THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 131

[Appeal No: 2016/448]

Finlay Geoghegan J.
Hedigan J.
Whelan J.

Between/

Elektron Holdings Limited and Ann Keane

Plaintiffs/Appellants

and

Kenmare Property Finance Limited and Paul McCann

Defendants/Respondents

Judgment of Ms. Justice Finlay Geoghegan delivered on the 9th day of May, 2018.

1. This is an appeal against an order of the High Court (Twomey J.) made on the 27th July, 2016, striking out the plaintiffs' proceedings. The basis for the application made to the High Court and the reasons for which the Court made the order are set out in a written judgment delivered on the 25th July, 2015; *Elektron Holdings Limited and anor v. Kenmare Finance Property Finance Limited & anor* [2016] IEHC 438.

2. The first named appellant, Elektron Holdings Limited ("Elektron"), is the owner of Aberdeen Lodge in Sandymount, Dublin 4. It is a hotel or guest house and also the family home of the second named plaintiff ("Ms. Keane"), her partner Patrick Halpin ("Mr. Halpin"), and their children. Ms. Keane is a director of Elektron and claims a right to reside in the hotel.

3. The second named defendant ("the Receiver") is a receiver appointed inter alia over the assets of Elektron by Irish Bank Resolution Corporation Society Limited ("IBRC") by a deed of appointment dated the 17th September, 2012. The first named defendant ("Kenmare") claims to be the current owner of the loans originally made by Irish Nationwide Building Society Limited ("INBS") to Elektron and a related company Crossplan Investments Limited ("Crossplan") guaranteed by Elektron. Kenmare claims to have acquired the underlying loans from IBRC to which the business of INBS had been transferred in 2011.

4. The deed of appointment of 17th February, 2012 was made pursuant to six deeds of mortgage over Aberdeen Lodge (set out in its schedule) securing direct liabilities of Elektron to IBRC and securing guarantees given by Elektron for the liabilities of Crossplan to IBRC. At the time of appointment of the Receiver, IBRC had demanded repayment from Elektron of €986,397.90 and from Crossplan and also Elektron pursuant to its guarantee of Crossplan the sum of €25,170,660.24, which sums were not paid.

5. These plenary proceedings were issued by the plaintiffs on the 29th July, 2015. The High Court judge refers to these, for reasons which will become apparent, as the "2015 proceedings" and I propose doing likewise. A statement of claim was delivered on the 2nd March, 2016. In the 2015 proceedings the plaintiffs seek inter alia a declaration that the Receiver does not stand validly appointed as receiver of the assets of Elektron. They also seek an order directing Kenmare to release or vacate any security it holds over Elektron's property known as Aberdeen Lodge. They do so essentially on two grounds. First, it is contended that a guarantee given by Elektron to INBS in respect of the borrowings of Crossplan in or about 1998 was in breach of s.31 of the Companies Act, 1990, and has been validly avoided by Elektron on 15th September, 2014 ("the s.31 claim"). Secondly, it is contended that the appointment of the Receiver over the assets of Elektron and in particular Aberdeen Lodge ceased to have effect as of the date of the sale of the loans and related securities by IRBC to Kenmare ("the Loan Sale claim").

Earlier Proceedings

6. Prior to the institution of the 2015 proceedings there were three separate earlier related proceedings which are relevant to the High Court decision and this appeal. These were:-

(i) An originating notice of motion filed on 16th July, 2012 by the Receiver invoking s.316(1) of the Companies Act, 1963 (as amended) seeking declarations of validity of his appointment and certain directions in relation to the exercise of his powers as receiver the companies named in the title thereof, namely Elektron and Crossplan. Mr. Halpin and Ms. Keane were the respondents to that application (2012 No. 411 Cos) ("s.316 motion").

