THE HIGH COURT

COMMERCIAL

[2018 No. 3858 P.]

BETWEEN

SHANE GEORGE AND MARY GEORGE

PLAINTIFFS

AND

AVA TRADE (EU) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on 29 March, 2019

The application before the court

1. In this application, the defendant seeks an order pursuant to the inherent jurisdiction of the court striking out the proceedings on the grounds that the claims made by the plaintiffs are (a*) res judicata* or (b) caught by the rule in *Henderson v. Henderson* (1843) 3 Hare 100 such that the proceedings constitute an abuse of process.

2. In broad terms, the defendant contends that the claims now made by the plaintiffs in these proceedings were previously raised in proceedings before the courts of England and Wales or are claims that ought to have been raised in such proceedings.

3. As described in more detail below, the proceedings in question were taken by the plaintiffs to set aside the statutory demands served on them by the defendant in respect of a debt of £1,306,035.70 sterling together with interest in respect of the first named plaintiff and a debt of £1,025,063.05 sterling together with interest in respect of the second named plaintiff. The demands in question was a precursor to bankruptcy proceedings in England and Wales. The demands were served on 10th February, 2015. In March 2015, the plaintiffs made an application to set aside the statutory demands. Those proceedings were resisted by the defendant and ultimately on 20th December, 2016, District Judge Jones sitting in Slough County Court, in a written judgment, ordered that the application to set aside the statutory demands be dismissed.

4. The plaintiffs applied for leave to appeal to the High Court of England and Wales from the order of District Judge Jones. That application was initially refused in a written decision of Barling J. dated 22nd May, 2017. There was subsequently a further hearing before Ms. Amanda Tipples Q.C. (sitting as a deputy judge of the English High Court) but Ms. Tipples, in a decision of 30th June, 2017, reached the same conclusion as Barling J. In those circumstances, the decision of District Judge Jones was undisturbed by the English courts. On 22nd May, 2018 the defendant filed bankruptcy petitions in the English courts in which they requested the court to adjudicate each of the plaintiffs bankrupt for failure to comply with the statutory demand.

5. These proceedings were commenced by plenary summons issued on 1st May, 2018 in which the plaintiffs seek damages for breach of contract, negligence and breach of duty (including breach of statutory duty) under the European Communities (Markets in Financial Instruments) Regulations, 2007 (S.I. No. 60 of 2007) ("*the 2007 Regulations*") and/or the European Communities (Distance Marketing of Consumer Financial Services) Regulations, 2004 (S.I. 853 of 2004) ("*the Distance Marketing Regulations*"). A statement of claim was subsequently delivered on 13th June, 2018. However, prior to delivering a defence, the defendant has now brought the present application seeking to dismiss the proceedings on *res judicata* and *Henderson v. Henderson* grounds. Essentially, the defendant says that the claims made in these proceedings replicate the grounds on which the plaintiffs sought to set aside the statutory demands in the English proceedings. Insofar as there is any additional claim made in these proceedings, the defendant argues, by reference to the rule in *Henderson v. Henderson*, that such claim could and should have been brought in the English proceedings seeking to challenge the statutory demands. In moving this application, the defendant relies on the Recast Brussels I Regulation (namely Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)) and/or on the Recast Insolvency Regulation (namely Regulation (EU) 2015/848 of 20th May, 2015 on insolvency proceedings (recast)). The defendant also relies on common law principles.

6. Before addressing the relevant legal issues which require to be considered, it may be helpful to set out the underlying facts in more detail.

Relevant facts

7. The plaintiffs reside in Buckinghamshire in England. The first named plaintiff is an anaesthetist. According to the statement of claim, the second named plaintiff is a homemaker.

8. The defendant is a limited company based in Dublin. The defendant is an online provider of broker services. In April 2014 the plaintiffs opened separate foreign exchange trading accounts with the defendant via its website. According to the statement of claim, each of the plaintiffs entered into the relevant contracts with the defendant in their capacity as consumers. The defendant does not accept that the plaintiffs acted as consumers. However, this is not an issue that requires to be decided by me at this stage of these proceedings.

9. According to the first named plaintiff, he opened both accounts. Both plaintiffs contend that the second named plaintiff had no involvement with or knowledge of the trades that the first named plaintiff conducted on both accounts. Following the opening of the accounts, £200,000 was deposited by the first named plaintiff as a "*margin deposit*" to his own account and £300,000 was deposited by him as a "*margin deposit*" to his wife's account. Thereafter, the first named plaintiff says that he began to embark upon transactions using both accounts whereby he sold Forex put options to counterparties identified using the defendant's online platform. As I understand it, these Forex put options are a form of contract for difference. In return for the payment of the option price, the counterparty was entitled to require the plaintiffs to purchase the quantity of euros specified in the option at a price of 1.20 Swiss Francs to one euro at any time during the course of the option period. At the time the contracts were put in place, the National Bank of Switzerland had a fixed policy known as the "peg" whereby the Swiss Franc was not permitted to drop below the foreign exchange rate of 1.20 Swiss Francs to one euro.

10. Regrettably, very significant losses were subsequently incurred when the National Bank of Switzerland removed the peg without

warning on 15th January, 2015. As a consequence, the value of the euro as against the Swiss Franc dropped suddenly and significantly. In turn, the plaintiffs incurred very significant liabilities. In the case of the first named plaintiff, the total deficit on his account was £1,306,035.70 sterling while the total deficit on the second named plaintiff's account was £1,025,063.05 sterling.

11. By statutory demands both dated 10th February, 2015, the defendant claimed £1,306,035.70 from the first named plaintiff and £1,025,063.05 from the second named plaintiff.

12. On 6th March, 2015 the plaintiffs, acting as litigants in person, submitted an application to the County Court at Slough seeking to set aside the statutory demands on the grounds that the underlying debts were disputed and that the plaintiffs had a cross-claim against the defendant.

13. Although the plaintiffs acted as litigants in person in presenting that application to the Slough Country Court, the first named plaintiff confirmed in para. 26 of his witness statement dated 6th March, 2015 as follows:-

> *"I have recently instructed solicitors, Knipe Woodhouse Smith of Chalfont St. Peter and have attended a consultation with counsel. I intend to complain to AVA about the matters raised in this Witness Statement and about my misgivings and their failure to comply with the Regulatory Framework under MiFID and the Irish statutory code as well as their breach of duty".*

14. In para. 27 of his witness statement the first named plaintiff said that he expected the defendant to process his complaint through its internal complaints procedures and he indicated that if the complaint was not upheld by the defendant, it was likely that he would refer the complaint to the Financial Services Ombudsman ("FSO") in Dublin. He also indicated that if he was unable to obtain redress from the defendant, he would ask his solicitors to instruct lawyers to take proceedings against the defendant in Ireland.

15. It should be noted that, as para. 27 of the first named plaintiff's witness statement makes clear, the proceedings taken by the plaintiffs in England were designed to set aside the statutory demands. It is clear that the plaintiffs always intended that if they were successful in setting aside the statutory demands, the substantive proceedings would be taken in Ireland either before the FSO or in the High Court.

16. The plaintiff also submitted a witness statement in which she complained that she was not independently advised. She also contended that she had not provided any written or oral authorisation to the defendant permitting her husband to trade on her behalf. Thereafter, two very detailed witness statements were made on behalf of the defendant in the proceedings in the Slough County Court. In addition, a detailed second witness statement was made by the first named plaintiff in the County Court proceedings in November, 2015.

17. The application to set aside the statutory demands first came on for hearing before District Judge Jones in Slough County Court in October 2015. During the course of that hearing, it appears that Judge Jones directed that certain disclosure should be made by the defendant of the initial information that was provided to the plaintiffs in relation to the creation of their accounts together with additional correspondence relevant to the position of the plaintiffs.

18. For reasons which it is unnecessary to address in this judgment, there was some hiatus in the hearing of the proceedings such that the hearing in the County Court did not ultimately resume until December 2016. Following that hearing in December 2016, District Judge Jones, on 20th December, 2016, delivered a detailed written judgment in which he examined the arguments raised by the plaintiffs and came to the conclusion in para. 97 of his judgment in the following terms:-

> *"…I must come to the very clear conclusion that, even if I did set aside the statutory demands, there would be no real prospect of these arguments availing Dr. or Mrs. George in any future litigation between themselves and the Respondent….it is sad that I reach that conclusion because, if I had thought that there was any substance in any of the arguments that they have put forward, then I would have given them the opportunity to litigate those matters further because I know what the implications are of these proceedings for themselves and for their family".*

19. The decision of District Judge Jones was arrived at under the then applicable provisions of the Insolvency Rules 1986 (UK) and the Insolvency Act 1986 (UK). According to the affidavit evidence of Laurie Scher BL as to English law, the purpose of a statutory demand such as that served by the defendant on the plaintiffs here is to demonstrate a debtor's inability to pay a debt. Mr. Scher explains that, under s.267 of the 1986 Act, when petitioning for the bankruptcy of a debtor, a creditor must show that the debtor appears to be unable to pay the relevant debt. The statutory demand is therefore used as a mechanism to fulfil this statutory requirement. Mr. Scher also explains that a debtor, served with a statutory demand, is entitled to apply to the court to set it aside. Under the 1986 rules which were then in force, the statutory demand could be set aside if the debtor had a counter claim which equalled or exceeded the amount of the debt specified in the statutory demand or where the debt was disputed on grounds which appeared to the court to be substantial. With regard to those grounds, the test to be applied, in accordance with the decision of the English Court of Appeal in *Ashworth v. Newnote Limited* [2007] BPIR 1012(CA) is whether the applicant challenging the statutory demand has a "*real prospect of success*". In substance, that is the test that was applied by Judge Jones in the County Court when he came to the conclusion set out in para. 18 above.

20. On 9th January, 2017 the plaintiffs submitted a written application to the High Court of England and Wales for permission to appeal the order of District Judge Jones. At the time this application was filed, a full copy of the judgment of District Judge Jones was not available. The grounds of appeal were drafted by junior counsel retained directly by the plaintiffs namely Mr. Marc Brittain. Subsequently, a detailed skeleton argument (running to fifty-nine paragraphs) was submitted by Mr. Brittain on 6th March, 2017. The grounds of appeal were also amended (following receipt of the judgment of District Judge Jones).

21. The application for leave to appeal was considered in writing by Barling J. in the English High Court who issued a reasoned order on 22nd May, 2017 in which he expressed the view that the plaintiffs had no real prospect of establishing that the decision of Judge Jones was wrong. Thereafter, the plaintiffs sought an oral hearing before the High Court to further consider their application for permission to appeal. That hearing took place on the 13th June, 2017 before Ms. Amanda Tipples Q.C. sitting as a deputy High Court judge. On that occasion, both leading and junior counsel were retained by the plaintiffs namely Mr. David Berkley Q.C. and Mr. Brittain. However, Ms. Tipples took a similar view to Barling J. After considering the arguments put forward by the plaintiffs, she expressed herself to be satisfied that there were no grounds on which the appeal could be said to have any real prospects of success.

22. As noted above, bankruptcy petitions were then presented against both of the plaintiffs on 22nd May, 2018. In the meantime, these proceedings had been commenced in Ireland on 1st May, 2018. As described in more detail below, the claims made in these

proceedings share many of the features of the arguments addressed to District Judge Jones in the proceedings in Slough County Court. However, they include a new claim based on the Distance Marketing Regulations. Counsel for the plaintiffs also argues that they contain a new duty of care claim which he described as the "*appropriateness point*". In essence, this element of the plaintiff's case relates to an allegation that the defendant failed to gather sufficient information in relation to the plaintiffs; failed to assess that information; failed to assess whether the transactions were appropriate for the plaintiffs; and failed to warn the plaintiffs that the transactions were not appropriate for them.

23. I examine, in further detail below, the nature of the case asserted by the plaintiffs in these proceedings and the nature of the case raised in argument in the course of the proceedings before District Judge Jones. However, before addressing that issue, it is necessary to consider a preliminary objection raised by the plaintiffs to the present application based on the failure of the defendant to deliver a defence and expressly plead reliance on *res judicata*.

The preliminary objection to the application

24. It is strongly argued by Counsel for the plaintiffs that, before bringing an application to dismiss proceedings on the grounds of *res judicata*, it is necessary for a defendant to expressly raise that ground in its defence. Counsel for the plaintiffs accepted that where a defendant seeks to dismiss proceedings on the grounds that they are an abuse of process, it is not necessary for the defendant to first deliver a defence raising that issue. However, counsel argued that *res judicata*, like the Statute of Limitations, is a matter of defence which must be pleaded prior to being argued and determined. He maintained that this is a long standing principle. He referred, for example, to the observation of Warren J. in *Carnegie v. Carnegie* (1886-1887) 17 L.R. Ir.430 at p. 434 (in the context of an argument by the defendant in that case that a decree of divorce should be refused on the ground of an estoppel created by a prior divorce petition) in the following terms:-

> *"It cannot be doubted that the doctrine that the judgment of a court of competent jurisdiction on a matter directly in issue*, if well pleaded, *is conclusive between the same parties on the same matter…. In considering whether such a judgment is well pleaded, I must not overlook the rules of law viz. that pleadings by way of an estoppel must be certain in every particular…".* (Emphasis added).

25. Counsel also referred to the decision of Wright J. in *Coppinger v. Norton* [1902] 2 IR 232 p. 236-237 where Wright J., referring to the relevant rules of court, said:-

> *"In my opinion, according to the language and spirit of that rule, the plaintiff, if he seeks to rely upon these orders as a decision of a court of competent jurisdiction…estopping the defendant from setting up a particular defence, is bound to put it forward in his pleading".*

26. Counsel drew attention to the fact that the rule considered by Wright J. in that case was in substantially similar terms to O. 19, r. 15, currently in force, which provides as follows:-

> *"The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleading, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds".*

27. Counsel placed particular reliance on the decision of the Supreme Court in *McMahon v. Jackson's Garage Limited* (1968) 102 ILTR 197 where Walsh J. (giving the judgment of the Supreme Court) said at p. 199:-

> *"A decision of the Circuit Court can operate as an estoppel in the High Court between the same parties suing in the same capacity provided that the issue before the High Court is the same as that alleged to have been the subject of the adjudication in the Circuit Court*…It is also essential that the alleged estoppel should be pleaded". (Emphasis added).

28. Counsel for the plaintiff submitted that, insofar as there are Court of Appeal decisions to the contrary, those decisions were primarily concerned with the rule in *Henderson v. Henderson* (which came under the abuse of process rubric) rather than *res judicata*. He also drew attention to the fact that the decision of the Supreme Court in *McMahon v. Jackson's Garage* was obviously not brought to the attention of the Court of Appeal in any of those cases.

29. In response, counsel for the defendant drew attention to a significant number of cases in which the court has dealt with applications to dismiss proceedings, on *res judicata* grounds, prior to delivery of a defence. These included Barton J. in *O'Driscoll v. McDonald* [2015] IEHC 100, the recent decision of Costello J. in *Corbett v. LSREF III Achill Investments Ltd* [2016] IEHC 176 and the very recent decision of Ní Raifeartaigh J. in *Cronin v. Dublin City Sheriff* [2017] IEHC 685. Counsel also drew attention to the decision of O'Malley J. in *Murray v. Sheridan* [2013] IEHC 303. The decision of O'Malley J. was not in the specific context of a *res judicata* challenge but in the context of an application to dismiss proceedings on the grounds that they were clearly statute barred. Nonetheless, the decision of O'Malley J. is of particular importance in the present context because she specifically addressed her mind to the question of whether a defence should have been filed before the application was brought. It will be recalled, in this context, that O.19 r.15 specifically requires that any defence based on the Statute of Limitations must be pleaded. It will also be recalled that counsel for the plaintiff relies on O.19 r.15 in support of the proposition that *res judicata* must be pleaded. In para. 54 of her judgment in *Murray*, O'Malley J. said:-

> *"It is well-established law that a limitation period operates as defence, rather than extinguishing a cause of action, and I have therefore considered whether it should be required that a defence be filed before an application of this sort be brought. However, in the circumstances it seems to me that there can be no doubt as to the intention of the defendants to rely upon the Statute, given the contents of Ms. Hanley's affidavit. Equally, there can be no doubt but that the defence would have to succeed. It seems to me, therefore, absolutely clear that the plaintiff has no chance of success in relation to his defamation claims and that his action must be dismissed on the basis that it is bound to fail."*

At one point in the hearing, it was suggested by counsel for the plaintiffs that the decision of O'Malley J. was inconsistent with the previous decision of the Supreme Court in *O'Reilly v. Granville* [1971] I.R. 90. However, in light of the more recent decision of the Supreme Court in *O'Connell v. Building and Allied Trades Union* [2012] 2 I.R. 371, I do not believe that there is any substance to that suggestion and I therefore do not propose to address it further in this judgment.

30. Counsel for the defendant also drew attention to a number of decisions of the Court of Appeal where, likewise, no defence was delivered prior to the bringing of an application to dismiss the proceedings on *res judicata* or *Henderson v. Henderson* grounds.

