which is of significance only insofar as it identifies the proper approach to the assessment of damages where one party claims that but for the negligence of another party they would not have proceeded with a particular transaction.

66. The facts in *ACC Bank plc v. Johnson* could not be further from the facts of the present case. It seems to me that Dr. Stephens believes that somehow his agreement with ACC is unenforceable because he received the monies without executing the deed of charge. Thus he contends that the agreement between himself and ACC is in some sense to be considered at an end and unenforceable. However, what Dr. Stephens simply chooses to ignore is that he has never disputed that he concluded a contract with ACC whereby he agreed that in return for the loan of €400,000, which he received, he would provide ACC with a first legal charge over his interest and that of his wife in the lands and premises contained in Folio 11109F of the Register of Freeholders, County Mayo. He has never disputed that he entered into a contract on such terms or his alleged failure to meet his obligations thereunder. His default and that of his wife in respect of their obligations thereunder has necessitated ACC in issuing two sets of legal proceedings against them. It is the apparent determination on the part of Dr. Stephens to take the benefit of the loan monies from ACC and avoid his liabilities thereunder that has brought him to where he is today. Whether Mr. Clarke is or is not to be faulted for releasing the loan monies prior to ensuring that they had signed the deed of charge, affords Dr. Stephens no defence in the context of the present proceedings.

Fair hearing and bias

67. For the purposes of considering Dr. Stephens' submission that he was not afforded a fair hearing by the trial judge, I have considered in detail the content of his notice of appeal, his oral submissions and the transcript of the High Court hearing. Having done so, I am satisfied that Dr. Stephens has not established that the hearing which was afforded to him was other than in accordance with the fair and proper administration of justice.

68. In coming to the aforementioned conclusion, I have paid particular attention to the specific parts of the transcript identified by Dr. Stephens in the course of his oral submissions to this Court. Dr. Stephens is correct when, in the course of his submissions, he states as a matter of fact that the High Court judge restricted him from pursuing certain matters with the bank's witnesses. However, when such interventions are viewed in the context of the issues which the court had to determine, I am quite satisfied that the trial judge properly exercised his discretion to ensure that Dr. Stephens did not engage with matters which were outside of the parameters of the issues that required determination.

69. A trial judge is obliged to ensure that proceedings are conducted in an expeditious manner and consistent with the proper administration of justice. He or she must ensure that litigation is confined to the issues that need to be resolved. This is so for several reasons. First, litigation is costly and parties should not be subjected unnecessarily to costs beyond those that are unavoidably incurred in order that there may be a proper determination of the dispute. Second, the court's own resources are limited and are in great demand and too much time spent on one case may deprive other litigants of an entitlement to be heard in other equally meritorious and perhaps even more meritorious claims. Third, judges must protect witnesses who come to give evidence from unjust attack unless same is warranted in the context of the proceedings.

70. Having read and considered the transcript, I am satisfied that on many occasions, Dr. Stephens tried to engage with issues which were not relevant to the proceedings and at times sought to make allegations of wrongdoing which were not central to the issues under consideration. Further, he appeared determined to adopt such an approach in circumstances where he was not prepared to expose himself to any cross examination concerning those matters nor was he willing to adduce any evidence to support his assertions.

71. Whilst I accept the submission made by Mr. Dunleavy SC that the trial judge acted favourably towards Dr. Stephens in agreeing to permit him amend his defence on day two of the hearing, that of course is not dispositive of Dr. Stephens' complaint that the High Court judge was biased and did not provide him with a fair and just hearing.

72. That being so, for the purposes of considering Dr. Stephens' submission to the effect that the evidence supports his contention that the High Court judge was guilty of bias such that he should have acceded to his application to recuse himself on the third day of the trial, I have reviewed the transcript bearing in mind the test for bias as set out in many of the leading decisions on the point such as *Ryanair v. Terravision London Finance Limited* [2011] I.R. 192. That test required the court to assess whether the hypothetical person, who was not unduly sensitive and had full knowledge of all of the relevant facts and circumstances, would have a reasonable apprehension that the decision maker would not be fair and impartial.

73. Reviewing the transcript of the High Court hearing and the interventions of the trial judge in the course of the proceedings and the manner of his engagement with Dr. Stephens, I am satisfied that Dr. Stephens' submission that the High Court judge was biased must fail.

74. I recognise that there are contained in Dr. Stephens' notice of appeal grounds of complaint additional to those which are dealt with in this judgment. However, such complaints are not properly constituted grounds of appeal and could not have any bearing on the decision which this Court is required to make on the appeal. That decision is whether, contrary to the assertions made by Dr. Stephens, the trial judge in the course of a properly conducted hearing was entitled to conclude that ACC had established its entitlement to the relief and orders sought in these proceedings. That being so, I have not found it necessary to address those matters.

75. For all of the aforementioned reasons, I would dismiss the appeal.