(ii) Possession proceedings pursuant to a special summons issued by the Receiver as plaintiff on the 13th July 2012 (Sp 379 2012) and initially naming Mr. Halpin and Ms. Keane as defendants. Elektron was later joined as a defendant to those proceedings by order of the High Court of the 17th October, 2012 ("the possession proceedings").

(iii) Plenary proceedings issued by Elektron as plaintiff on the 29th November, 2012 ([2012] 12134P), naming the Receiver, IBRC and the Attorney General as defendants ("the 2012 plenary proceedings").

7. The section 316 motion and possession proceedings were admitted to the commercial list prior to the commencement of the 2012 plenary proceedings. All three related 2012 proceedings were before the High Court (Charleton J.) on the 5th December, 2012, when he gave directions set out in an order made in the s.316 motion, but which related to all three sets of proceedings. They are referred to further below.

8. Shortly thereafter, the 2012 plenary proceedings were discontinued.

9. The section 316 motion and possession proceedings were later adjourned for plenary hearing, witness statements prepared and exchanged, and discovery made. Ultimately they were listed for hearing before the High Court (Peart J.) in September 2013, and on a

further date in October, 2013. The issues arising in those proceedings had been had been narrowed considerably at the commencement of the hearing before Peart J. It appears that the principal issue was the validity of the appointment of the Receiver over the assets of Elektron and Crossplan. Peart J. in a judgment delivered on 8th November, 2013, upheld the validity of the appointment of the Receiver and on 17th December, 2013, in the possession proceedings made an order for possession in favour of the Receiver of the property known as Aberdeen Lodge. In the same order Elektron was joined as a defendant in the possession proceedings. A stay was placed on the order for possession.

10. Mr. Halpin and Ms. Keane appealed the judgment and orders of the High Court in both the s.316 motion and possession proceedings to the Supreme Court. In June/July, 2014, they applied for and obtained a stay from the Supreme Court on the order for possession. The appeals were heard in the Supreme Court on the 9th February, 2016, and judgment was delivered (Laffoy J.: Dunne and Charleton JJ concurring) on the 11th March, 2016. There was a further short hearing before the Supreme Court on the 8th April, 2016 in relation to the order to be made and costs. It is common case that this was the first date upon which the Supreme Court was informed of the 2015 proceedings. The order made by the Supreme Court on 8th April, 2016, in the appeal in the possession proceedings was that the "appeal be dismissed and that the said order of the High Court [of the 17th December 2013 granting possession to the plaintiff] do stand affirmed accordingly". On that day there was a further application for a stay on the order for possession, and the Supreme Court made an order continuing the existing stay to the 6th May, 2016. Consequently the Receiver was entitled to possession of Aberdeen Lodge on 7th May, 2016.

High Court Motions in 2015 Proceedings
11. The plenary summons in the 2015 proceedings was issued on the 29th July and served shortly thereafter. An appearance was entered on the 25th August, 2015. The statement of claim was delivered on the 2nd March, 2016, i.e. between the Supreme Court hearing of the appeals in the s.316 motion and possession proceedings and the delivery of judgment.

12. On the 20th April, 2016, the defendants issued a motion seeking entry for the 2015 proceedings to the commercial list. On the 22nd April, 2016, the plaintiffs issued a motion seeking an injunction restraining Kenmare and the Receiver "from executing or attempting to execute a possession order in respect of Aberdeen Lodge…" until the determination of the 2015 proceedings. On the 25th April, 2016, the High Court (McGovern J.) admitted the 2015 proceedings to the commercial list and gave directions in relation to an exchange of affidavits in the plaintiffs' application for an injunction. Before that came on for hearing, the defendants issued a further motion on the 3rd May, 2016, seeking orders that the 2015 proceedings be struck out or dismissed both pursuant to the inherent jurisdiction of the Court, and O.19, rr.27 and 28 and related reliefs. Ultimately, both the plaintiffs' motion for an interlocutory injunction and the defendants' motion to strike out or dismiss came on for hearing together before Twomey J., and it is that hearing which gave rise to the judgment and order under appeal.