However, as counsel for the plaintiffs observed, most of these cases were decided on *Henderson v. Henderson* grounds rather than on the basis of *res judicata*. As noted above, counsel for the plaintiffs accepted that it is not necessary to deliver a defence raising the rule in *Henderson v. Henderson* before bringing an application to dismiss proceedings as an abuse of process. Counsel for the plaintiffs argued that a different principle applies where a defendant seeks to rely upon an estoppel such as *res judicata*.

31. Nonetheless, there is at least one decision of the Court of Appeal in which the court upheld a decision of the High Court dismissing proceedings on *res judicata* grounds prior to delivery of defence – namely the decision in *Murphy v. Canada Life Assurance Ireland Ltd* [2016] IECA 128. It is also worth considering a number of the observations made by the Court of Appeal in some of the *Henderson v. Henderson* decisions. For example, in *O'Connor v. Cotter* [2017] IECA 25, an issue arose as to whether an application could be made to dismiss proceedings on *Henderson v. Henderson* grounds even prior to delivery of a statement of claim. In the judgment of the court delivered by Finlay Geoghegan J., it was made clear that there was nothing to prevent such a course being taken. At para. 14 of her judgment, Finlay Geoghegan J. said:-

> *"…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 … 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."*

32. Similarly, in *Vico Ltd v. Bank of Ireland* [2016] IECA 273, the Court of Appeal rejected a submission made on behalf of the appellants that the High Court was incorrect in deciding that an application to strike out proceedings as an abuse of process could be brought in advance of filing a defence. In para. 33 of the judgment of Finlay Geoghegan J. in that case, she said:-

> *"…I do not accept the appellants' submission that the High Court was incorrect in deciding the defendants' application to strike out the proceedings as an abuse of process in advance of their filing a defence. As pointed out by Lord Bingham in Johnson v. Gore Wood at p. 34 'an application to strike out for abuse of process is not a defence; it is an objection to an action being brought at all'. The nature of the action now sought to be brought by the plaintiffs … was evident from the statement of claim filed and the application could be determined having regard to the statement of claim."*

33. Counsel for the plaintiffs suggested that this observation of Finlay Geoghegan J. was of no relevance to the present application insofar as the defendant seeks to rely on *res judicata*. He submitted that the observation clearly proceeded on the basis that, where an abuse of process is alleged, this was not a matter of defence but was an objection to the action being brought at all. Counsel further submitted that *res judicata* proceeded on the basis of an estoppel rather than on the basis of an abuse of process. He then argued that, in circumstances where the case law makes clear that *res judicata* must be pleaded, the observation could not be said to have any application.

34. I have given careful consideration to the arguments on both sides in relation to this issue. While great credit is due to counsel for the plaintiffs for his industry and ingenuity in raising this issue and identifying potentially relevant authority, I have come to the conclusion that it is not necessary to deliver a defence raising the issue of *res judicata* before any application is made by a defendant to dismiss proceedings on *res judicata* grounds. In my view, when one reads the relevant authorities on which counsel for the plaintiff relies, they do not address the issue which arises in these proceedings. In particular, none of the judgments address the specific question which arises here as to whether a motion to dismiss can be brought prior to the delivery of a defence.

35. In *Carnegie v. Carnegie*, the issue before the court related to an objection taken, on demurrer, to a plea made by a petitioner in a reply delivered on behalf of the wife in petition proceedings brought by a wife against her husband for restitution of conjugal rights. In his answer, the respondent had sought to justify his refusal to live and cohabit with the petitioner in light of her alleged intemperance and violence. He cross-petitioned for a divorce on the grounds of cruelty. In response, the petitioner delivered a reply in which she alleged that her husband was estopped from pursuing that allegation in circumstances where he had previously made a similar allegation in earlier proceedings between them and she claimed that he was estopped from raising the issue in the subsequent proceeding. The proceedings that came before Warren J. were in the nature of a demurrer i.e. an objection to the sustainability of the claim pleaded. The observations of Warren J. must be seen in that context.

36. The nub of the decision made by Warren J. was that the issue had not been appropriately pleaded and, even if it had been, there was no proper basis for the allegation because the earlier proceedings had never been determined between the parties. In those circumstances, Warren J. allowed the demurrer. Crucially, Warren J. never had to address the question which arises for consideration here – namely whether, before an application is brought to dismiss proceedings on *res judicata* grounds, a defence raising that issue must be delivered. There is nothing in the judgment of Warren J. to suggest that he had such a situation in mind when he made his observations about the necessity for *res judicata* to be properly pleaded.

37. Similarly, there is nothing in the judgment of Wright J. in *Coppinger v. Norton* which deals with the issue raised by the plaintiffs here. The application before the court in that case was an application to strike out certain allegations in the reply delivered on behalf of the defendant (in ejectment proceedings) on the grounds that the material in question was embarrassing. It is true that in his judgment in that case (at p. 236-237) Wright J. trenchantly expressed the opinion that if the plaintiff, there, sought to rely upon an order in previous proceedings as giving rise to an estoppel, he was bound to put it forward in his pleadings. However, it seems to me to be clear that this observation was made in the context of the underlying purpose of pleadings. At p. 236 Wright J. made a telling observation when he said:-

> *"[the] plaintiff's counsel say that they are bound by the rules of pleading to raise this issue if they intend to rely upon it. I think they are bound to put it forward in some shape or form*, for otherwise a complaint may be made at the trial that this estoppel has not been pleaded…" (emphasis added).

38. In making that observation, Wright J. referred to O.19 r.16 of the rules which were then in force. As noted by counsel for the plaintiffs, that rule is in substantially similar terms to O.19 r.15 of the current rules. In my view, it is very important to keep in mind the purpose of O.19 r.15. Its purpose (which is consistent with the purpose of pleadings and particulars generally) is to ensure that the opposing party is not to be taken by surprise at trial. Thus, the rule sets out a non-exhaustive list of matters that are required to be specifically pleaded including fraud, the Statute of Limitations, release, payment, performance, illegality or the Statute of Frauds. The rule is designed to ensure that, at the trial, issues of this kind are not suddenly raised without due notice being given to the opposing party in advance. Essentially, pleadings are necessary to put a party on notice of the case which he or she will have to face at trial so that appropriate preparations can be made for that trial. There can be no doubt that the rule applies both to *res judicata* and the rule in *Henderson v. Henderson* if it is intended to leave those matters to be raised at the trial of proceedings. In this

context, it is not unusual for a party to leave such matters to be determined at the trial rather than bringing a "*knock-out*" application at an interlocutory stage to dismiss the proceedings.

39. Against the backdrop described in para. 38 above, Wright J. was, obviously, correct in stressing the necessity to plead *res judicata*. However, his judgment does not address the issue currently before me. In particular, it does not address the question of whether it is necessary to deliver a defence prior to bringing an application, at an interlocutory stage, to dismiss proceedings on the grounds of either *res judicata* or the rule in *Henderson v. Henderson*. As noted above, the views expressed by Wright J. must be seen in the context of the observation that he makes on p. 236 of the report (quoted in para. 37 above) which, to my mind, make it clear that Wright J. was focussing on the need for estoppel to be pleaded if it is to be pursued at trial.

40. The decision on which counsel for the plaintiffs principally relies, is the judgment of Walsh J. in the Supreme Court in *McMahon v. Jackson's Garage Ltd*. That decision is, of course, binding on me. If it has the effect contended for by counsel for the plaintiffs, it would, obviously, take priority over any observations to the contrary made by the Court of Appeal, and I would be bound to follow it notwithstanding those observations of the Court of Appeal.

41. Properly analysed, I do not believe that there is anything in the judgment of Walsh J. in *McMahon* which suggests that, in making the observations quoted in para. 27 above, Walsh J. had in mind circumstances, such as the present, where an application is brought to dismiss proceedings at an interlocutory stage on *res judicata* grounds.

42. The plaintiff, in that case, was employed by the defendant garage where, as part of his work, he was involved in spray painting motor vehicles. He suffered a severe rash to his face and neck. Initially, he commenced proceedings in the Circuit Court in which he claimed compensation under the Workman's Compensation Act, 1934 on the basis that he had contracted a scheduled industrial disease due to the nature of his employment. The sixth schedule to the 1934 Act listed as an industrial disease: "*Dermatitis produced by dust or liquids*". Prior to commencing proceedings, the plaintiff had been certified as suffering from industrial dermatitis caused by the painting and spraying of motor vehicles. However, the defendants exercised their right under s.34 of the 1934 Act to refer the issue to the medical referee who took a different view to the medical practitioner and issued a certificate that the plaintiff was not suffering from dermatitis produced by dust or liquids (which was the relevant scheduled disease under Schedule Six to the 1934 Act). When the matter came on for hearing before the Circuit Court, the Circuit Court judge dismissed the proceedings on the basis of the certificate from the medical referee. The plaintiff then commenced proceedings in the High Court in which he claimed damages for negligence against his employer. A defence was delivered on behalf of the defendant which made no reference to the previous proceedings in the Circuit Court under the 1934 Act. However, on 5th June, 1964, the defendant obtained an order giving leave to amend the defence by the addition of a further paragraph in which it was alleged that it had been "*conclusively determined by the Circuit Court …in proceedings between the plaintiff … and the defendants…that the rash complained of in this action was not sustained by the plaintiff as a result of …his employment by the defendants…*". Thus, it will be seen that the issue of *res judicata* was not raised until after the defendant had delivered a defence.

43. By the order of 5th June, 1964, the court directed that an issue be tried as to whether the plaintiff was estopped from pursuing the High Court proceedings as a consequence of the prior decision of the Circuit Court. That issue was heard in the High Court on 28th June, 1967 when O'Keeffe P. came to the conclusion that the order made by the Circuit Court was a judicial determination that the plaintiff was not suffering from dermatitis and accordingly the proceedings were dismissed. An appeal was taken to the Supreme Court on the basis that it was not open to O'Keeffe P. to make this finding. In the Supreme Court, Walsh J. took a different view. He took the view that the order of the Circuit Court was not an adjudication in respect of anything other than the availability of the 1934 Act. He also took the view that the certificate of the medical referee was invalid. In the circumstances, there was no scope for the application of *res judicata*.

44. It is true that, as noted above, Walsh J., in the course of his judgment, unequivocally stated that it is essential that the alleged estoppel should be pleaded. However, that observation must be seen in the particular context of that case. As set out above, the amended defence contained a new plea that the order of the Circuit Court constituted a determination that the rash complained of was not sustained by the plaintiff as a result of his employment. At p. 199 of the report (where the relevant comment about pleading is made) Walsh J. analysed the plea of estoppel made in the amended defence and came to the conclusion that there was no substance to the suggestion that the Circuit Court order in that case could be said to be a determination of the kind alleged. Walsh J. said:-

> *"The matter pleaded in the amended defence was that the 'rash'… had been conclusively determined by the Circuit Court not to have been sustained as a result of …his employment by the defendants….That was the issue directed by Mr. Justice Murnaghan to be tried in the High Court. The medical referee found that the plaintiff did not suffer from dermatitis produced by dust or liquids…that in my view does not amount to a finding that the rash complained of in the High Court proceedings did not arise out of or was the result of his employment by the defendants or of any work that fell within the course or scope of his employment with the defendant. Furthermore, it is admitted that the plaintiff is suffering from a skin disease which he says has resulted from his employment ….At most the …certificate, if it be valid, is a finding that the skin disease he suffers from is not a schedule disease under the Workman's Compensation Act. Insofar as the learned Circuit Judge's order can be construed as an adjudication upon anything it is an adjudication upon this latter point and not an adjudication to the effect that the plaintiff did not have a skin disease which he suffered by reason of an accident to him in the course of his employment…."*

45. The passage quoted above follows directly after the observation made by Walsh J. that it is "*essential that the alleged estoppel should be pleaded*". In my view, when that observation is read in light of the passage which immediately follows, it is clear that Walsh J. was doing no more than making the obvious point that it is always necessary to consider the precise plea of estoppel that is made. In that case, the plea of estoppel that was made in the amended defence was without substance when one analysed what had occurred in the earlier Circuit Court proceedings and the nature of the determination made by the Circuit Court.

46. Crucially, Walsh J. was not purporting to lay down a rule that estoppel must be pleaded even if the defendant decides to raise the issue prior to delivery of a defence. Walsh J. did not address his mind to that issue at all. On the facts, that issue simply did not arise in *McMahon v. Jackson's Garage Ltd*. Accordingly, I do not believe that it would be appropriate, in these circumstances, to regard the observation made by Walsh J. (as to the necessity to plead estoppel) as applying in the particular circumstances of this case where the defendant has chosen to seek a dismissal of the proceedings prior to delivery of its defence. If, on this motion, the defendant is in a positon to demonstrate to the court that *res judicata* applies, then I can see no difference, in principle, between this case and the facts and circumstances which confronted O'Malley J. in *Murray v. Sheridan* (discussed above). As Finlay Geoghegan J observed in *O'Connor v. Cotter* at p. 14, there is no rule which precludes the defendant from proceeding in this way.

47. I must therefore reject the contention advanced by the plaintiffs that it is necessary to deliver a defence pleading *res judicata*

prior to bringing a motion of the kind under consideration here. Accordingly, I will now proceed to consider the *res judicata* case advanced by the defendant.

Res judicata

48. The defendant maintains that, quite apart from common law principles, the judgment of District Judge Jones and the subsequent decisions of the English High Court are entitled to recognition in accordance with the Recast Brussels I Regulation or alternatively under the Recast Insolvency Regulation. In contrast, the plaintiffs argue that the Insolvency Regulation has no application in circumstances where the proceedings before District Judge Jones did not involve the opening of Insolvency proceedings within the meaning of the Recast Insolvency Regulation. The plaintiffs also argue that the Recast Brussels I Regulation is not applicable in circumstances where Article 1(2)(p) of that Regulation expressly excludes bankruptcy proceedings from its scope. Notwithstanding these contentions on the part of the plaintiffs, it is very properly accepted that, quite apart from any provision of EU law, the common law concept of *res judicata* extends to a foreign judgment involving the same parties. In light of this very proper acknowledgment on the part of the plaintiffs, it seems to me to be unnecessary to address the EU position in any detail. It is sufficient to record that the concept of *res judicata* is well recognised at EU level. This has been recognised in the decision of the CJEU in *de Wolf v. Cox* [1976] ECR 1759, the decision of the Supreme Court in *DT v. FL* [2009] 1 IR 434, the decision of Hogan J. in *Celtic Atlantic Salmon (Killary) Ltd v. Aller Aqua (Ireland) Ltd* [2014] 3 IR 214 and the decision of Ní Rafeartaigh J. in *Cronin v. Dublin City Sheriff* [2017] IEHC 685.

49. Furthermore, Recital 7 to the Recast Insolvency Regulation makes it clear that both that Regulation and the Recast Brussels I Regulation are designed to form a cohesive set of rules governing jurisdiction. Recital 7 expressly states that the interpretation of the Recast Insolvency Regulation should *"as much as possible avoid regulatory loopholes between the two instruments".* This is reinforced by Article 32 of the Recast Insolvency Regulation dealing with the recognition and enforceability of judgments. The first para. of Article 32.1 provides that a judgment concerning the opening of insolvency proceedings is to be recognised in other Member States with no further formalities. Such judgments are to be enforced in accordance with the enforcement provisions of the Recast Brussels I Regulation. Importantly, the second para. of Article 32.1 extends its application to: *judgments deriving directly from the insolvency proceedings and which are closely linked with them…".* Even more importantly, Article 32.2 provides as follows:

> *"The recognition and enforcement of judgments other than those referred to in paragraph 1 of this Article shall be governed by [the Recast Brussels I Regulation] provided that that Regulation is applicable."*

50. Article 32 therefore appears to be designed to ensure that effect is given to the policy underlying Recital 7 to the Recast Insolvency Regulation/namely to ensure that there are no loopholes or gaps between the Brussels I regime and the Insolvency Regulation regime. In this context, it is important to keep in mind that, in construing provisions of EU law, a purposive approach should be taken rather than a purely literal approach.

51. Counsel for the plaintiffs makes the argument that Article 32.2 of the Recast Insolvency Regulation does not apply in circumstances where the Recast Brussels I Regulation cannot apply in light of the fact that the English court assumed jurisdiction under the Recast Insolvency Regulation. The English court did so notwithstanding that the application to set aside the statutory demands did not involve the opening of insolvency proceedings within the meaning of the Recast Insolvency Regulation. Furthermore, it could not assume jurisdiction under the Recast Brussels I Regulation because there is an exclusive jurisdiction clause contained in the terms and conditions governing the contract between the plaintiffs and the defendant which confers exclusive jurisdiction on the Irish courts to resolve disputes between the parties. That said, one should not lose sight of the fact that it was the plaintiffs who invoked the jurisdiction of the English court by bringing an application to set aside the statutory demands served upon them. The plaintiffs, very properly, accept that the English court was, accordingly, a court of competent jurisdiction for the purposes of the application of the *res judicata* principle.

