THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2017] IECA 25

Finlay Geoghegan J.
Peart J.
Binchy J.

2015/446

PATRICK O'CONNOR

PLAINTIFF/APPELLANT

V

MICHAEL COTTER AND LUKE CHARLETON TRADING AS ERNST AND YOUNG

DEFENDANTS/RESPONDENTS

JUDGMENT of the Court delivered by Ms. Justice Finlay Geoghegan on the 10th day of February 2017

1. This judgment of the Court is a judgment to which all the members of the court contributed. It is given in an appeal brought by Mr. O'Connor ("the appellant") against the defendants ("the receivers") who were joint receivers appointed over certain properties of the appellant under a deed of mortgage given in favour of Bank of Scotland (Ireland) Limited ("BOSI") of which Bank of Scotland plc ("the Bank") now holds the benefit pursuant to the cross-border merger which took place on the 31st December, 2010, and pursuant to which all the assets and liabilities of BOSI were transferred to the Bank. No issue arises in relation to the transfer (see *Freeman v. Bank of Scotland plc and Others* [2016] IESC 14).

2. This appeal was heard at the same time as the two further appeals brought by the appellant against the Bank and, *inter alia*, the receivers, being the respondents herein (Appeal Nos.2015/225 and 2015/226). Those appeals were against the judgment of the High Court (Cregan J.) of the 20th February, 2015, delivered following a joint hearing of those proceedings and the orders made in each proceeding pursuant to that judgment.

3. This appeal is against a judgment delivered by the High Court (Haughton J.) on the 30th July, 2015 and the order made pursuant thereto dismissing these further proceedings issued by the appellant against the receivers on the 12th March, 2015, and ordering that a *lis pendens* registered within the said proceedings be set aside.

4. The separate judgment of the Court in the appeals from the judgment and order of Cregan J. in what were termed the 2012 *lis pendens* proceedings and summary judgment proceedings is delivered today by Peart J.

2015 Proceedings

5. The orders of Cregan J. in the 2012 *lis pendens* proceedings and 2012 judgment proceedings were made on the 6th March, 2015. They provided, *inter alia*, that the *lis pendens* registered against certain properties stand vacated. The receivers were two of the defendants in the 2012 *lis pendens* proceedings alongside BOSI, the Bank, and two solicitors.

6. The appellant issued the 2015 plenary summons against the receivers alone on the 12th March, 2015. The general endorsement of claim seeks, *inter alia*, damages for loss and damage by reason of alleged actions of the receivers and also by reason of "Invalid appointment – Invalid Deed of Appointment without Seal - . . .". The summons was not served on the receivers or the solicitors who had acted for them jointly with the other defendants in the 2012 *lis pendens* proceedings. There was correspondence between the appellant and the solicitors for the receivers, between April and June 2015. About the 25th June, 2015, it came to the attention of the receivers and their solicitors that the appellant had issued the 2015 proceedings. They requested service and it was not done. Ultimately an application was made on behalf of the receivers for short service of a notice of motion seeking entry into the commercial list and including an order for the dismissal of the proceedings pursuant to the rule in *Henderson v. Henderson* [1843] 3 HARE 100. The plenary summons was then served and affidavits exchanged. The motion was heard and determined by Haughton J. in an *ex tempore* judgment delivered on the 30th July, 2015. The trial judge determined that the proceedings should be dismissed under the rule in *Henderson v. Henderson* [1843] 3 HARE 100, having regard to the claims made against the joint receivers in the 2012 *lis pendens* proceedings, and what occurred before the trial judge in those proceedings.

The Law

7. The rule in *Henderson v. Henderson*, as it is commonly known, deriving from the decision in *Henderson v. Henderson* [1843] 3 HARE 100, was recently considered by the Court of Appeal in *Vico Limited and Others v. Bank of Ireland and Others* [2016] IECA 273. As stated in that judgment, which I delivered (with the concurrence of Peart J. and Irvine J.), "[t]he underlying principle is similar to that in *res judicata* namely the public interest in those who resort to litigation obtaining a final and conclusive determination of their disputes.".

8. In that judgment, I adopted the explanation of the rule in *Henderson v. Henderson* given by Cooke J. in the High Court in *Re: Vantive Holdings & Others and the Companies Acts 1963-2006* [2009] IEHC 408, at paras. 32 to 33, and cited on appeal by Murray C.J. in *Re: Vantive Holdings* [2010] 2 I.R. 118, at para. 21:-

> "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 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."