Decision of the High Court
13. The trial judge delivered a written judgment on the 25th July, 2016; [2016] IEHC 438 in which he sets out in full the affidavit evidence before him, the issues considered, and the reasons for his ultimate decision. He referred to the defendants' application to strike out the proceedings as being an abuse of process claim. As appears, he considered that he should first consider that motion, as the plaintiffs' interlocutory application would be of no relevance if the proceedings were to be struck out.

14. The trial judge identified the new grounds in the 2015 proceedings upon which the validity of the appointment of the Receiver is challenged as being the s.31 claim and the Loan Sale claim referred to above. The key issue identified by the trial judge was as to whether those claims could and should have been made in the s.316 motion or possession proceedings such that the plaintiffs are guilty of an abuse of process by instituting the 2015 proceedings.

15. The trial judge having considered the applicable law and each of the new claims in the 2015 proceedings set out his conclusion at para. 41 in the following terms:-

> *"41. For the reasons set out above, it is this Court's view that the claims set out by the plaintiffs in the July 2015 Proceedings could and should have been brought by them in the earlier s. 316/Possession proceedings, whether before the High Court or on appeal in the Supreme Court. It is this Court's view that it is likely that a tactical decision was taken by the plaintiffs to hold the s. 31 Claim and the Loan Sale Claim in reserve so as to seek to make a collateral attack on the Supreme Court decision, if, as turned out to be the case, the appointment of the receiver was upheld by the Supreme Court. As is evident from Vico v. Bank of Ireland, it is an abuse of process for a party to litigation to bring a claim in later proceedings that could and should have been brought in earlier proceedings. The subject matter of the July 2015 Proceedings could and should have been brought in earlier proceedings by plaintiffs and so this Court finds that the plaintiffs are guilty of abuse of process and strikes out the proceedings on that basis."*

The Law
16. It is not in dispute that the trial judge identified the correct principles deriving from the decision in *Henderson v. Henderson* [1843] 3 Hare 100. He referred to the decision in the High Court of McGovern J. in *Vico v. Bank of Ireland* [2015] IEHC 525 on the application of that rule by the Irish courts. This Court in the judgment delivered by me on the appeal in *Vico Limited and ors. v. Bank of Ireland* [2016] IECA 273 adopted the explanation of the rule given by Cooke J. in the High Court *in Re Vantive Holdings and ors and the Companies Acts 1963-2006* [2009] IEHC 408, para. 32-33 and cited on appeal by Murray C.J. *in Re. Vantive Holdings* [2012] 2 I.R. [2010] 2 I.R. 118, at p.124:-

> *"The rule in Henderson v. Henderson is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but to every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."*

17. As pointed out in *Vico*, the special cases referred to by Cooke J. are, primarily, those where the judgment was procured by fraud. In *Vico* at paras. 28 and 29, I cited the restatement by Lord Bingham of the rule in *Henderson v. Henderson* approved by the Supreme Court in this jurisdiction which is relevant in this appeal:-

> *"28. The restatement of the abuse of process rule from Henderson v. Henderson by Lord Bingham in Johnson v. Gore Wood & Co. [2002] AC 1 at 31, has been approved of by the Supreme Court in this jurisdiction in a number of cases including Re. Vantive Holdings [2010] 2 I.R. 118. There he stated:-*

'… But 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. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.'

29. In the same decision Lord Bingham addresses the position where one or more of the parties to the second set of proceedings was not a party to the first proceedings. This is relevant given the addition of Vico (which was not a party to the Gorse Hill proceedings) as a plaintiff in the current proceedings. Lord Bingham at p. 32 determined that the courts below in those proceedings had correctly rejected a submission that the rule in Henderson v. Henderson did not apply because the personal plaintiff, Mr. Johnson had not been a party to the first action, but rather a company had been. He then identified as the correct approach that formulated by Sir. Robert Megarry V.C. in Gleeson v. J. Wippell & Co. Ltd. [1977] 1 WLR 501, where he said:-

'Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'."