52. Ultimately, I do not find it necessary to reach any conclusion on the issue as to whether this case falls into some perceived gap between the Brussels I Regime and the Insolvency Regulation Regime. As noted above, the plaintiffs accept that the *res judicata* principle applies not only to decisions of Irish courts but also to decisions of foreign courts. Moreover, it is clear that, even if an issue of this kind were to be considered by reference to EU law, a court would resort to its national procedural rules on *res judicata* in order to determine the issue. This is the view expressed by Briggs in *Civil Jurisdiction and Judgments*, 6th ed., at p.p. 666-667 where he said:-

> *"…the applicable principles will be those of [national]law rather than European law. Accordingly, although the [Brussels I] Regulation will determine that the judgment is one which is entitled to recognition, and that the adjudicating court was jurisdictionally competent, it must still be shown that the point relied on can be accurately characterised as a finding which the court needed to make, and was final in the court which pronounced it and was given in proceedings between the parties or there privies, and was founded on the merits of the point at issue, for these are the elements of common law estoppel by* res judicata*…"*

53. A similar view was expressed by McDermott in *Res Judicata and Double Jeopardy*, 1999, at p. 144. These views are also consistent with the decision of the CJEU in Case C-40/08 *Asturcom v. Nogueira* [2009] ECR I-9579 at paras. 37-38 where the court said:-

> *"37 … according to the case-law of the Court, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision …*
>
> *38 In the absence of Community legislation in this area, the rules implementing the principle of* res judicata *are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness)..."*

54. In the circumstances, I propose to consider the *res judicata* issue by reference to the common law principles applicable in Ireland.

55. *Res judicata* is often used as an umbrella term to cover two species of estoppel namely cause of action estoppel and also issue estoppel. *Res judicata* in the sense of cause of action estoppel will not apply unless the cause of action asserted by the plaintiff in a later action is one and the same as the cause of action previously determined against a plaintiff in earlier proceedings. The distinction between cause of action estoppel and issue estoppel was explained by Dixon J. in *Blair v. Curran* (1939) 62 CLR 462 pp. 531-532 (in a passage expressly approved by Keane J. (as he then was) in the Supreme Court in *Belton v. Carlow County Council* [1997] 1 IR 172):-

> *"A judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between* res judicata *and issue estoppel is that in the first, the very right or cause of action claimed or put in suit has, in the formal proceedings, passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, the state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment…".*

56. The distinction between *res judicata* and issue estoppel was also explained with great clarity by Diplock L.J. (as he then was) in *Thoday v. Thoday* [1964] 1 All E.R. 342 at p. 352 where he said:

> *"The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call 'cause of action estoppel,' is that 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-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim 'Nemo debet bis vexari pro una et eadem causa.' In this application of the maxim 'causa' bears its literal Latin meaning.*
>
> *The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.'"*

57. As counsel for the plaintiffs explained in his written submissions, a cause of action estoppel only arises where a cause of action relied upon by one of the parties in subsequent proceedings has been conclusively upheld or rejected by a judgment in previous proceedings such that the cause of action merges with that judgment. Counsel correctly argued that the effect of the English judgment was not to determine any cause of action advanced by the plaintiffs but to decide that a sufficient basis to set aside the bankruptcy demands had not been shown. Accordingly, it seems to me that counsel for the plaintiffs was correct in suggesting that the plaintiffs' cause of action now formulated in these proceedings did not merge with or pass into the English judgment.

58. In the course of the hearing before me, counsel for the defendant confirmed that the defendant does not go so far as to suggest that cause of action estoppel arises in this case. Counsel for the defendant has made it clear that what is relied on by the defendant is issue estoppel. As the judgment of Diplock L.J. in *Thoday v. Thoday* makes clear, it is well established that even where the cause of action in the second set of proceedings is different to that previously determined in earlier proceedings, a party in the later proceedings will be precluded from contending the contrary of any point previously in issue in the earlier proceedings and determined against him. As the judgment of Diplock L.J. in *Thoday v. Thoday* again makes clear, this species of estoppel is frequently referred to by reference to the *res judicata* rubric and, for convenience, I will continue to make reference to *res judicata* in this judgment. To the extent that I do so, I do not wish to suggest that what is in issue here is cause of action estoppel. That is not the case which has been made here. As noted above, the defendant relies solely on issue estoppel.

59. There is no dispute between the parties as to what must be shown by the defendant if it is to succeed on this issue. The ingredients of estoppel in this context are well established. In this case, what must be demonstrated is that the judgment of District Judge Jones was:-

> (a) A judgment given by a court of competent jurisdiction;
>
> (b) A final decision on the merits;
>
> (c) The judgment must have determined a question which is now raised in these proceedings; and
>
> (d) The parties to this litigation must be the same as the parties to the proceedings before District Judge Jones.

60. The plaintiffs do not raise any issue in relation to the first or fourth of those requirements. They accept that the County Court was a court of competent jurisdiction and, of course, they accept that the parties to these proceedings are precisely the same as the parties to the proceedings before Judge Jones.

61. It will therefore be necessary to consider the second and third grounds outlined above namely whether the decision of District Judge Jones constitutes a final decision on the merits and whether his judgment determined questions which are now raised by the plaintiffs in these proceedings in Ireland. I consider these issues, in turn, below. Insofar as the first of those questions is concerned, I will separately consider whether it can be said that the decision of Judge Jones is "*final*" and whether it can be said to be a decision on the merits. The plaintiffs contest both of those propositions.

Is the decision of District Judge Jones a final decision?

62. According to the affidavit of Mr. Scher, the decision of District Judge Jones to dismiss the applications to set aside the statutory demands amounts, as a matter of English law, to a final determination as to whether those grounds had a real prospect of success. This is subject to the "*Turner*" principle described further below. In para. 36 of his affidavit, Mr. Scher says:-

> *"(a) The decision of District Judge Jones creates an issue estoppel;*
>
> *(b) the plaintiffs have exhausted their avenues of appeal. They have been denied permission to appeal by Barling J. and subsequently by a deputy judge of the High Court on a renewed oral application;*

(c) in any subsequent bankruptcy proceedings, the 'Turner principle' would apply which would ordinarily prevent the same issues being raised by the plaintiffs in opposition to the bankruptcy petitions, albeit that the court on the hearing of the bankruptcy petitions would retain a discretion".

63. The reference made by Mr. Scher to the "*Turner*" principle requires further elaboration. In paras. 48-51 of his affidavit, Mr. Scher explains that the "*Turner*" principle had its origin in a decision of the English Court of Appeal in *Turner v. Royal Bank of Scotland* [2000] BPIR 683 (CA). The principle was explained by Chadwick LJ in *Coulter v. Chief Constable of Dorset Police* [2006] BBIR 10 CA at para. 22 as follows:-

"The principle is not based on estoppel… it goes no further than this:

(i) That it is indeed a waste of the court's time and the parties money to rehearse arguments which have already been run and have failed; and

(ii) that, in circumstances where it is desired to run arguments which have not already been run, then… the court will inquire why those arguments were not run at the time when they could and should have been run".

64. Mr. Scher also refers to an English High Court decision in *Harvey v. Dunbar Assets plc* [2016] BPIR 48 (Ch) where the trial judge again stressed that, absent a change of circumstances or the existence of some other exceptional consideration, a debtor will not be permitted to reargue or reiterate arguments presented previously in the course of an application to set aside a statutory demand. The underlying rationale was explained by Neuberger J. (as he then was) in *Atherton v. Ogunlende* [2001] All ER (D) 33 where he said:-

"… in general, it seems to me right in principle and in the public interest that, if a party has raised an argument in a proper forum, where it has been considered, in connection with a particular process, in this case a bankruptcy or a prospective bankruptcy, and from which forum he had a right of appeal if he wished to exercise it, if that argument is rejected and he does not appeal, it requires exceptional circumstances before he can raise the same argument at a later stage during the same process…the principle should not be abrogated simply because the party has found a better way of putting the same point, or wants to put in more evidence to support the same point".

65. It is therefore clear that, but for the ability of the English bankruptcy court to review the decision of District Judge Jones in exceptional circumstances of the kind described above, the decision of District Judge Jones is regarded, as a matter of English law, as a final judgment. The question which therefore arises is whether the status of the judgment of District Judge Jones as a final judgment is affected by the residuary discretion left to the bankruptcy court, under the *Turner* principle, on the hearing of the bankruptcy petition to take a different view to that of Judge Jones in the event that the plaintiffs can identify a change in circumstances or some other exceptional reason. In this context, the defendant relies, by analogy, on the decision of Costello J. (as he then was) in *M. McC. v. J. McC* [1994] 1 IR 293. In that case, the parties obtained a decree of divorce from the courts of Hong Kong while they were living there. The defendant husband subsequently took up residence in Ireland. He defaulted on making payments of maintenance to the plaintiff pursuant to the order of the Hong Kong court. The plaintiff instituted proceedings for the arrears of maintenance in the Circuit Court in County Kildare. The defendant argued that the Hong Kong order was not a final order in circumstances where it could be varied by the court based on a change of circumstances. He was unsuccessful in that argument in the Circuit Court and he appealed to the High Court. Costello J. dismissed the appeal.

66. In that case, Costello J. refused to follow contrary English authority (decided subsequent to the decision of the House of Lords in *Nouvian v. Freeman* (1889) 15 App. Cas. 1) and concluded that the decision of the Hong Kong Courts was a final decision for the purposes of the application of the *res judicata* principle notwithstanding that it was possible that the order might subsequently be varied by the Hong Kong courts in the event that there was a change in the circumstances of the parties. At pp. 300-301, he said:-

"I cannot with respect, agree with the conclusions reached in Harrop v. Harrop [1920] 3 KB 386 and in re. McCartney [1921] 1 Ch. 522 that, because a foreign maintenance order may subsequently be varied if circumstances change that this means that the order is not a 'final and conclusive' one…the finality and conclusiveness of the order is to be determined by the nature of the proceedings before the foreign court and of the effect of the courts orders…when a court is required to determine the right to maintenance and the amount of maintenance and has power to adjudicate on all issues touching on these claims and does so then it is also clear… that the order is a 'final and conclusive' one because the court's order will estop the parties from litigating those issues again by virtue of the application of the principle of res judicata. And this is so even if the law permits the court to vary its earlier order if circumstances change – the court will then be seized with a new issue, that is, whether there has occurred a change of circumstances such as to justify a variation and it will not be reconsidering the issues already determined by the earlier orders. The fact that a foreign law may permit a foreign court to vary its orders (as Spanish law did in the case of the type of the 'summary' order which was considered in Nouvion v. Freeman (1889) 15 App. Cas. 1 may *be evidence that the order is not a final and conclusive one: but it is not conclusive on the point. If it can be shown that the principle of res judicata applies to the order and even though it may be subject to appeal by a higher court or be varied if circumstances change by the same court then it is a 'final and conclusive' order which will be enforced".* (emphasis in original)

67. At an earlier point in his judgment Costello J. carefully analysed the decision of the House of Lords in *Nouvion v. Freeman* (to which he referred in the passage quoted above). In *Nouvion v. Freeman*, the House of Lords had refused to apply the *res judicata* principle to a judgment of the Spanish courts called a "*remate*" judgment. However, the reason why the House of Lords was not prepared to do so is obvious when one considers the underlying facts. As Costello J. explained at pp. 297-298, a "*remate*" judgment was given in proceedings which were described as "*summary*" or "*executive*". The defences open to a defendant in such proceedings, under Spanish law, were extremely limited. In essence, the defendant could only plead that payment had previously been made or had been waived. In the "*remate*" proceedings, the defendant could not deny the validity of the contract on which the claim was brought. If either party to those proceedings was unsuccessful, they could take separate and independent proceedings in the same court which were described as "*ordinary*" or "*plenary*" proceedings in respect of the same matter and the "*remate*" judgment could not be pleaded as *res judicata* or otherwise made use of in those proceedings. Judgment in the plenary proceedings rendered the "*remate*" judgment inoperative and any monies paid under it would have to be restored.

68. In the circumstances described in para. 67 above, it is unsurprising that the House of Lords was not prepared to treat the "*remate*" judgment as one giving rise to *res judicata*. At p. 299 of the report in *M. McC. v. J. McC.*, Costello J. explained that, in *Nouvion*, Lord Watson observed that the Spanish judgment could not be considered to be a decision which exhausted the merits of the controversy between the parties in circumstances where only limited defences were open to the defendant in the "*remate*" proceedings. In the same case, Lord Ashbourne observed that the judgment in the "*remate*" proceedings could not be treated as a final and conclusive one because, in no sense, could it be regarded as an adjudication upon a cause where the merits were or could

have been tried. Only an adjudication of the latter kind will give rise to *res judicata*. Having carefully analysed the decision of the House of Lords in that case, Costello J. concluded (at p. 299):

> *"It is thus clear that the test of finality established by the House of Lords is whether the order whose enforcement is sought operates as a* res judicata*."*

69. Costello J. refused to follow subsequent English authority to contrary effect and came to the ultimate conclusion (at p.301):

> *"If it can be shown that the principle of res judicata applies to the order then* even though it *may be subject to appeal by a higher court or* be varied *if circumstances change by the same court then it is a 'final and conclusive' order which will be enforced."* (emphasis added)

70. In light of these principles, I must now consider whether it makes any difference that the judgment of District Judge Jones here is subject to the *Turner* principle which, as noted above, does not depend on *res judicata* or any species of estoppel. The foundation of the *Turner* principle is that it would be a waste of the court's time to allow parties, on the hearing of a bankruptcy petition, to relitigate issues which should properly have been dealt with on an application to set aside a statutory demand. Bearing in mind the conclusion of Costello J. that the test of finality established by the *Nouvion* case is based on whether the Order (which is sought to be enforced) operates as a *res judicata*, does it matter that the standing of the judgment of District Judge Jones in any subsequent UK bankruptcy proceedings is subject to the *Turner* principle?

71. There is no authority directly in point. However, in my view, there is a clear parallel between the circumstances that arose in *M. McC. v. J. McC*. and the present case. In that case, there was a possibility that the relevant foreign order could be reviewed or varied if circumstances were to change. Similarly, there is the possibility in this case (however unlikely it may appear) that, in the exercise of residuary discretion, the UK bankruptcy court could potentially allow new arguments to be opened up if the circumstances change.

72. I have come to the conclusion that the operation of the *Turner* principle does not undermine the finality of the decision of District Judge Jones. This seems to me to follow, in the first place, from the fact that (as explained in more detail below) the judgment of District Judge Jones was a decision on the merits. It is furthermore clear that, as a matter of English law, the judgment is a final judgment (all avenues of appeal having been exhausted) and that there are only very limited circumstances in which the English bankruptcy court would entertain any new argument being made by the debtors on the hearing of the bankruptcy petition. Secondly, as set out in para. 71 above it is difficult to see any distinction in principle between a judgment of the kind under consideration in *M. McC. v. J. McC*. and the judgment of District Judge Jones here. Both judgments can be reviewed in the event of a genuine change in circumstances. Thirdly, when one considers the effect of the *Turner* principle, it is clear that it has a very similar effect as *res judicata* (albeit not based on estoppel). This is clear, for example, from the decision in *Harvey v. Dunbar Assets Plc* [2016] BPIR 48 (Ch) where Roger Kaye QC (sitting as a Deputy High Court Judge) said at p. 93:-

> *"First, the court, on the hearing of a bankruptcy petition … has a duty to consider, on the material before it, whether the conditions for the making of a bankruptcy order are satisfied …*
>
> *Second, on such a hearing where there has been a previous hearing on the merits, whilst the court ought always to ask itself whether the arguments have been previously run and failed, and, why arguments now advanced have not been run before*, absent a change of circumstances or some other special or good reasons or circumstances, the debtor cannot go back on the hearing of the petition …to re-argue or reiterate arguments presented earlier, or which he had an opportunity to present*. The basis of this principle (which has been referred to in the recent cases as the Turner principle) is that to hold otherwise would be to encourage a waste of court time, a waste of the parties' money and defeat the obvious purpose of the statutory scheme which was that arguments on whether or not there was a genuine debt ought to be raised at the earliest stage i.e. on the application to set aside the statutory demand…".* (emphasis added).

73. The approach taken in *Harvey v. Dunbar Assets Plc* is far removed from the circumstances of the "*remate*" judgment that the House of Lords was not prepared to recognise in the *Nouvion* case. It will be recalled that in the *Nouvion* case, the "*remate*" judgment was given in proceedings in which only very limited defences were available to the defendant. More importantly, neither the plaintiff nor the defendant was bound by the judgment given in such proceedings. Both parties remained free to institute parallel plenary proceedings in which the court could take a different decision to that taken in the "*remate*" proceedings. The description by Roger Kaye Q.C. in *Harvey v. Dunbar Assets Plc* of the approach taken by the English bankruptcy court is quite different. It is true that the English court, on the hearing of a bankruptcy petition, has a residuary discretion to ultimately take a different approach to that taken by District Judge Jones. However, it is clear from the case law cited by Mr. Scher, that the bankruptcy court will not lightly do so absent a change of circumstances. This makes it very similar, in my view, to the position with regard to maintenance orders considered by Costello J. in *M. McC*. In that case, the relevant maintenance order was subject to variation by the courts of Hong Kong in the event that the circumstances changed. There is therefore a very strong parallel between the circumstances of that case and the present case.