9. As pointed out in the *Vico* judgment the special cases are primarily those where the first judgment was procured by fraud. That does not arise on the facts herein.

10. The more recent mitigation of the rule derives from the re-statement of the abuse of process rule in *Henderson v. Henderson* by Lord Bingham in *Johnson v. Gore Wood & Co*. [2002] 2 AC 1 at 31, which has been approved of by the Supreme Court in this jurisdiction in a number of cases:-

> ". . . 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."

11. The trial judge, taking account of the relevant claims in and facts relating to these 2015 proceedings, the earlier 2012 *lis pendens* proceedings, and the record from the transcript of what transpired before Cregan J. in those proceedings, determined that the appellant was now abusing the process of the court in seeking to challenge again in the 2015 proceedings the validity of the appointment of the joint receivers.

Appeal

12. The appellant lodged both a lengthy notice of appeal and very lengthy written submissions. He also made oral submissions on this appeal. It is neither necessary nor appropriate that the court in this judgment deal with all issues raised, as regrettably the vast majority of the matters sought to be raised by the appellant on this appeal are simply not relevant to the issue which the trial judge had to decide on the motion brought on behalf of the receivers. Notwithstanding the lengthy submissions, the appellant does not appear to dispute the legal principles set out above. Rather he seeks to take himself outside of the application of those principles on the facts herein.

Decision

13. The appellant raises two issues which may be considered to be preliminary issues. The first was that there is not an identity of parties between the 2012 *lis pendens* proceedings and the 2015 proceedings. The fact that in the 2012 proceedings the appellant had joined additional defendants is not relevant. The High Court and this Court are only considering the position between the appellant and the receivers on the receivers' motion and the appeal in the 2015 proceedings. The receivers were parties to the 2012 *lis pendens* proceedings against whom the appellant made claims.

14. Second, the appellant submitted that the High Court order should not have been made in advance of the delivery of the statement of claim. The Court recognises that it may be considered unusual to bring such an application in advance of the delivery of the statement of claim. However, there is no rule which precludes such an approach. On the facts of these proceedings the Court considers that it was a justified approach by the receivers and that the relevant claim was sufficiently identified in the endorsement to the plenary summons to permit the High Court make a decision on the motion and application of the receivers.

15. The endorsement of claim stated that the appointment of the receivers was being challenged, and the basis of the challenge to their appointment was identified. It also claimed damages against the receivers. The Court therefore rejects those grounds.

16. The Court considers that the trial judge was correct in his application of the so called rule in *Henderson v. Henderson*, taking into account the mitigation in *Johnson v. Gore Wood,* to the facts herein in concluding that the 2015 proceedings are an abuse of process. As identified by the trial judge, the 2012 proceedings included a challenge to the validity of the appointment of the receivers. He identified the paragraphs in the statement of claim and then referred to what occurred before Cregan J. in the 2012 proceedings, on day 4 in particular, in relation to the challenge to the validity of the appointment of the receiver. Shortly put, it appears from the transcript that the appellant sought to raise the issue of the alleged lack of sealing of the Deed of Appointment. Objection was taken by Counsel for the defendants upon the grounds that it had not been pleaded. The appellant was given an opportunity to identify where the issue had been pleaded. He was unable to do so. Haughton J. on the motion in these proceedings referred to the exchanges which took place between Cregan J. and the appellant during the 2012 proceedings, in which the appellant then confirmed that the only argument he was making in relation to the unlawful appointment of receivers "relates to the issue about the incorrect map, the incorrect common areas".

17. As set out in the judgment of the Court delivered by Peart J. today in the appeals from the 2012 *lis pendens* and the 2012 judgment proceedings, the trial judge therein, Cregan J., gave significant latitude to the appellant as a lay litigant in the pursuit of those proceedings and took care that the appellant agreed to the issues which had to be determined in those proceedings following the lengthy hearing. Those issues, whilst they included the validity of the appointment of the receivers in relation to the lands identified as the common areas in the Lindeville development, did not include by agreement of the plaintiff any other issue relating to the validity of the appointment of the receivers. The issues also included claims for damages against the receivers on certain grounds

set out.

18. On the relevant facts before the trial judge on the hearing of the motion in these 2015 proceedings, the Court considers that the trial judge was correct in holding that the appellant is abusing the process of the court in seeking to pursue an issue which he could have pursued in the 2012 proceedings but did not, and that the 2015 proceedings should be dismissed.

19. Accordingly the Court will dismiss the appeal.