Submissions on Appeal

18. On behalf of the appellants, counsel accepts that the trial judge in application of the above principles correctly identified as the issue to be decided whether the new challenges to the validity of the appointment of the Receiver pursuant to the s.31 claim and the Loan Sale claim could and should have been made in the earlier s.316 motion or possession proceedings. However, he submits that the trial judge incorrectly applied the principles to the facts pertaining to each of the s.31 and Loan Sale claims.

19. In relation to the s.31 claim, some reliance is placed upon the fact that the challenge to the validity of the appointment of the Receiver was primarily raised by way of response to the directions sought by the Receiver in the 316 proceedings, and that s.316 does not permit Elektron, as the company to which the Receiver was appointed, to bring an application for directions pursuant to s.316. However, the primary submission made was that pursuant to s.38 of the Companies Act, 1990, a guarantee entered into in breach of s.31 of the 1990 Act is not void but is voidable at the instance of the company giving the guarantee and that the guarantees given by Elektron in respect of Crossplan's borrowings were only avoided by Elektron by a board resolution passed on the 15th September, 2014. Whilst it is accepted that the basis for the avoidance - namely that Elektron and Crossplan were connected persons within the meaning of s.31 but that Crossplan was not a subsidiary of Elektron (and as such entitled to benefit from the exemption in s.35 of the 1990 Act) - was known to the directors at the time of the s.316/possession proceedings in 2012, it is submitted that it only became of practical benefit to Elektron to avoid the guarantee when it was in a position to discharge its direct liabilities secured by the legal mortgage over Aberdeen Lodge. This, it is alleged, only occurred in September, 2014 after the High Court judgment.

20. The principal submission in relation to the Loan Sale claim is that the sale to Kenmare was only in 2014, and hence after the High Court judgment. It was notified to Elektron in June, 2014, and it is not in dispute that Ms. Keane was aware of it from that time.

21. The plaintiffs' Loan Sale claim is that the sale of the loans by IBRC to Kenmare in 2014 invalidates the continuing appointment of the Receiver who had been previously appointed by IBRC. The plaintiffs submit in reliance upon a number of decisions relating to O.58, r.8 of the Rules of the Superior Courts in relation to the discretion of the Supreme Court to hear new evidence on an appeal and the principles relating to its appellate jurisdiction, that this was not an issue which could or should have formed part of the appeals in the s.316 or possession proceedings in 2016. The plaintiffs also seek to rely on the fact that the solicitors for the plaintiffs had written to the Receiver's solicitors on the 12th March, 2015, expressly raising the issue as to whether the purported appointment of the Receiver by IBRC could survive the sale of the loans to Kenmare. They submit that the High Court should also have taken into account the fact that the Receiver was aware from that letter and the service of the 2015 proceedings in August, 2015, that the plaintiffs were challenging the continuing validity of the appointment of the Receiver after the sale to Kenmare. Finally, on this issue it is submitted that the absence of Kenmare as a party to the s.316/possession proceedings is relevant.

22. The appellants also submit that the trial judge incorrectly took into account comments of the Supreme Court in separate proceedings that Mr. Halpin's actions therein amounted to an abuse of process and that Mr. Halpin was a person who "looms large in

the consideration of the alleged abuse of process against Elektron and Ms. Keane". The appellants finally submit that certain findings made by the trial judge, in particular that the withdrawal of the 2012 plenary proceedings was a tactical decision on behalf of the plaintiffs and was done at the time by Elektron to hold in reserve the s.31 claim in case the High Court and Supreme Court in the s.316/possession proceedings upheld the validity of the Receiver's appointment, were unsupported by evidence.