74. Moreover, it is instructive that the plaintiffs here sought to appeal the decision of District Judge Jones. When, initially, their written appeal was rejected by the decision of Barling J., they asked for an oral hearing in order to further press their case for leave to appeal. The very fact that they went to such lengths reinforces the view that the judgment of District Judge Jones had significant consequences for them in any subsequent bankruptcy proceedings. There would be little point in their going to so much trouble and expense (including the retainer of both leading and junior counsel) if the judgment of District Judge Jones did not have serious implications for them in any bankruptcy proceedings initiated by the defendant.

75. Lastly and most importantly, it is clear from the English case law cited by Mr. Scher in his affidavit as to English law, that, save for the residuary discretion of the bankruptcy court under the *Turner* principle a decision of an English court refusing to set aside statutory demands gives rise to *res judicata*. This is clear from the decision of Evans-Lombe J. in *Eberhardt & Co. Ltd v. Mair* [1995] 1 WLR 1180 at p. 1186. It is also clear from the decision of the Court of Appeal in *Brillouet v. Hachette Magazines Ltd* [1996] BPIR 518 at p. 524. Those authorities were applied more recently by Judge Purle Q.C. sitting as a High Court judge in *Roseoak Investments Ltd v. Network Rail Infrastructure Ltd* [2010] BPIR 646. In that case, a statutory demand was made by Network Rail Infrastructure Ltd ("*Network*") on Mr. Davey as a guarantor of two leases granted to a company he controlled namely Roseoak Investments Ltd ("*Roseoak*") in respect of rent due in relation to a premises near Paddington Railway Station. Mr. Davey applied to set aside the statutory demand. That application was dismissed in May 2008. Subsequently, on 17th February, 2009 the High Court refused permission to appeal. Mr. Davey then issued proceedings in the Commercial Court in the name of Roseoak and his own name against Network. Those proceedings were dismissed by Judge Purle (sitting as a High Court judge). In para. 4 of his judgment in that case, Judge Purle said:-

> "The normal position is that once a statutory demand has been served, the onus is upon the person upon whom it is served to challenge it by seeking to set it aside. Once such a challenge fails, it is not in general open to the recipient of the statutory demand to reopen the issues in the absence of a change of circumstances on the hearing of the petition itself….When the basis of the court's decision is (as it was before the Deputy District Judge and Lewison J.) that there is no sustainable cause-claim, the same must apply to any attempt to reopen the matter by separate proceedings, and must also apply to any collateral attack by a connected party such as Roseoak".

76. In these circumstances, I believe that the judgment of District Judge Jones should be regarded as final notwithstanding the operation of the *Turner* principle.

Is the decision of District Judge Jones a decision on the merits?

77. In *Celtic Atlantic Salmon (Killary) Ltd v. Aller Aqua (Ireland) Ltd* [2014] 3 I.R. 214 at p. 229 Hogan J. adopted the following statement by Lord Brandon in *The Sennar (No. 2)* [1985] 1 W.L.R. 490 at p. 499 as an appropriate explanation of the meaning of a judgment on the merits:-

> *"Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned."*

78. In *Moffitt v. Agricultural Credit Corporation Plc* [2008] 1 ILRM 416 Clarke J. (as he then was) gave further guidance as to the parameters of what can be considered to be a judgment on the merits. In that case an issue arose as to the status of a previous decision of the High Court striking out proceedings on the ground that they disclosed no reasonable cause of action and were frivolous and vexatious. The question was whether such a judgment was a decision on the merits. Clarke J. explained the position as follows (at p. 423):-

> *"it is clear that the dismissal of proceedings for want of prosecution … or by virtue of prematurity … does not give rise to a bar to future proceedings.*
>
> *3.3 In that context there is an issue as to whether a dismissal on the basis that proceedings are frivolous and vexatious or are an abuse of process amounts to a judgment on the merits. …*
>
> *There may well be cases where the fact that proceedings are dismissed as being frivolous or vexatious may not give rise to a bar to further proceedings. However, it seems to me that where proceedings are dismissed as being bound to fail following on from a hearing in which the court considered the merits of the case for the purposes of determining whether the case had any chance of success, then it follows that fresh proceedings on the same basis are barred. In order to determine that proceedings are bound to fail, the court must enter into a consideration of the merits. Indeed, it does so on the basis of allowing the benefit of the doubt concerning any factual or complex legal issues to be determined in favour of the plaintiff. The proceedings will only be dismissed, under Barry v. Buckley, where the court is satisfied that there is no prospect of success on the merits. Such a hearing can, in my view, be properly described as a hearing on the merits…".*

79. It is clear from the decision of Clarke J. in *Moffitt* that, once a court has entered into a consideration of the merits, it does not matter what form the hearing took. For example, as explained by Clarke J., a motion to dismiss proceedings on the basis that they are bound to fail will be a judgment on the merits since a court, on the hearing of such a motion, will necessarily have to address the merits of the plaintiff's case. The position is the same in cases where a plaintiff seeks summary judgment and where the defendant resists that application. In such cases, a court will have to consider whether the grounds of defence asserted by the defendant give rise to an arguable case that the defendant does not owe the money claimed by the plaintiff. Thus, in *Corbett v. LSREF III Achill Investments Ltd* [2016] IEHC 176, Costello J. came to the conclusion that a previous decision of Barrett J., in summary summons proceedings, (by which he rejected the grounds of defence relied upon by the Corbetts) gave rise to *res judicata* as against the Corbetts in subsequent plenary proceedings. In that case, after Barrett J. had decided that they had no grounds of defence in the summary summons proceedings, the Corbetts commenced plenary proceedings against LSREF III Achill Investments Ltd on similar grounds to those previously rejected by Barrett J. in the summary summons proceedings. In those plenary proceedings, Costello J. held that the Corbetts were estopped from pursuing, in those plenary proceedings, arguments which had previously been rejected by Barrett J. in the summary summons proceedings.

80. There is an obvious parallel between the exercise conducted by District Judge Jones in Slough County Court and the exercise undertaken by a court in considering whether a case is bound to fail (which is what happened in the previous proceedings in *Moffitt*) or the task undertaken by the court in considering whether a defendant, in summary summons proceedings, has arguable grounds of defence (as occurred in *Corbett*). In each case the court has to consider whether the case put forward has any chance of success. I cannot see any relevant basis on which the approach taken by District Judge Jones could plausibly be distinguished. His task was essentially to consider whether the plaintiffs here had any real prospect of success in the intended future litigation between themselves and the defendant in Ireland. As noted in para. 18 above, District Judge Jones came to the conclusion that there was no real prospect of success and in those circumstances he dismissed the applications to set aside the statutory demands. For similar reasons to those discussed by Clarke J. in *Moffitt* and by Costello J. in *Corbett*, it seems to me that the decision of District Judge Jones was, in truth, a decision on the merits.

81. However, counsel for the plaintiffs argues that the decision of District Judge Jones on the issue as to whether the plaintiffs have a case against the defendant under the 2007 Regulations is not a decision on the "*legal merits*". He advances this argument on the basis that any finding made by an English court as to the 2007 Regulations is a finding of fact rather than of law and he submits that such a finding of fact cannot give rise to an estoppel as to any issue of Irish law. Counsel refers, in this context, to the following statement by McGrath in *Evidence*, 2nd Ed. 2014, at para. 6-99:

> *"It is important to note that an issue of foreign law is regarded as a matter of fact. Therefore, the finding of the court on the issue has no precedential value and if the point arises again, it must be decided anew by reference to fresh expert evidence."*

82. Counsel accordingly argued that, since the English judgment ruled upon issues of Irish law as a matter of fact, it has no value as a precedent in relation to the determination of those issues as matters of law. As such, counsel submitted that the English judgment cannot bind an Irish court in relation to any of the issues of law required to be determined in these proceedings.

83. While counsel for the plaintiffs was not in a position to identify any authority directly in point, he drew attention to the decision of the English Court of Appeal in *Bott & Co. v. Ryanair* [2019] EWCA Civ. 143. In that case, an issue arose as to the validity of clause 15.2 of Ryanair's standard contract of carriage. The contract was stated to be governed by Irish law. In the course of his judgment Lewison L.J. observed, at para. 60:

> *"That leads to the question whether clause 15.2 of Ryanair's standard contract of carriage is valid. It is a curious issue for this court to have to decide, for at least three reasons. First, the contract of carriage is governed by the law of the Republic of Ireland, not by the law of England and Wales. We were told that the validity of clause 15.2 is to be decided in proceedings currently before the High Court in Ireland. Our decision on its validity would not bind an Irish court, although it may be persuasive. On the other hand, it is said that whether the clause is valid is a question of EU law, which applies as much to this jurisdiction as to Ireland. Second, Bott is not a party to the contract; and no passenger is before the court…"*

84. Counsel for the plaintiffs submitted that this observation by Lewison L.J. suggests that he had in mind that a finding by the English Court of Appeal on the validity of a contract governed by Irish law would merely rank as a finding of fact which would not bind an Irish court when it came to consider the same issue in Ireland where it would be addressed as a question of law rather than fact.

85. I have to say that I doubt very much whether that is what Lewison L.J. had in mind. It seems to me to be more likely that all Lewison L.J. had in mind is that any decision of the English courts would never bind the courts of another jurisdiction. However, having regard to the respect which the Irish courts have for decisions of the English courts, the decision of the English Court of Appeal might well be persuasive in any subsequent Irish hearing. There is nothing novel in that approach. The same point was made by Costello J. in M.McC. v. J.McC. in the context of the English decisions considered by him in his judgment in that case.

86. I strongly doubt that Lewison L.J. had any issue of *res judicata* in mind. There was no suggestion that the proceedings in Ireland (to which Lewison L.J. made reference) were between the same parties and therefore no question of issue estoppel would arise. While Ryanair was obviously a party to the Irish proceedings, there is no suggestion that Bott & Co. (who were a firm of English solicitors representing a number of Ryanair customers in various proceedings in England) were parties to the Irish proceedings.

87. Moreover, it is essential not to conflate *res judicata* with the quite separate issue as to whether a previous judgment binds a subsequent court. The submission made by counsel that the English judgment cannot bind an Irish court in relation to any of the issues of law required to be determined in these proceedings is without doubt, correct. However, that is not the issue that arises in the context of *res judicata*. The question which arises in the context of *res judicata* is whether a party to proceedings is estopped from raising an issue in subsequent proceedings in Ireland which has already been determined against that party in earlier proceedings in England and Wales. *Res judicata* operates to bind the party; not the court. The way in which estoppel operates is explained by Diplock L.J. in *Thoday v. Thoday* [1964] 1 All E.R. 341 at p. 351 as follows:

> *"estoppel merely means that, under the rules of the adversary system of procedure on which the common law of England is based,* a party is not allowed*, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action."* (emphasis added)

88. The underlying rationale is further spelt out in the extract from the judgment of Diplock L.J. quoted in para. 56 above from which it is clear that the estoppel operates against the parties. In cases where the court holds that a party is estopped from raising an issue, the court is, in no sense, suggesting that it is itself bound by what happened in the previous proceedings. It is simply holding that the parties in the litigation before it are so bound.

89. Furthermore, it is clear that *res judicata* operates in respect of questions of both fact and law and also questions of mixed fact and law. The relevant principle is succinctly summarised by Spencer Bower & Handley in *Res Judicata* 4th Ed., at para. 8.04 as follows:

> *"The determination which will found an issue estoppel may be of law, fact, or mixed fact and law. Examples of the first include cases where the issue is one of construction. In Hoysted this was the application of a Revenue statute to a will, and in Blair v. Curran and Re Waring the construction of wills. In road traffic cases the issues have generally been of fact or mixed fact and law."*

90. It is true that there are certain findings of fact which do not give rise to *res judicata*. These were described by Diplock L.J. in *Thoday* at p. 352 as follows:

> *"But 'issue estoppel' must not be confused with 'fact estoppel' which although a species of 'estoppel in pais', is not a species of estoppel per rem judicatam. The determination by a court of competent jurisdiction of the existence or non-existence of a fact, the existence of which is not of itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before that court, but which is only relevant to proving the fulfilment of such a condition, does not estop at any rate per rem judicatam either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court. It may not always be easy to draw the line between the facts which give to its issue estoppel and 'those which do not, but the distinction is important and must be borne in mind'."*

91. In my view, there is no scope to suggest that the relevant findings by District Judge Jones fall within the category of fact described in that passage by Diplock L.J. The findings made by District Judge Jones were to the effect that the plaintiffs had no real prospect of succeeding in a case under the 2007 Regulations. Insofar as the plaintiffs now seek, in these proceedings in Ireland, to contend that the defendant was in breach of the 2007 Regulations, they are essentially making a case which is contrary to the findings made by District Judge Jones. To paraphrase Diplock L.J. (in the second para. of the passage from his judgment in *Thoday* quoted in para. 56 above), the plaintiffs, in the proceedings before District Judge Jones, had to establish that they had, at the least, an arguable case to make that the defendant was in breach of the 2007 Regulations. This was the condition which they had to fulfil in order to establish a right to have the statutory demands set aside. The condition which the plaintiffs would have to establish in the present proceedings (were the proceedings to go to trial) is that the defendant was in breach of the 2007 Regulations. In essence, that is an identical (or more properly a mirror-image) condition to that which has already been decided against them by District Judge Jones. By his decision in proceedings which they themselves instituted in the Slough County Court, they have been found not to have any reasonable prospect of succeeding on that issue. In those circumstances, it seems to me to follow that (subject to what I say below in the next section of this judgment) they cannot, in these proceedings, assert that the 2007 Regulations were breached by the defendant.

92. While I have considerable admiration for the way in which counsel for the plaintiffs has argued the matter, I cannot see any basis on which one can plausibly make a distinction between a finding of fact made by a foreign court which does not involve any issue of Irish law and a finding by a foreign court as to Irish law (which is to be treated as a finding of fact). While I fully admit that there may be cases where the finding of the foreign court could well be erroneous as a matter of Irish law, that does not seem to me to affect the application of *res judicata*. The effect of *res judicata* is to estop the parties from seeking to relitigate an issue which has already been determined against them. The relevant decision on that issue may well have been erroneous as a matter of law, but that does not affect the operation of the *res judicata* principle. The whole point of that principle is that the parties are estopped from rearguing the point again whether the decision by which they are bound is a good decision, a bad decision or an indifferent decision. Once it is a final decision, the estoppel arises (provided the other elements of the *res judicata* test (as summarised in para. 59 above) are satisfied.

93. Accordingly, I must reject the argument of counsel for the plaintiffs that the decision of District Judge Jones is not a finding "*on the merits*". In my view, subject to a consideration of the remaining criterion (addressed in the next section of this judgment) the finding of District Judge Jones binds the plaintiffs notwithstanding that it constitutes a finding by a foreign court as to Irish law. As noted above, that finding is, in no sense, binding on this court. But it does bind the plaintiffs.

Did the judgment of District Judge Jones determine questions which are now raised in these proceedings?
94. It is strongly argued by counsel for the plaintiffs that there are at least two significant questions raised in the proceedings in Ireland which were not determined in the English proceedings. In particular, counsel maintains that District Judge Jones did not deal with the case now made under the Distance Marketing Regulations and he also did not deal with what is now described as the "*duty of care"* or the "*appropriateness*" point. There is no dispute between the parties insofar as the Distance Marketing Regulations claim is concerned. The defendant accepts that this was not pursued in the proceedings before District Judge Jones. However, the defendant submits that, having regard to the rule in *Henderson v. Henderson*, the plaintiffs ought not be permitted to pursue that argument now in these proceedings.

95. The defendant does not accept that the duty of care/appropriateness point were not issues in the English proceedings. On the contrary, the defendant maintains that these were issues which have been decided against the plaintiffs as a consequence of the judgment of District Judge Jones and that the plaintiffs are, accordingly, estopped from re-litigating those claims now in these proceedings.

96. In this section of the judgment, I will confine myself to considering the issue in relation to duty of care/appropriateness. I will consider the Distance Marketing Regulations claim in the next section of my judgment dealing with the rule in *Henderson v. Henderson*.

97. Counsel for the plaintiffs argued that, in considering whether the duty of care/appropriateness point has been addressed in the proceedings before District Judge Jones, it is critically important to consider the judgment of District Judge Jones rather than the witness statements or the submissions that were made to him. Counsel took me through the judgment of District Judge Jones and he argued that, on any proper analysis of the judgment, it did not address the appropriateness argument. Counsel submitted that, while District Judge Jones had decided that the risks of the investment had been sufficiently brought to the attention of the plaintiffs, he had failed to consider whether the appropriate level of information had been collected by the defendant from the plaintiffs; whether it had been properly assessed by the defendant; and whether the plaintiffs had been warned that the investment was not an appropriate investment for them, having regard to the individual circumstances of the plaintiffs. Counsel also argued that when one looks at the decision of Barling J. and Ms. Tipples Q.C., there is no hint that any argument was addressed by them as to the appropriateness of the trades for the plaintiffs. Counsel accordingly argued that the duty of care claim now made in these proceedings (largely based on the appropriateness point) was not decided in any way by District Judge Jones and, therefore, was not covered by issue estoppel.