23. The respondents submit that the trial judge was correct both in his identification of the issues and his application of the principles set out above deriving from the restatement of the abuse of process rule from *Henderson v. Henderson* by Lord Bingham in *Johnson v. Gore Wood*. The respondents rely upon the fact that the s.316 motion and possession proceedings commenced by the Receiver in 2012 were aimed at procuring a determination by the courts of the Receiver's entitlement to possession of Aberdeen Lodge. In relation to the s.31 claim, they submit that that claim could and should have been raised in the High Court either by pursuing the 2012 plenary proceedings discontinued by Elektron, or in response to the s.316 motion, or as a defence to the possession proceedings to which Elektron was joined as a defendant. They point out that in December, 2012, Ms. Keane was a director of Elektron, and the facts now contended to constitute a breach of s.31 and to entitle Elektron to avoid the guarantee then existed. They rely upon the directions given by the High Court (Charleton J.) on the 5th December, 2012, contained in the order of that date. It included a direction that the respondents (Mr. Halpin and Ms. Keane) deliver an affidavit in the s.316 proceedings *inter alia* setting out their claim in respect of the guarantees entered into by Elektron in favour of Crossplan and also the delivery within seven days of a statement of claim in the plenary proceedings. No statement of claim was delivered and instead the plenary proceedings were discontinued on the 19th December, 2012. The affidavits delivered setting out the claim in respect of the guarantees entered into by Elektron of Crossplan did not include any contention that they were given in breach of s.31 of the 1990 Act.

24. In relation to the Loan Sale claim it is submitted that it could and should have been raised before the Supreme Court by an application to admit fresh evidence. The respondents submit that it was clear that on appeal what the Supreme Court had to consider, inter alia, was whether or not the Receiver was, at the time of the appeal, entitled to an order for possession of Aberdeen Lodge, or to put it another way, that the then defendants to the possession proceedings, namely Mr. Halpin, Ms. Keane and Elektron, were or were not obliged to deliver up possession of Aberdeen Lodge to the Receiver. They submit that Twomey J. was correct in his consideration of the decision of the Supreme Court in *Fitzgerald v. Kenny* [1994] 2 I.R. 383 and since the Supreme Court was deciding in 2016 whether it would affirm an order of the High Court granting possession of Aberdeen Lodge to the Receiver that a challenge to the continuing appointment of the Receiver in reliance upon evidence of events which took place since the High Court judgment (i.e. Loan Sale) was a matter which could and should have been the subject of an application to the Supreme Court.

25. The respondents submit that the trial judge was entitled to draw the inference that he drew in relation to the probable tactical decisions and the probable involvement of Mr. Halpin is the same, but submit that the primary test is an objective one as to whether the plaintiffs in the 2015 proceedings could or should have pursued or sought to pursue the challenges to the validity of the appointment of the Receiver by reason of the s.31 claim both before the High Court and the Supreme Court, and sought to pursue the challenge based upon the loan sale claim in the appeal before the Supreme Court.

Discussion and Conclusion

26. The principle at issue in this appeal is the public interest in those who resort to litigation obtaining a final and conclusive determination of their disputes. When the Receiver instituted the s.316 motion for directions, and the possession proceedings in 2012, he was doing so for the purpose of the courts determining, *inter alia*, whether he was entitled to possession of Aberdeen Lodge. Aberdeen Lodge was owned by Electron, and Ms. Keane and Mr. Halpin together with their children were living in the premises and as officers or employees of Elektron carrying on a small hotel or bed and breakfast business in it. The primary dispute which the court was being asked to resolve was whether or not they were obliged to give up possession of Aberdeen Lodge to the Receiver.