98. Referring to the decision of Carswell J. (as he then was) in *Deighan v. Sunday World* [1987] NI 105, counsel for the defendant argued that, in considering whether an issue had been decided in previous proceedings, it is necessary to look not only at the judgment given in those proceedings but at the underlying pleadings. Counsel argued that it was therefore necessary, in this case, to consider the documents submitted by the parties including the witness statements and the skeleton arguments submitted by them. Counsel contended that it was plain from the documents that were submitted to District Judge Jones that the appropriateness point was in issue in the proceedings before him. Furthermore, counsel submitted that, when the judgment of District Judge Jones is considered against the backdrop of the documents and materials before him, it is very clear that the appropriateness point was "*squarely*" addressed by District Judge Jones.

99. For my part, I believe that the submission made by counsel for the defendant is correct insofar as he suggested that, on an application of this kind, it is necessary to consider not only the relevant judgment but also the pleadings and other materials that reflect the case made by the parties. It is noteworthy that in *Moffitt*, Clarke J. carefully considered the pleadings in the previous proceedings as p. 426 of the report in that case demonstrates. It is essential to consider the pleadings (or any equivalent documents) in order to understand what were the issues in play in the previous proceedings and in turn to consider whether those issues were determined by the relevant judgment. That is precisely the approach that was taken by Carswell J. in *Deighan v. Sunday World*. In that case, the plaintiff had sued the defendant for libel in the courts in this jurisdiction. His case had been rejected by a jury and the decision of the jury had subsequently been upheld by the Supreme Court, on appeal. The plaintiff then commenced fresh proceedings in the High Court of Northern Ireland in relation to the same publication. Carswell J. held that he was estopped from doing so. In reaching that decision, Carswell J. carefully reviewed the nature of the case made in the pleadings in the Irish proceedings. In the present case, I will therefore take a similar approach. I will review the case made in the proceedings before District Judge Jones and then consider his judgment in the light of the case which was made to him.

100. Before I address the case made in the proceedings before District Judge Jones, it may be helpful, at this point, to identify the relevant case now made in these proceedings in Ireland. Counsel for the plaintiffs very helpfully drew my attention to the particulars to para. 20 of the statement of claim. Counsel explained that paras. (a) to (c) of those particulars related to the Distance Marketing Regulations. It will be necessary, at a later point in this judgment, to consider, in more detail, the nature of the claim made under those Regulations. Paragraphs (d) to (j) are concerned with that part of the plaintiff's case on duty of care which counsel accepts was addressed in the English proceedings. In those paras., the plaintiffs allege that there was a failure by the defendant to make them sufficiently aware not only of the risk that they might lose their actual investment by way of margin deposit but also the risk that they would be exposed to very substantial liability in excess of the deposit.

101. Counsel for the plaintiff submitted that paras. (k) to (w) of the particulars make a new case which was not addressed in the English proceeding. The case made in these paras. can be summarised as follows:-

(a) There was a failure to gather any information in relation to the plaintiff's levels of education or professional backgrounds;

(b) There was a failure to assess whether the transactions were appropriate for the plaintiffs particularly in circumstances where the second named plaintiff is a homemaker with an annual income of less than £10,000 sterling and no professional background or education and where the first named plaintiff is a medical doctor with an annual income of £100,000 sterling with no professional background or education relevant to investing;

(c) There was a failure to warn the plaintiffs that the transactions were not appropriate for them and a failure to advise the plaintiffs of the extent of their personal exposure;

(d) The defendant permitted the first named plaintiff to carry out a large number of transactions with a significant exposure on the second named plaintiff's account without warning her;

(e) There was a failure to have any adequate regard to the fact that the net worth of the plaintiffs was many multiples less than the amount of their exposure.

102. In making the case outlined in para. 101 above, the plaintiffs rely on Regulations 76 and 94 of the 2007 Regulations. The plaintiffs also rely on the Central Bank (Supervision and Enforcement) Act, 2013 ("the 2013 Act"). Under s.44 of the 2013 Act, a failure by a regulated financial service provider to comply with any obligation under financial services legislation is actionable by any customer who suffers loss as a result.

103. Regulation 76(4) imposes an obligation on an investment firm (when providing investment services other than investment advice or portfolio management) to gather information from the client in relation to the client's knowledge and experience in the investment field relevant to the specific type of product or service offered. Under the same Regulation, the investment firm is required to take that information into account in order to assess whether the investment service or product envisaged is appropriate for the client. If the investment firm considers, on the basis of the information gathered under Regulation 76(4) that the product is not appropriate to the client, the investment firm has a duty under Regulation 76(5) to warn the client. This obligation must be read in conjunction with Regulation 94(7) which provides that an investment firm, when carrying out a Regulation 76(5) assessment, must determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered.

104. Regulation 94(9) provides further detail as to the information which should be gathered in relation to a client for the purposes of carrying out an assessment of this kind. Insofar as relevant, Regulation 94(9) provides as follows:-

> *"The information regarding a client's…knowledge and experience in the investment field shall include, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, the following:*
>
> *(a) The types of service, transaction and financial instrument with which the client is familiar;*
>
> *(b) The nature, volume, frequency of the client's transactions in financial instruments and the period over which they have been carried out;*
>
> *(c) The level of education, profession or relevant former profession of the client…"*

105. Having set out the nature of the case now made in the statement of claim (insofar as the appropriateness/duty of care point is concerned) it is next necessary to consider the case that was made before District Judge Jones. In the initial witness statements filed in support of the application to set aside the statutory demands, no reference was made to the 2007 Regulations. A number of arguments were made which are no longer being pursued and are therefore not relevant. Although the 2007 Regulations were not cited in the witness statements, it is noteworthy that in para. 16 of the witness statement sworn by the first named plaintiff he stated as follows:-

> *"Any basic Know Your Customer diligence conducted by AVA would have revealed to them or to any competent or reasonable investment manager …that exposure to losses on the scale identified in the Statutory Demand was outside my trading objectives and would have been foolhardy and irrational and entirely outside of my comfort zone and experience".*

106. Prior to the first hearing before District Judge Jones in October 2015, both sides filed skeleton arguments. The skeleton argument submitted by the plaintiffs did not make any reference to the 2007 Regulations. However, a detailed skeleton argument was submitted on behalf of the defendant in which specific reference was made to the MiFID Directive (i.e. the Markets in Financial Instruments Directive, 2004/39/EC). In particular, para. 26 of the skeleton referred to Article 19 (5) of MiFID which was transposed in Ireland by Regulation 76 (5) of the 2007 Regulations. In paras. 29-32 of the skeleton, the defendant made the case that the first named plaintiff represented that he was a highly experienced investor (including in currencies and options) and both plaintiffs confirmed that they possessed the highest possible level of knowledge and experience with regard to options trading. This section of the skeleton drew attention to emails sent by the first named plaintiff which, it was submitted, demonstrated that the first named plaintiff was plainly highly experienced in trading options of the kind in issue here. On that basis, the defendant made the case that under Article 19 (5) of MiFID, the defendant had no reason to warn the plaintiffs that the products were unsuitable. The skeleton also referred to the risk warnings that were contained in the contract documents and it also highlighted an email dated 6th June, 2014 to the first named plaintiff from the defendants in which it was expressly stated:-

> *"…if the Swiss Central Bank changes its intervention policy, and the rate crashes through your strike, volatility …will spike and spreads will widen. That is the nature of the trade you are entering…".*

107. As noted above, the proceedings before District Judge Jones were adjourned in October 2015 and subsequently the hearing was resumed in December 2016. In the meantime, a very detailed witness statement was submitted by the first named plaintiff on 6th November, 2015 to which he attached a complete copy of the 2007 Regulations. In paras. 52-53 of his witness statement, specific reference was made by the first named plaintiff to the obligation on the defendant to gather information and to warn the client if the product or service is not appropriate. In particular, reference was made in para. 53 of the witness statement to Article 76 (4) and (5) and the terms of those paras. of Article 76 are quoted in para. 54. Furthermore, in para. 5 of the witness statement, the case was made that the 2007 Regulations take priority over the terms and conditions issued by the defendant. In para. 61 of the witness

statement, the first named plaintiff said that, in light of the provisions of the 2007 Regulations, the defendant:

> *"…will find it difficult to establish that appropriate warnings were provided. They have repeatedly failed in their Statutory obligations in relation to these transactions. Attempts to state that their obligations are limited because it was Execution-only will fail".*

108. Insofar as I can see, no express reliance was placed by the plaintiffs in their proceedings in England on Regulation 94 of the 2007 Regulations. Regulation 94 (7) and (9) are expressly invoked in the statement of claim in these proceedings in Ireland. However, it is important to keep in mind that the obligations which arise under Regulation 94 (7) and (9) are not free standing obligations. They are to be read in conjunction with Regulation 76 (5) and (6). They spell out how the investment firm is to perform its obligations under Regulation 76 (5) and (6).

109. As noted previously, District Judge Jones delivered a detailed written judgment in which he considered the arguments of the parties. In para. 29 of his judgment, Judge Jones refers to the 2007 Regulations and the case made by the plaintiffs that the Regulations supersede any terms of the contract between the parties. In para. 30 the judge adverts to the case made by the plaintiffs that the contract with the defendant is vitiated by the failure to comply with the provisions of the 2007 Regulations. In paras. 42-43 of his judgment, the judge refers to the information provided by the plaintiffs at the time of formation of the contracts with the defendant. In particular, in para. 43, the judge draws attention to the extent of information that was provided by the plaintiffs in relation to their previous trading experience in respect of securities, currencies, futures, options and commodities. In each one of those fields, the plaintiffs suggested that they had five or more years' experience.

110. In para. 62 of his judgment, District Judge Jones specifically refers to the obligation (which is contained in Regulation 76 (4) of the 2007 Regulations) on an investment firm to obtain information about the client's knowledge and experience relevant to the type of product it is using. He also refers to the obligation to take that information into account in order to assess whether the investment service or product is appropriate. Counsel for the plaintiffs accepts that, in this paragraph, the judge came closest to addressing the appropriateness point. But counsel contends that the judge never made a decision on the point. I will presently address the decision actually made by the judge. However, I believe that the next paragraph (i.e. para. 63) of the judgment is very relevant in this context (and is consistent with the case made by the defendant in relation to Regulation 76 or its equivalent in MiFID) where the judge said:-

> *"I remark in passing that of course, given the assertions made by the Georges when they completed the online forms, these were experienced investors and, therefore, the Respondents are entitled to rely upon those assertions when assessing the suitability of the types of transactions that the Applicants were entering into".*

111. That is an important observation by the judge particularly in light of the provisions of Regulation 94 (7) which, as noted above, provides that an investment firm, when carrying out a Regulation 76 (5) assessment, must determine whether the client has the necessary experience and knowledge in order to understand the risks involved. Thus, although Regulation 94 is not expressly addressed in the judgment, the substance of the obligation contained in the Regulation is addressed. At para. 77 of his judgment, District Judge Jones addresses a different aspect of the plaintiff's case based on duty of care arising from an alleged contractual duty to provide investment advice. That aspect of the case is not relevant for present purposes. The judge then discusses, in some detail, the terms and conditions which formed part of the contract between the parties. At para. 82 of his judgment, he observes that the terms and conditions contain a section on appropriateness of trading. However, the analysis undertaken by the judge is based on the terms and conditions rather than on Regulation 76. At para. 84, the judge addressed Regulation 80 of the 2007 Regulations. At para. 85 he made a definite finding that the risks were clearly set out for the plaintiffs at the time of formation of the contracts. Paragraphs 86-96 of the judgment deal with the case then being made by the plaintiffs that their liability was limited. Having found against the plaintiffs on that issue, the judge then reached the conclusion set out in para. 18 above.

112. In setting out his conclusion, District Judge Jones did not make individual findings in relation to each of the arguments made by the plaintiff. Nonetheless, it seems to me to be clear that he was rejecting all of their arguments. As noted in para. 18 above, he expressly said that if he had thought that there was any substance *"in* any *of the arguments"* (emphasis added) that the plaintiffs had put forward, then he would have given them the opportunity to litigate those matters further. To my mind, that is a rejection of each of the arguments made by the plaintiff including the argument made under Regulation 76 (which he addressed at an earlier point in his judgment). As noted above, the Regulation 76 argument is addressed at paras. 62-63 of his judgment. It is clear, therefore, that he had the plaintiff's argument based on Regulation 76 in mind. It must follow, in my view, that when he says, later, at para. 97 of his judgment, that he does not see any substance in any of the arguments put forward by the plaintiffs, he is, plainly, rejecting the argument previously summarised in para. 62 and commented upon in para. 63.

113. In light of the fact that the Regulation 76 issue was expressly addressed by both sides in the course of the proceedings before District Judge Jones and in light of the considerations outlined in para. 112 above, I have come to the conclusion that the Regulation 76 argument was raised in the proceedings (as the second witness statement of the first named plaintiff and the skeleton argument of the defendant make clear) and was decided against the plaintiffs in the judgment of District Judge Jones. I fully appreciate that no reference to Regulation 94 is expressly made in the judgment. Nonetheless, as previously mentioned, the entire 2007 Regulations were placed before the District Judge. Moreover, as noted in para. 111 above, the Regulation 94 argument was addressed in substance. Furthermore, as noted in para. 108 above, Regulation 94 does not appear to me to be a freestanding provision. Instead, it appears to be designed to be read in conjunction with Regulation 76. Given that the Regulation 76 issue was decided against the plaintiffs, I do not think that it makes any difference that Regulation 94 was not separately addressed.

114. I am reinforced in this conclusion in circumstances where the issue of Regulation 76 was specifically addressed on appeal to the High Court. This is very clear from the note of the *ex tempore* judgment given by Ms. Tipples Q.C. sitting as a deputy High Court judge. It is important to recall that, at this point, the plaintiffs were no longer acting as litigants in person. They were represented by both leading and junior counsel. The note of the judgment of Ms. Tipples records on p. 2 the reliance placed by the plaintiffs on Regulation 76. At a later point in her judgment, the Deputy Judge records that the complaint made by the plaintiffs is that the District Judge had failed to consider the implications and impact of (*inter alia*) Regulation 76. On p. 3 of her ruling, the Deputy Judge also records the argument made by leading counsel on behalf of the plaintiffs that the District Judge had failed to have regard to the regulatory framework and the protection afforded under that framework. The conclusion reached by the Deputy Judge in relation to this argument is important. On p. 3 of her judgment she said:-

> *"…it is said that the D.J. failed to have regard to the regulatory framework and in particular referring to the statutory instrument. Mr. Berkley did not take me to any particular aspects of the judgment where he said the judge went wrong in this regard. I disagree with this point as well. At para. 60 of the D.J.'s judgment he begins considering the statutory instrument and then deals with Regulations 76, 77, 80 and 81. He considered it with care and with reference to the facts*

of the case. I do not see anything that could give rise to an appeal with any real prospect of success."

115. Like District Judge Jones, Ms. Tipples Q.C. expressed herself to be satisfied that there were no grounds on which the appeal had any prospect of success. In the circumstances she dismissed the application for permission to appeal the judgment of District Judge Jones.

116. For the reasons outlined above, I find that the Regulation 76 (and by extension the Regulation 94) arguments advanced by the plaintiffs in these proceedings are subject to issue estoppel in circumstances where the issue was previously raised in the English proceedings before District Judge Jones (and on the application for leave to appeal to the High Court) and rejected by the court. In the context of issue estoppel, there is no scope for the court to exercise any discretion. Accordingly, I am bound to hold that the plaintiffs are estopped from pursuing this claim in these proceedings in Ireland. That is the claim made in sub. paras. (k) to (w) of the particulars to para. 20 of the statement of claim. In my view, that element of the plaintiff's claim must be dismissed. In addition, in circumstances where counsel for the plaintiffs accepts that the claims made in sub paras. (d) to (j) were also addressed in the English proceedings, it must follow that a similar order must be made in relation to that claim also.

The rule in *Henderson v. Henderson*

117. The final element of the application by the defendant relates to the plaintiff's claim in relation to the Distance Marketing Regulations. As noted above, the defendant accepts that this claim was not raised in the proceedings in the Slough County Court. In those circumstances the defendant does not contend that any issue of estoppel arises. Instead, the defendant relies on the rule in *Henderson v. Henderson* and says that this is a claim that could and should have been raised in the proceedings in the County Court. On the basis of the rule in *Henderson v. Henderson*, the defendant contends that it is an abuse of process on the part of the plaintiff to bring proceedings against the defendant in Ireland in respect of a ground that should properly have been raised in the proceedings before District Judge Jones.

118. There is no dispute between the parties that the rule in *Henderson v. Henderson* forms part of Irish law. It has been applied by the Supreme Court and the Court of Appeal in a number of cases (discussed in more detail below). There is, nonetheless, a significant dispute between the parties as to the correct approach to be taken in applying the rule in *Henderson v. Henderson*. There is equally a dispute between the parties as to the result of the application of the rule in this case.

119. In light of the extent of the dispute between the parties as to the approach to be taken, it is necessary to examine the existing case law in some detail. The starting point is the decision in *Henderson v. Henderson* (1843) 3 Hare 100 where, at p. 114, Wigram V.C. set out the rationale for the rule in terms which have been quoted so often that it is unnecessary to do so here. It is sufficient to record that, in that case, Wigram V.C., observed that parties to litigation in a court of competent jurisdiction are required to bring forward their whole case. Where they fail to do so, the court will not (in subsequent litigation) permit the parties to raise an issue which the party, exercising reasonable diligence, ought properly have raised in the previous litigation.

120. As Hardiman J. highlighted in *A.A. v. Medical Council* [2003] 4 I.R. 302 at p. 315, the same view was taken by Palles C.B. in *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345.

121. In *A.A. v. Medical Council* (discussed in more detail below) Hardiman J. cited, with approval, the observations of Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1 at p. 31 where Lord Bingham explained the approach to be taken (and the rationale underlying it) in the following terms:-

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

122. That passage has been cited, with approval, on several occasions by the Supreme Court and by the Court of Appeal in this jurisdiction. Counsel for the plaintiffs drew particular attention to the observation by Lord Bingham that there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. Counsel submitted that the onus is on the defendant in this case to establish that these proceedings constitute unjust harassment of the defendant. Counsel argued strongly that, since this passage (or a somewhat shorter version of it) has been approved on several occasions by the Supreme Court, it must follow that the Supreme Court regards "*unjust harassment*" as a necessary ingredient of the abuse of process which is at the heart of the rule in *Henderson v. Henderson*.

123. In contrast, counsel for the defendant argues that unjust harassment is not the relevant criterion. He submits that the Irish courts, in applying the rule in Henderson v. Henderson, have never suggested that a defendant must show that the proceedings in question give rise to unjust harassment. Instead, counsel submitted that, notwithstanding the repeated approval of the relevant passage from the speech of Lord Bingham in *Johnson v. Gore Wood & Co.*, the test actually applied by the Irish courts is to ask whether the point at issue in the later proceedings could and should have been raised in the earlier proceedings. If the answer to that question is in the affirmative, the onus shifts to the plaintiff to show that there are special circumstances which justify the maintenance of the later proceedings. Counsel for the defendant drew attention to the way in which, in *A.A. v. Medical Council*, Hardiman J. made no reference to unjust harassment when he came to apply the rule in *Henderson v. Henderson*.

124. In light of these opposing submissions, it is necessary to carefully review the Irish authorities in order to identify the proper approach to be taken. In *A.A. v. Medical Council*, the applicant sought an order of prohibition restraining the Medical Council from conducting an inquiry into alleged misconduct on his part as a medical practitioner. The principal ground on which he sought relief was

the failure of the Medical Council to provide legal aid to enable him to be legally represented at the proposed inquiry. Two years previously he had brought similar proceedings in which he sought to prohibit the holding of the inquiry. In those proceedings no issue was raised by him in relation to the lack of legal aid. The principal ground on which he had sought relief was alleged double jeopardy and a breach of natural justice. Those proceedings were dismissed by the High Court and the applicant did not appeal. The second proceedings were also dismissed by the High Court. The applicant's appeal to the Supreme Court was unsuccessful. The Supreme Court applied the rule in *Henderson v. Henderson*. As noted above, Hardiman J., in the course of his judgment, quoted (with at least implicit approval) the above passage from the speech of Lord Bingham in *Johnson v. Gore Wood & Co*. He also quoted a number of other authorities including an observation made by Brooke L.J. in *Woodhouse v. Consignia* [2002] 1 WLR 2558 at p. 2575:-

> *"But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in* Henderson v. Henderson *…that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided … once and for all, is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits where one would do."*

125. Hardiman J., like Lord Bingham in *Johnson v. Gore Wood*, stressed (at p. 317) that these principles cannot be applied in an automatic or unconsidered fashion. At p. 318 he placed significant emphasis upon the failure of the applicant to explain his failure to raise the legal representation point in the earlier proceedings notwithstanding that he had, at all material times, "*legal advice and representation of high quality*". At p. 319 he described this as a "*determining feature*" of the proceedings. He then continued as follows:-

> *"No reason has been advanced, and none appears on the evidence as to why these points could not have been raised two years previously. The applicant's financial position had not worsened in the interval: he was impecunious at all material times. He had first raised the question of legal aid less than a month before the institution of the present proceedings, and no reason has been advanced for not raising it earlier…. The issues in relation to legal aid are, therefore, to adapt the language of* Henderson v. Henderson *… issues 'which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time 'of the first proceedings. In the language of* Johnson v. Gore Wood & Co*. …, there are issues which might "sensibly" have been brought forward in the previous litigation. The present litigation in my view runs foul of the rule of public policy 'based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do'".*

126. It might be suggested that, in substance, Hardiman J. was applying the "*could and should"* approach advocated by the defendant. Hardiman J. appears to have taken the view that it was for the applicant to explain why the legal aid point had not been raised in the previous proceedings and the applicant had manifestly failed to do so. To that extent, it might be suggested the judgment supports the position of the defendant here. On the other hand, it might be argued that the reference to a defendant not being "oppressed *by successive suits*" (emphasis added) is consistent with the "*unjust harassment*" criterion on which the plaintiffs now rely.

127. The rule in *Henderson v. Henderson* was also considered by the Supreme Court in *Carroll v. Ryan* [2003] 1 I.R. 309. In that case, the first named plaintiff in April 2000 instituted proceedings in the High Court seeking to review a decision of the education committee of the Law Society which had determined that he was not a fit and proper person to be admitted as a solicitor. Subsequently, in June 2000 he made an application for leave to commence judicial review proceedings in relation to an unfavourable report of the education committee of the Law Society. However, three days later he indicated, through his counsel, that he was not proceeding with the application in circumstances where he was advised that he had a full right of appeal from the decision of the education committee such that judicial review was unnecessary. Thereafter he sought to revive earlier plenary proceedings which had been issued in October 1996 in which he had claimed damages for personal injuries, nervous shock and loss occasioned by reason of the alleged negligence nuisance, conspiracy, breach of contract and breach of duty on the part of the Law Society. A statement of claim was delivered in those proceedings in July 2000. The statement of claim included new claims which had never been raised in the plenary summons issued in 1996. These included claims of anti-competitive behaviour contrary to what was then Articles 85 and 86 of the Treaty of Rome and ss. 4 and 5 of the Competition Act, 1991. The Law Society then brought an application to strike out this part of the claim as an abuse of process. That application succeeded in the High Court. The first plaintiff appealed to the Supreme Court where the judgment of the court was given by Hardiman J. At p. 317, Hardiman J. referred to the rule in *Henderson v. Henderson* and to a number of 19th century Irish authorities where a similar approach had been taken. He also referred at p. 318 to the judgment of Palles C.B. in *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345. On the same page he again quoted what had been said by Brooke L.J. in *Woodhouse v. Consignia* [2002] 1 WLR 2558 (which he also cited in *A.A. v. Medical Council*). He then observed that this was consistent with what had been said by Lord Bingham in *Johnson v. Gore Wood & Co*. at p. 31 when he said that a court should arrive at:-

> *"… 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."*

128. The basis of the Supreme Court decision is set out at p.p. 319-320 of the report. Significantly, Hardiman J. said at p. 319:-

> *"I agree with what was said by Lord Bingham in* Johnson v. Gore Wood & Co*….at p. 32 when, speaking of the rule in* Henderson v. Henderson *…, he said 'an important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter'. This harassment, in my view, may arise whether or not a set of proceedings is pursued to judgment or settlement. None of the first plaintiff's proceedings have reached this stage but that does not prevent the defendant from having to deal with them…".*

129. This passage provides some support for the submission made by counsel for the plaintiffs here. Although Hardiman J. does not refer to "unjust *harassment"*(emphasis added), it is noteworthy that he expressly grounds his decision on the fact that the Law Society there was subjected to harassment on the basis that it was facing successive sets of proceedings. As against that, it might be argued that this was a decision very much on its own facts. It is clear that Hardiman J. took the view that the manner in which the plaintiff proceeded was (at p. 20) "*an unacceptable way to conduct litigation*". There was very obvious harassment having regard to the sheer number of proceedings in which a variety of claims were made and where the plaintiff in the plenary proceedings were seeking to re-agitate the same contention which had previously been put forward (but not pursued) in the abandoned judicial review proceedings. Given that there was fairly obvious harassment in that case, one could not safely conclude that the judgment of

Hardiman J. establishes that a defendant must establish unjust harassment before the rule in *Henderson v. Henderson* will be applied as against a plaintiff. The court does not appear to me to have gone that far.

130. The rule in *Henderson v. Henderson* was again the subject of a Supreme Court decision in *S.M. v. Ireland* [2007] 3 I.R. 283. In that case, the plaintiff commenced plenary proceedings in the High Court in 2003 claiming a declaration that s. 62 of the Offences Against the Person Act, 1861 ("the 1861 Act") was unconstitutional and he sought an injunction restraining the prosecution of a number of charges against him of indecent assault contrary to s. 62 of the 1861 Act. Previously, in 1998, he had brought judicial review proceedings seeking to restrain his criminal prosecution on foot of charges of indecent assault. The ground relied on in the judicial review proceedings was delay. The judicial review proceedings were dismissed in 1999. Subsequent to the commencement of the judicial review proceedings, 8 further charges were brought against the plaintiff. When the plenary proceedings were subsequently instituted in 2003, the defendants applied to dismiss the proceedings on the grounds of abuse of process. That application was successful before Hanna J. and the plaintiff then appealed to the Supreme Court. The judgment of the court was given by Kearns J. (as he then was). Kearns J. referred to the observation of Brooke L.J. in *Woodhouse v. Consignia* (quoted above). He also observed (at p. 295) that the rule in *Henderson v. Henderson* must not be applied in a rigid or mechanical manner so as to deprive the court of any discretion. Kearns J. also referred to the observation previously made by Hardiman J. in *A.A. v. Medical Council* at p. 317 (where Hardiman J. had indicated that the rule should not be applied in an "*automatic or unconsidered fashion*". At p.p. 296-297, Kearns J. quoted from a shorter extract from the same passage of Lord Bingham's speech in *Johnson v. Gore Wood* which had been cited (in longer form) by Hardiman J. in *A.A. v. Medical Council*. The passage included the reference to: "*there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party").*

131. At p. 297, Kearns J. said that the defendants had failed to put forward any evidence or reasoning to support a case of abuse of process. He distinguished the case from the position in *A.A. v. Medical Council* where the legal aid argument was: "*ancillary to the challenge which had previously been brought in the first judicial review and could not therefore be raised in a second judicial review.*" In contrast, he said that the current plenary proceedings raised a discrete constitutional point which could not sensibly have been raised as part of the judicial review proceedings. He said that an explanation had been given as to why the point had not been adverted to at an earlier time which he described as "*not the most meritorious*". He then continued:-

> "*However, that does not lead inexorably to a conclusion that the raising of the constitutional issue at a later time was an abuse of process*. Nor can the present proceedings be characterised as dishonest or tantamount to the unjust harassment of any party. *The defendants themselves have merely contended that the plaintiff could have raised his constitutional point either in the judicial review or in parallel plenary proceedings brought at the same time."* (emphasis added).

132. It might be said that the passage just quoted lends significant force to the argument made by counsel for the plaintiffs here that unjust harassment (or something akin to it) is required before a court will hold that subsequent proceedings constitute an abuse of process by reference to the rule in *Henderson v. Henderson*. However, Kearns J. continued, on p. 298, with a further observation which could be said to support the view offered by counsel for the defendant and which shows that there were particular circumstances why the plenary proceedings did not constitute an abuse. Kearns J. said:-

> "*…Furthermore, the plaintiff is not here seeking to reopen the same subject of litigation. He is not seeking to challenge a related procedural defect which might, and* which should have been argued *in the context of his delay type judicial review in 1998. What the plaintiff seeks to achieve in the present proceedings is a discrete and distinct subject of litigation, namely, that of seeking to have the statutory sentencing regime as set out in s. 62 … declared unconstitutional. The dictum of Barrington J. in Riordan v. An Taoiseach (No. 2) [1999] 4 I.R. 343 makes it clear that this was not a relief to be claimed appropriately in the judicial review proceedings."* (emphasis added).

133. The next relevant Supreme Court authority is *Re: Vantive Holdings* [2010] 2 I.R. 118. In that case, *Vantive Holdings* (a member of the Zoe group of companies involved in the construction and development business) presented a petition under s.2 of the Companies (Amendment) Act, 1990 in July 2009 seeking the appointment of an examiner to the group. The petition was dismissed by the High Court and this decision was upheld by the Supreme Court by a judgment delivered on 11th August, 2009. Following the dismissal of the petition on 11th August, 2009, *Vantive Holdings* presented a second petition for the same purpose pursuant to s. 2 of the 1990 Act on 14th August, 2009. The second petition was not founded on new circumstances, new material or new evidence which had arisen or become available subsequent to the decision of the Supreme Court. The second petition relied on a three year business plan drawn up in December 2008 for the group of companies which the petitioner had decided (contrary to legal advice) not to place before the court on the hearing of the first petition. A secured creditor, ACC Bank plc objected to the second petition and argued that it should be dismissed as an abuse of process by analogy with the rule in *Henderson v. Henderson*. As Murray C.J. explained at p. 125 the rule in *Henderson v. Henderson* did not strictly speaking apply in circumstances where a petition under s. 2 of the 1990 Act did not constitute proceedings inter partes. He said:-

> "*Viewing it through the prism of estoppel … the rule in* Henderson v. Henderson *… strictly speaking applies to proceedings between parties where those proceedings determine the rights or obligations between those parties. It is intended,* inter alia*, to promote finality in proceedings and to protect a party from being harassed by successive actions by another party when the issues between them either were or could have been determined with finality in the first proceedings."*

134. Although the rule in *Henderson v. Henderson* could not be said to apply, the court held that there was an inherent jurisdiction to protect the integrity of the due process of the administration of justice and the finality, in principle, of a judicial decision. Essentially, the Supreme Court applied *Henderson v. Henderson* rationale. Murray C.J. again expressed approval for the same passage from the speech of Lord Bingham in *Johnson v. Gore Wood & Co*. as previously cited by Hardiman J. in *Carroll v. Ryan* and *A.A. v. Medical Counsel* (i.e. the passage which makes express reference to "*unjust harassment*"). Having quoted from Lord Bingham, Murray C.J., at p.p. 126-127, expressed the view that *Vantive Holdings* had the opportunity in the first petition to present to the court all the evidence at its disposal but it deliberately chose not to do so against express legal advice. On that basis, it permitted the application for the appointment of an examiner to be heard and determined by the High Court and, on appeal, by the Supreme Court. At p. 127 he continued in the following terms:-

> "*In my view the bringing of the second petition on foot of crucial and material evidence which was deliberately withheld from the court in the course of the proceedings determining the first petition and the reliance on evidence which could have been produced at that hearing constitutes an abuse of the process in relation to the appointment of examiners under the Act of 1990 and* prima facie *is a bar to the second petition proceeding. To permit the petition to proceed, unless there are exceptional excusing circumstances, would undermine the integrity of the proper and efficient administration of justice and the principle of finality."*

135. In his judgment, Murray C.J. then examined the arguments put forward as to why there were excusing circumstances in that case, which, it was argued, justified the bringing of a second petition. However, Murray C.J. rejected the arguments that there were any excusing circumstances.

136. While the rule in *Henderson v. Henderson* was not, strictly speaking, at issue in those proceedings, it is nonetheless instructive that the Supreme Court came to the conclusion that the failure (or more correctly the deliberate decision) not to deploy the evidence as to the business plan in the first proceedings gave rise, *prima facie*, to an abuse of process unless there were some excusing circumstances in the case which justified the conduct of the petitioner. Although the court expressly approved the extract from the speech of Lord Bingham, the approach actually taken by the Supreme Court does not suggest that it is necessary to show unjust harassment before an abuse could be said to arise. That said, the approach taken by the court in that case appears to have been motivated very significantly by the very stark fact that there had been a deliberate decision made by the petitioner in that case to withhold what was described by the Chief Justice as "*crucial and material evidence".* To paraphrase Lord Bingham in *Johnson v. Gore Wood & Co*., that made the second set of proceedings more obviously abusive.

137. The question of unjust harassment was not addressed by Clarke J. (as he then was) in *Moffitt v. Agricultural Credit Corporation Plc* [2008] 1 ILRM 416. However, in that case, Clarke J., having considered the decision of the Supreme Court in *A.A. v. Medical Council*, emphasised that, in the application of the rule in *Henderson v. Henderson*, the court enjoys a discretion. At p. 424 he said:-

> *"If the actual matter in issue has been determined in previous proceedings, then in the absence of a specific reason, such as estoppel or fraud, it will not be open to the party who lost to re-litigate that question*. However, where a party seeks to make a new and different case which, it might be said, ought to have been included in the earlier proceedings, the court enjoys a wider discretion to consider what the result should be having regard to the competing interests of justice." (*emphasis added).*

138. In *Moffitt* the plaintiff had acted in person in previous proceedings which had been dismissed on the basis that they were bound to fail. In the subsequent proceedings which came before Clarke J., the plaintiff raised a new argument which had not been made in the previous proceedings. As para. 4.10 of his judgment (quoted below) illustrates, Clarke J. appears to have proceeded on the basis that, *prima facie*, the second proceedings were capable of giving rise to an abuse (in circumstances where the argument now made could have been ventilated in the previous proceedings) but that there were "*special circumstances*" which justified the continuation of the proceedings. This is consistent with the approach subsequently taken by the Supreme Court in *Vantive Holdings*. It is also consistent with the approach advocated by the defendant here.