27. First, in relation to the s.31 claim, Elektron and Ms. Keane (and Mr Halpin) were aware in 2012 of all the relevant facts upon which they seek to rely in the 2015 proceedings in contending that the guarantee given by Elektron was in breach of s.31 of the 1990 Act. Whilst I recognise that it is, of course, correct to say that a guarantee given in breach of s.31 is voidable as distinct from void, Mr. Halpin and Ms. Keane had the ability at any relevant time to procure the passing of a resolution by Elektron to avoid the guarantee

28. The trial judge was, in my view, correct in his analysis of the facts pertaining to the s.31 claim, and his conclusion that it was a claim which both could, and should, have been made in December, 2012, either by Ms. Keane and Mr. Halpin in response to the s.316 motion which sought a declaration of validity of the appointment of the Receiver, or as part of the defence to the possession proceedings, or in the separate 2012 plenary proceedings instituted by Elektron. I have taken into account the submission made that in 2012 Elektron, Mr. Halpin and Ms. Keane were not in a position to pay off the direct borrowings of Elektron, and hence the avoidance of the guarantee would not have of itself invalidated the appointment or deprived the Receiver of entitlement to possession. Nevertheless, the difference in amount of the direct borrowing (€986,397.90) and the liability as guarantor of Crossplan (€25,170,660.24) and the fact that the appointment was expressly pursuant to six deeds of mortgage (which included those given in support of the guarantee) were such that if it was sought to challenge the validity of the appointment pursuant to the deed of mortgage given in support of the guarantee of Crossplan, that was a relevant challenge which could, and should, have been made in 2012.

29. In relation to the Loan Sale claim, I am also in agreement with the High Court that this was a claim which both could, and should, have been raised before the Supreme Court on the appeal in the s.316 motion and possession proceedings prior to the hearing in 2016. The facts were known to Ms. Keane and Elektron since June, 2014. In taking this view, it was not necessary for the High Court and it is not necessary for this Court to determine what the Supreme Court would have done if such an application was made to them. The High Court judge was, in my view, correct that in accordance with the principles set out by the Supreme Court in *Fitzgerald v. Kenny* in relation to Order 58, Rule 8, an application could have been made to the Supreme Court for the admission of fresh evidence, and should have been made. Thereafter it would have been a matter for the Supreme Court to consider and decide as to whether, if it admitted the fresh evidence, it would continue to determine the appeal, or remit the matter to the High Court for further consideration and a decision on the new ground of challenge to the continuing validity of the appointment of the Receiver and, more particularly, his entitlement to an order for possession of Aberdeen Lodge. The absence of Kenmare as a party is not relevant. IBRC which made the appointment then being challenged was not a party.

30. The failure to make such an application and the pursuit of the appeals before the Supreme Court including against the order in favour of the Receiver for possession of Aberdeen Lodge without seeking to challenge the continuing validity of his appointment (and hence entitlement as Receiver to possession) but rather now seeking to pursue the 2015 proceedings which includes such a challenge is in substance a collateral attack on the order of the Supreme Court made on the 8th April, 2016, which granted the Receiver possession of Aberdeen Lodge with effect from the 6th May, 2016.

31. For all the above reasons I consider that the High Court Judge was correct in concluding on the facts herein that the claims now sought to be made by the plaintiffs in the 2015 proceedings are ones which could and should have been made in one or more of the

2012 proceedings, and that the failure to do so means that the 2015 proceedings, which also amount to a collateral attack on the Supreme Court order of 8th May 2016, are an abuse of process and should be struck out.

32. By reason of the conclusions which I have reached on the above issues, it is not necessary for me to consider whether the trial judge was correct in either taking into account prior comments by the Supreme Court in relation to an abuse of process by Mr. Halpin in earlier proceedings, or the findings he made in relation to probable tactical decisions. In reaching my conclusions on the above issues I have not taken the comments made by the Supreme Court in relation to Mr. Halpin into account. As appears from the statement of Lord Bingham in *Johnson v. Gore Wood & Co.* set out above, the principles in relation to the modern restatement of the rule in *Henderson v. Henderson* apply without any finding of a tactical decision to reserve a particular point.

Relief
33. For these reasons I would dismiss the appeal.