139. In taking that approach, Clarke J. was significantly influenced by the fact that the plaintiff had acted as a litigant in person in the previous proceedings and by the fact that the issue which was now sought to be litigated by the plaintiff was a "*narrow legal issue*" which would not place a significant burden on the defendant. This emerges from the following passage from the judgment of Clarke J. at p.p. 426-427:-

> *"4.8 … it seems to me that I need to consider, on a broad basis, the merits of allowing, or not allowing, Mr.* Moffitt *to continue with these proceedings. It is important, in relation to this aspect of the case, … to note that Mr.* Moffitt *represented himself. The points now sought to be relied on are purely legal points and Mr.* Moffitt *could not, in those circumstances, have been expected to raise them. In those circumstances much less blame attaches to him for those issues not having been raised in his previous proceedings, than might be the case had he been represented….*
>
> *4.10 There is no doubt but that the principle in* Henderson v. Henderson*,* prima facie *applies. These issues are very closely connected with the issues which were litigated in the previous proceedings. If Mr.* Moffitt *had the benefit of legal advice at the time of those proceedings, I would have no hesitation in determining that the attempt to raise these new, but analogous, issues in these proceedings would be an abuse of process and would require to be restrained. However he did not have the benefit of such advice.*
>
> *4.11 On the other side of the coin the issues which are now sought to be litigated are, in my view, narrow legal issues whose litigation will not place any significant burden on ACC other than the obvious risk that if they turn out to be well made points, ACC's entitlements may be altered. The conduct of the litigation would not, of itself, be burdensome.*
>
> *4.12 In all of those circumstances I have come to the view that the sort of special circumstances identified by Hardiman J. in A.A. exist in this case and that it is appropriate to allow some latitude to Mr.* Moffitt. *…."*

140. Counsel for the defendant also drew my attention to two decisions of Costello J. in *Morrissey v. Irish Bank Resolution Corporation Ltd* [2015] IEHC 200 and *Corbett v. LSREF III Achill Investments Ltd* [2016] IEHC 176 where Costello J. at p. 11 and p. 19 respectively succinctly summarised the approach to be taken under the rule in *Henderson v. Henderson*. In each case, she emphasised that if there are issues in a second set of proceedings which could properly have been raised and decided in earlier proceedings, the proceedings should be struck out unless a special circumstance is established which justifies the raising of the issue in the second set of proceedings. Before arriving at her decision to that effect in *Morrissey*, Costello J. engaged in an extensive analysis of the judgements of the Supreme Court in *Re: Vantive Holdings*, and the case law cited therein including *Johnson v. Gore Wood & Co*. She also dealt in detail with the decision of the Supreme Court in *A.A. v. Medical Council*. There is nothing in the judgment of Costello J. to suggest that she regarded unjust harassment as an essential ingredient in any finding of abuse of process by reference to the rule in *Henderson v. Henderson*. On the contrary, as outlined above, her summary of the law (having previously analysed the pre-existing Supreme Court authorities) is entirely consistent with the approach now advocated by counsel for the defendant in these proceedings. That said, there is nothing in either of the judgments of Costello J. to suggest that anyone ever argued in either case that unjust harassment was a necessary ingredient of any finding of abuse.

141. There are also a number of important and recent decisions of the Court of Appeal. In *Vico Ltd v. Bank of Ireland* [2016] IECA 273 the Court of Appeal applied the rule in *Henderson v. Henderson* to dismiss proceedings taken by the plaintiffs seeking a declaration that a mortgage held by the defendant over property in which they resided was void. Those proceedings were instituted against the backdrop where, in 2012, a number of the same plaintiffs had commenced proceedings against the defendants seeking similar relief. Those proceedings were dismissed and the High Court order was upheld by the Supreme Court in a judgment delivered in December 2014. Fresh proceedings were then commenced in February 2015 in which a new claim was made that the Bank of Ireland had wrongly represented that Bank of Ireland Private Banking was a credit institution or bank within the meaning of s. 7 of the Central Bank Act, 1971. Those proceedings were dismissed by the High Court on the basis of the rule in *Henderson v. Henderson*. That decision was upheld by the Court of Appeal in a judgment delivered by Finlay Geoghegan J. on 12th October, 2016. In giving judgment, Finlay Geoghegan J., drew attention to the same passage from the speech of Lord Bingham in *Johnson v. Gore Wood & Co*. which had been cited by Hardiman J. in A. A. v. Medical Council. At para. 38 of her judgment, Finlay Geoghegan J. said that, applying the Lord

Bingham approach, her conclusion was:-

> *"…that the High Court was correct in determining that in all the circumstances of these proceedings that all the plaintiffs including Vico in commencing these proceedings is abusing the process of the court by seeking to raise in these proceedings issues which either have been raised or could have been raised in the [earlier]… proceedings. Further in all the circumstances of this litigation the striking out of the proceedings is not excessive, unfair or disproportionate."*

142. Notwithstanding that Finlay Geoghegan J explained that she was applying the Lord Bingham approach, the judgment of the court does not suggest that there is any requirement that unjust harassment must be established. There is nothing to suggest that the argument now made by counsel for the plaintiffs here was raised in that case.

143. Nor is there anything in the subsequent judgment of the Court of Appeal in *O'Connor v. Cotter* [2017] IECA 25 to suggest that unjust harassment must be established. In that case, the plaintiff sought to challenge the appointment of receivers over property. Similar proceedings had been taken by him three years previously which had been dismissed. In the High Court, Haughton J. dismissed the second proceedings under the rule in *Henderson v. Henderson*. His decision was upheld by the Court of Appeal. Finlay Geoghegan J., in the judgment of the court, drew attention to the passage in *Johnson v. Gore Wood & Co*. which had been approved by the Supreme Court in *A.A. v. Medical Council*. At p.p. 7-8 of her judgment, Finlay Geoghegan J. explained the reasoning of the Court of Appeal as follows:-

> *"The Court considers that the trial judge was correct in his application of the … rule in* Henderson v. Henderson*, taking into account the mitigation in Johnson v. Gore Wood, to the facts … 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, ….*
>
> *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 …*
>
> *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."*

144. Again, there is no discussion in this judgment to suggest that it is necessary for the defendant to demonstrate that the maintenance of a second set of proceedings would involve unjust harassment of the defendant. It is also noteworthy that, in that case, the Court of Appeal does not appear to have regarded the position of the plaintiff, as a lay litigant, as a determining factor in the application of the rule in *Henderson v. Henderson*. This is in contrast to the approach taken by Clarke J. in *Moffitt*.

145. Similarly, in the subsequent decision of the Court of Appeal in *O'Connor v. Sherry Fitzgerald* [2018] IECA 67, the position of the plaintiff, as a lay litigant, does not appear to have influenced the outcome of the application of the rule in *Henderson v. Henderson*. In that case, the plaintiff was one and the same as the plaintiff in *O'Connor v. Cotter* (discussed above). Following the dismissal of his proceedings by the Court of Appeal in 2016, he commenced fresh proceedings in which he claimed damages for trespass as against the estate agents who were retained by the receivers to sell the lands. These proceedings were dismissed by the High Court under the rule in *Henderson v. Henderson*. The plaintiff appealed to the Court of Appeal where, in a judgment of Edwards J., the decision of the High Court was upheld. In his judgment, Edwards J. reiterated what had been said in *O'Connor v. Cotter* and concluded that the High Court had approached the matter correctly in dismissing the proceedings. Edwards J. said that the High Court had correctly considered the law and in particular the judgment of the Supreme Court in *A.A. v. Medical Council*.

146. Again, there is no discussion in the judgment of the Court of Appeal of any requirement of unjust harassment. At p. 36, Edwards J. applied the "could and should" test for which the defendant in these proceedings now contends. He said:-

> *"In my view the High Court was fully correct in its ruling that the proceedings should be dismissed as an abuse of the process for the combined reasons that on the one hand they seek to re-litigate a matter previously litigated and rejected, and on the other hand they seek to litigate other matters* that could and should have been litigated in earlier proceedings." (emphasis added).

147. The defendant also drew attention to the decision of the Court of Appeal in *Elektron Holdings Ltd v. Kenmare Property Finance Ltd* [2018] IECA 131. That judgment relates to proceedings which were commenced by the plaintiffs in 2015 in which the plaintiffs sought to contest the appointment of a receiver on the grounds that a guarantee provided by the first named plaintiff in respect of the borrowings of another company in the same group was given in breach of s. 31 of the Companies Act, 1990. Previously, the receiver in question had commenced his own proceedings in 2012. Two sets of proceedings were commenced by him at that time. The first was issued pursuant to s. 316 of the Companies Act, 1963 in which he sought a declaration as to the validity of his appointment. Separately, he instituted proceedings seeking possession of the premises in question. On 8th November, 2013 the High Court determined that the receiver had been validly appointed and that he was entitled to possession of the property in question. That order was appealed to the Supreme Court but, on 11th March, 2016, the Supreme Court dismissed the appeal.

148. In the case of the proceedings commenced in 2015, Twomey J. dismissed the proceedings under the rule in *Henderson v. Henderson*. The plaintiffs appealed. In a judgment delivered by Finlay Geoghegan J., the appeal was dismissed. In her judgment, Finlay Geoghegan J. referred to the restatement of the rule in *Henderson v. Henderson* by Lord Bingham in *Johnson v. Gore Wood & Co*. However, it is quite clear from her judgment that she applied the "*could and should*" approach. At para. 23 of her judgment, Finlay Geoghegan J. summarised the argument made by the defendants in that case. She expressly said that, in relation to the s. 31 claim, the defendant submitted that the claim "*could and should have been raised in the High Court".* Subsequently, at p. 15, Finlay Geoghegan J. concluded that the trial judge was:-

> *"…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, … *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…"* (emphasis added).

149. She then referred to the argument that was made by the plaintiffs in the 2015 proceedings that they were not in a position in 2012 to pay off certain direct borrowings of *Elektron* such that the avoidance of the guarantee (by reason of its failure to comply

with s. 31) would not have, of itself, invalidated the appointment of the receiver. Finlay Geoghegan J. did not consider that this made any difference. She said (again at p. 15):-

> "*Nevertheless, the difference in amount of the direct borrowing (€986,397.90) and the liability as guarantor … (€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 … that was a relevant challenge which could, and should*, have been made in 2012." (emphasis added).

150. The approach taken by the Court of Appeal in that case plainly supports the contention advanced by the defendant on this application. It is noteworthy that, subsequently, the Supreme Court, in a determination of 15th February, 2019, refused leave to the plaintiffs to appeal the judgment of the Court of Appeal. No argument appears to have been made to the Supreme Court by the plaintiffs that the decision of the Court of Appeal was in error in applying a "*could and should*" approach. Nor was any argument made that it is necessary to show unjust harassment.

151. This review of the case law demonstrates, in my view, that the Irish courts have not used "*unjust harassment*" as a yardstick for the application of the rule in *Henderson v. Henderson*. As the judgments of Edwards J. in *O'Connor v. Sherry Fitzgerald* and of Finlay Geoghegan J in *Elektron Holdings* show, the courts have generally applied a "*could*" and "*should*" approach. If the courts come to the conclusion that an issue could and should have been raised in previous proceedings, then the next question ordinarily addressed by the court is whether there are special or excusing circumstances that would justify the court in holding that there was no abuse of process. That is precisely the approach that was taken, by analogy with the rule in *Henderson v. Henderson*, by the Supreme Court in *Re: Vantive Holdings*. In these circumstances, I believe that this is the approach that I must also take. While I fully appreciate that the Supreme Court, on a number of occasions, has approved the passage (quoted in para. 121 above) from what was said by Lord Bingham in *Johnson v. Gore Woods & Co.*, I do not believe that this has the result that a defendant must show "unjust harassment" before a court can make a finding of abuse. Moreover, I do not believe that Lord Bingham in *Johnson* was himself laying down a test of unjust harassment. This is an issue that I address further below.

152. It is also noteworthy that, in *A.A. v. Medical Council*, Hardiman J., in quoting from what was said by Lord Bingham, did not include the penultimate sentence of the paragraph in which the quoted passage is found. In that sentence, Lord Bingham said:

> *"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."*

That sentence seems to me to lay down the test that Lord Bingham suggests should be used. It will be seen that no reference is made there to unjust harassment. In so far as I can see, that sentence has never been approved by any Irish court and, as the judgment of the Supreme Court in Vantage Holdings and the judgment of the Court of Appeal in *O'Connor v. Sherry Fitzgerald* demonstrate, that is not the approach which has been taken in the Irish cases. While the Irish cases have accepted that a broad approach should be taken and that the rule should not be applied in an automatic or unconsidered fashion, the Irish courts, in practice, have usually addressed the rule in *Henderson v. Henderson* by means of a two stage test:-

> (a) asking, in the first instance, whether an issue could and should have been raised in previous proceedings; and
>
> (b) secondly, if the issue could and should have been raised in previous proceedings, whether this is excused or justified by special circumstances.

153. While this test is not entirely on all fours with the observation made by Lord Bingham (quoted in para. 152 above), I am not sure that this makes any real difference in practice. As Lord Bingham observed in *Johnson v. Gore Wood* at p. 31, the result will often be the same whether one applies the *prima facie* abuse test or whether one asks whether, in all the circumstances, the conduct of a party amounts to an abuse.

154. It is instructive to consider why, on the facts, the House of Lords held, in *Johnson v. Gore Wood* that there was no abuse. In my view, when one considers the approach taken by the House of Lords to the facts of that case, it is difficult to identify any difference of substance between the way in which the House addressed the potential application of the rule in *Henderson v. Henderson* and the way in which an Irish court would do so. In *Johnson*, the defendants had acted as solicitors for the plaintiff who was a property developer and also for a company controlled by him called Westway Homes Ltd ("*Westway*"). In the course of his relationship with the defendants, the plaintiff instructed them on behalf of Westway in connection with the proposed purchase of land in Hampshire. In order to progress that purchase, it was necessary to serve an option notice. The vendor disputed the validity of the exercise of the option by Westway in the manner advised by the defendants. It was ultimately necessary for Westway to sue both the vendor and his solicitors in order to enforce the exercise of the option. The defendants acted on Westway's behalf in those proceedings. Eventually, a decree of specific performance was made against the vendor. However, it took more than four years to complete the conveyance. Westway suffered substantial loss as a consequence of the delay. In the meantime, the property market had collapsed.

155. Westway sued the defendants for the losses sustained by it, contending that the defendant had not exercised reasonable care in connection with the exercise of the option. Those proceedings came on for hearing in the High Court of England and Wales in October 1992. Although the hearing was estimated to last 10-12 days, this estimate was greatly exceeded. In the sixth week of the trial, the action was compromised upon payment by the defendants to Westway of £1,480,000. Before the action against the defendants came on for trial, they were notified that the plaintiff also had a personal claim against the firm which he would pursue "*in due course*". It was claimed that the defendants owed a duty to the plaintiff personally as well as to Westway. In the course of the negotiations to settle Westway's claim against the defendants, the lawyers acting for the defendants invited the plaintiffs' solicitors to enquire whether it would be possible to reach an overall settlement of both Westway's claim and the plaintiff's claim. It was not, however, possible to arrive at an overall settlement at that point. The settlement therefore only extended to Westway's claim. Notably, the settlement agreement expressly contemplated that the plaintiff might, thereafter, make a personal claim against the defendants albeit that this was subject to an overall ceiling of £250,000. Furthermore, a confidentiality clause in the agreement contained an exception in connection with any action which the plaintiff might thereafter bring against the defendant. Subsequent to the settlement of Westway's claim, the plaintiff issued proceedings against the defendants in April, 1993. Over the next 4.5 years the parties pleaded and re-pleaded their respective cases. After a trial date had been fixed, the defendants' solicitors intimated, for the first time in December, 1997, that they intended to apply to strike out the action as an abuse of process by reference to the rule in *Henderson v. Henderson*.

156. The House of Lords came to the conclusion that the plaintiff was a "privy" of Westway and therefore the rule in *Henderson v. Henderson* was capable of applying even though the parties to both sets of proceedings were not precisely the same. However, on

the basis of the facts of the case (as summarised in paras. 154-155 above) Lord Bingham came to the conclusion that the bringing of the second set of proceedings by the plaintiff personally against the defendant did not amount to abuse. In particular, the terms of the settlement agreement (and the exchanges between the solicitors for the parties which preceded the settlement):-

> *"…point strongly towards acceptance by both parties that it was open to Mr. Johnson to issue proceedings to enforce a personal claim, which could then be tried or settled on its merits, and I consider that it would be unjust to permit [the defendant] to resile from that assumption."*

157. From a consideration of the approach taken by the House of Lords in *Johnson v. Gore Wood*, it seems to me to be clear that the House of Lords proceeded on the basis that, but for these particular circumstances (i.e. the settlement negotiations and settlement agreement) the bringing of a second claim would have been an abuse. Although not articulated in this way in the observations of Lord Bingham or his colleagues, it appears to me to be implicit in the decision that it would work an injustice to the defendants to have to face two sets of proceedings (involving very similar allegations) at the suit of the same plaintiff or his privy. On the facts, what saved the personal claim from a finding of abuse was that there were very particular circumstances which would have made it unjust to dismiss the claim. While Lord Bingham expressly eschewed the use of the terms "*special circumstances*" or "*excusing circumstances*" the reality is that the particular circumstances of the case meant that the bringing of the second set of proceedings could not be regarded as an abuse. In fact, there were very strong reasons why the second set of proceedings should not be regarded as an abuse. I do not believe that a different view would be taken in Ireland if the same facts were considered here. In my view, the circumstances surrounding the settlement of the Westway claim would well qualify as "*special circumstances*" or "*excusing circumstances*".

158. Thus, I do not believe that any injustice will be done to the plaintiffs here by taking the two stage approach suggested in para. 152 above. At the end of the day, the result is likely to be the same. I must therefore consider whether the Distance Marketing Regulations point now sought to be ventilated in these proceedings could and should have been raised in the proceedings before District Judge Jones and, if so, whether there are any particular circumstances (whether special or excusing) which, taking a broad view, would nonetheless have the result that the continued maintenance of the Distance Marketing claim in these proceedings should not be regarded as an abuse.

159. It is important, in this context, to keep in mind the purpose of the application before District Judge Jones. The purpose of that application was to demonstrate to the court that the plaintiffs had either a counterclaim that would exceed the value of the defendant's claim or that they had substantial grounds to dispute the claim. They relied on the 2007 Regulations in an attempt to persuade District Judge Jones that they had a valid dispute and that, in fact, there was nothing owing by them to the defendant. A significant part of the case they made to District Judge Jones was that, under Regulation 81 of the 2007 Regulations, the defendants had an obligation to provide them with the terms of the agreement "*in a durable medium*". They contended that the defendant had failed to do so and that, as a consequence of the alleged failure to comply with Regulation 81, the agreements with the defendant were rendered void. This case is dealt with extensively by District Judge Jones at paras. 64 to 74 of his written judgment. At para. 70 of his judgment, District Judge Jones highlights that there was nothing in the 2007 Regulations that states that a failure to give the documentation in a durable medium would render void or voidable the agreement between client and service provider. At paras. 73-74 he stated his ultimate conclusion on this issue as follows:-

> *"73. I come to the clear conclusion in respect of that limb of the argument that it does not avail any either Mr. or Mrs. George because it would be a huge leap of jurisprudence for there to be a Statutory Instrument, such as this Irish Republic framework 60 of 2007, which had the effect of rendering void contractual arrangements simply because a paper copy of a document was not provided or was not provided at a certain time. If such was the intention, it would be expressly provided for rather than being a consequence which can …only be derived inferentially, say the submissions of Mr. and Mrs. George, from the requirement to provide the documentation in a particular format.*
>
> *74. For those reasons, there are no real prospects of success in arguing that the Georges were not bound by this contractual arrangement simply because the documentation was not provided in the format specified by Regulations 77 and 81".*

Crucially, the case now made under the Distance Marketing Regulations is that, in contrast to the 2007 Regulations, the alleged failure of the defendants to furnish the terms of the contracts (and the other information prescribed by those Regulations) to the plaintiffs in writing or some other durable medium makes the contract unenforceable by the defendants. This is clear from the particulars at sub-paras. (a) to (c) of para. 20 and from the plea made in para. 21 of the statement of claim. The plaintiffs rely in this context on Regulation 6(6)(a) and Regulation 9(5)(a) of the Distance Marketing Regulations (addressed further below). On the face of it, if that case had been made before District Judge Jones, it could potentially have been decisive. It might have caused the District Judge to hold that there was, in fact, a provision of Irish law which would have given the plaintiffs an arguable basis to suggest that the underlying contracts with the defendant were unenforceable.

160. In the course of the hearing before me, both plaintiffs swore affidavits confirming that they were not aware of the existence of the Distance Marketing Regulations at any time prior to the determination of the applications to set aside the bankruptcy demands heard before District Judge Jones. They each also say that they were likewise unaware of the existence or importance of the Regulations at any time prior to the conclusion of the subsequent applications for leave to appeal to the High Court of England and Wales.

161. However, there can be no doubt that the plaintiffs would have been entitled to refer to the Distance Marketing Regulations in their application before District Judge Jones. Thus, the plaintiffs could have raised the Distance Marketing Regulations in the proceedings in the Slough County Court. There was nothing to prevent that argument being raised. It would have provided an express basis on which to contend that the contracts relied upon by the defendants were unenforceable.

162. The next question is whether the plaintiffs should have raised the issue of the Distance Marketing Regulations in the English proceedings. As noted above, the case made by the plaintiffs in the English proceedings was that the contracts were unenforceable by reason of the alleged failure on the part of the defendants to provide a copy of the contract in durable form. Under Regulation 6 of the Distance Marketing Regulations, a supplier of financial services to a consumer under a "*distance contract*" is required within a reasonable time before a consumer becomes bound by a distance contract to provide all of the information set out in schedule 1 to the Regulations to the consumer in a durable form. Regulation 6(6)(a) (as amended by the 2005 Amendment Regulations) expressly provides that a distance contract for the supply of a financial service to a consumer is: "*not enforceable against the consumer if the supplier has failed to comply with the obligation imposed by this Regulation*". This is subject to Regulation 6(6)(b) which gives the court the power to take a different view if certain conditions are satisfied.

163. Similarly, under Regulation 9(1) the supplier is obliged to give to the consumer in writing or in some other durable medium all of the terms of the contract within a reasonable time before entering into a distance contract for the supply of a financial service. Regulation 9(5) sets out the consequences of non-compliance with this obligation. Regulation 9(5)(a) (as amended in 2005) provides that: *"A distance contract for the supply of a financial service is not enforceable against the consumer if the supplier has failed to comply with an obligation imposed on the supplier by this Regulation*." Again, this is subject to the court's power under Regulation 9(5)(b) to take a different view if certain conditions are met.

164. On their face, the provisions of the Distance Marketing Regulations therefore would have provided the plaintiffs with an argument (conditional on their being consumers and on establishing an arguable case that the provisions of the Regulations had not been complied with) that the contracts with the defendants are unenforceable. Given the nature of the argument raised by the plaintiffs in the English proceedings (addressed by District Judge Jones at paras. 64-74 of his judgment) it is impossible to avoid the conclusion that the Distance Marketing Regulations is an issue that should have been raised by them in the English proceedings.

165. In looking at what should have been raised by the plaintiffs in the English proceedings, I do not believe that I can have any regard to the status of the plaintiffs as lay litigants. That may well be an issue that I can take into account at the second stage of the test. However, it does not seem to me to affect the application of the first stage of the test. Lay litigants, in pursuing cases before the courts, are required to support their case by any relevant legal authorities just as any other litigants must. In these circumstances, I have come to the conclusion that the first part of the test outlined in para. 152 above has been satisfied. I must now consider whether there are any particular circumstances in this case which, on a broad view, would lead me to conclude that, notwithstanding the failure to raise this issue in the English proceedings, it would not be an abuse for the plaintiffs to pursue a claim under the Distance Marketing Regulations in these proceedings.

166. In considering whether any such circumstances apply in this case, it is important to keep in mind what was said by O'Donnell J. in the Supreme Court in a somewhat different context in *Emerald Meats Ltd v Minister for Agriculture* [2012] IESC 48 where he said, at para. 36:

> *"There are very few cases in which the losing side does not regret that different witnesses were called, evidence given or points made either in cross-examination or in submission. But a trial is not a laboratory experiment where one element can be substituted and all other elements maintained and a different outcome obtained. It is important that parties are aware of the finality of litigation, and bring forward their best case for adjudication. …. There are few cases which in hindsight could not be rerun with different witnesses, evidence, arguments, or advocates, but to consider that such a course is in the interests of justice is to engage in the delusion that endless litigation is a desirable rather than a tormented state."*

167. That observation was made in the context of an application to adduce fresh evidence for the purposes of an appeal which had not been led in the course of the High Court hearing. However, the underlying rationale of the observation seems to me to be equally apposite in present circumstances. It is clear from the affidavits sworn by the plaintiffs in the course of the hearing before me that they were not aware of the Distance Marketing Regulations at the time they pursued the application to District Judge Jones and, subsequently, when they applied to the High Court for leave to appeal. Had they been aware of the Distance Marketing Regulations they might have been in a position to persuade District Judge Jones that they had an arguable case to make that their agreements with the defendants are unenforceable. The case now sought to be made by them in these proceedings under the Distance Marketing Regulations might well have provided an answer to the point made by District Judge Jones (albeit in the context of the 2007 Regulations) in para. 74 of his judgment (quoted above). On the face of it, this seems to be a classic case where, after the event, the plaintiffs wish to make a new argument in the hope of achieving a different result. If all litigants were entitled to pursue new arguments in that way in subsequent proceedings (which had not been raised in earlier proceedings) it would significantly undermine the finality of legal processes. It would also expose a defendant to the injustice of having to face a multiplicity of proceedings. In addition to seeking to avoid injustice to an individual defendant, there is, for the reasons outlined by O'Donnell J, a significant public interest in ensuring that a plaintiff does not behave in that way.

168. There are, accordingly, strong reasons why the rule in *Henderson v. Henderson* should be applied in this case. However, there are also a number of countervailing circumstances which, I believe, must also be borne in mind. For the reasons outlined below, I have come to the conclusion that these countervailing circumstances are sufficient to outweigh the interests described in para. 168 above and to establish that it would not be an abuse to permit the Distance Marketing claim to be pursued.

169. There are a number of factors that require to be considered. In the first place, the plaintiffs were not legally represented in the course of the proceedings before District Judge Jones. Of itself, that fact would not ordinarily be considered to be a determining factor. There have been many cases (including *O'Connor v. Sherry Fitzgerald*) where the rule in *Henderson v. Henderson* was applied notwithstanding that the relevant plaintiff was unrepresented. Nonetheless, it seems to me to be a factor to which some weight should be attached. I am very conscious that in *Moffitt*, Clarke J. took into account that Mr. *Moffitt* did not have the benefit of professional advice at the time his first proceedings were dismissed as being bound to fail. At p. 426 Clarke J. said:-

> *"If Mr.* Moffitt *had the benefit of legal advice at the time of those proceedings, I would have no hesitation in determining that the attempt to raise these new, but analogous, issues in these proceedings would be an abuse of process and would require to be restrained. However, he did not have the benefit of such advice."*

170. Counsel for the defendants has sought to distinguish *Moffitt* on the basis that, here, the plaintiffs did have the benefit of some legal advice. As noted above, in para. 26 of his first witness statement in the County Court proceedings, the first named plaintiff stated that he had engaged with solicitors and had attended a consultation with counsel. It is also the case that the plaintiffs were represented by counsel on the applications for leave to appeal to the High Court of England and Wales. The plaintiffs are therefore not in the same positon as Mr. *Moffitt*. However, it is clear from para. 48 of the affidavit sworn by the first named plaintiff in these proceedings on 15th December, 2018 that he and his wife represented themselves: *"both in relation to the preparation of documents grounding the applications and at the hearings before District Judge Jones in Slough County Court…"*. They therefore did not have the benefit of legal advice during the course of the proceedings before the County Court. This was a crucial period when all of the evidence was placed before the court and when the arguments were formulated. During the course of the evidence in the County Court, a potentially significant witness statement was delivered on behalf of the defendant namely the second witness statement of Steven Mark Reiter sworn on 22nd October, 2015. This witness statement was filed pursuant to the direction given by District Judge Jones on 9th October, 2015 requiring the defendant to file and serve further evidence and relevant documents including the terms and conditions in force when the plaintiffs first did business with the defendants in April 2014. In para. 6 of his second witness statement, Mr. Reiter exhibited a copy of the defendant's terms and conditions as they were in force in April 2014. He then continued in para. 7 in the following terms:-

"I confirm that these terms and conditions were in force throughout the whole of April 2014 and were available on AVA Trade's website during this period. I further confirm that if, during this period, an applicant from the European Union visited AVA Trade's website and clicked on the link for 'Terms and Conditions' and/or the highlighted words 'Terms and Conditions' on the electronic application form…they would have been routed to these terms and conditions".

171. I can see nothing in Mr. Reiter's first or second witness statement to suggest that any evidence was ever given to District Judge Jones that a copy of the agreement between the plaintiffs and the defendant was ever given to the plaintiffs in writing or in some other durable form. In his first witness statement Mr. Reiter had described how, in opening their accounts, the plaintiffs had ticked the box on the website confirming that they accepted the defendant's terms and conditions. However, there is no statement to the effect that the terms and conditions were given to the plaintiffs either in writing or in some other durable medium. As explained further below, it is open to doubt (to put it neutrally) that the provision of terms and conditions on a website will suffice for the purpose of the Distance Marketing Regulations.

172. As noted above, District Judge Jones, in the context of the 2007 Regulations, did not ultimately see any merit in the plaintiffs' argument that they had never been given the terms and conditions. In reaching that conclusion he was significantly influenced by the fact that the 2007 Regulations do not contain a provision similar to Regulation 9(5)(a) of the Distance Marketing Regulations which, subject to Regulation 9(5)(b), makes a distance contract for the supply of a financial service unenforceable against a consumer if the supplier has failed to comply with the obligation under Regulation 9(1) to give to the consumer "*in writing or in some other durable medium and accessible to the consumer"* all of the terms of the contract and all of the information required under Part 2 of the Regulations (which includes the pre-contract information specified in Regulation 6).

173. No one drew the attention of the District Judge to the provisions of the Distance Marketing Regulations and in particular the provisions of those regulations dealing with unenforceability. The point is unlikely to have struck the District Judge of his own motion or indeed any of the English lawyers subsequently involved in circumstances where, in so far as I can see from *Chitty on Contracts*, 32 ed., vol 2, at paras 38.131, there is no equivalent provision in the 2004 UK regulations transposing the Distance Marketing Directive to Regulation 6(6)(a) or 9(5)(a) of the Distance Marketing Regulations (as amended). In this context, Article 11 of the Distance Marketing Directive leaves it to the individual Member States as to the sanctions to be imposed in the event of a supplier's failure to comply with national provisions adopted pursuant to the Directive. Article 11 specifies that these sanctions must be: "*effective, proportional and dissuasive*". However, there is no mandatory requirement that Member States impose an unenforceability sanction for non-compliance. Thus, it is unlikely that an English judge or lawyer should be aware that the national implementing measures taken in Ireland provided a possible argument in answer to the determination reached by District Judge Jones in paras. 73-74 of his judgment quoted above. In these circumstances, the plaintiffs were at a particular disadvantage in their conduct of the proceedings in England. Not only were they personally unaware of the Distance Marketing Regulations but also, in the absence of advice as to Irish law from an Irish lawyer, it was unlikely that any of the lawyers involved in the proceedings (including the judges who dealt with the matter) would have adverted to the potential importance of the Distance Marketing Regulations.

174. Therefore, unlike in *AA v Medical Council*, there is some explanation for the failure of the plaintiffs to advert to the Distance Marketing Regulations in the course of the proceedings in England. Furthermore, unlike *Vantive Holdings*, there is no suggestion that the plaintiffs deliberately held back the distance marketing argument.

175. I do not suggest that the lack of knowledge of the regulations and the lack of Irish law advice are sufficient, in themselves, to make it inappropriate to hold that the maintenance of the Distance Marketing Regulations claim is an abuse. But it is a factor that weighs in the plaintiffs' favour. When combined with the public interest factors identified below, it seems to me that the balance swings in the plaintiffs' favour.

176. In making the observation set out in para. 176 above, I have not lost sight of the fact that the plaintiffs did have legal representation for the application for leave to appeal. I accept that this creates a point of distinction with *Moffitt*. Nonetheless, they did not have representation at what I consider to be the really crucial phase of the English proceedings – i.e. the first instance stage before District Judge Jones. It is generally difficult to introduce a new case at an appeal stage. Moreover, as suggested in para. 174 above, it seems to me that the lack of Irish law advice created a real difficulty not just for the plaintiffs themselves but also for the lawyers. In those circumstances, I am of the view that the lack of knowledge and lack of relevant legal advice at the appropriate time remain relevant factors that should be taken into account.

177. The private interests of the parties are not the only relevant factors to be taken into account. It will be recalled that Lord Bingham, in *Johnson v Gore Wood*, in the passage cited by Hardiman J in both *AA* and *Carroll v Ryan*, expressed the view that, in taking a broad view on the merits, the court should consider both the public and private interests involved. Thus, for example, it will invariably be necessary, in an exercise of this kind, to take account of the very significant public interest in ensuring the finality of litigation. However, in my view, that is not the only relevant public interest that falls to be considered here.

178. As noted above, when Ireland came to enact the Distance Marketing Regulations, the sanction which the State chose to enact for a failure to comply with Regulation 6(6)(a) or Regulation 9(5)(a) was to make the distance contract unenforceable against the consumer save to the extent that a court can be satisfied to take a different view under sub-para. (b) of each Regulation. There are relatively few statutory provisions which expressly provide for the unenforceability of contracts in the financial world. This seems to me to very clearly indicate a legislative intention to ensure, consistent with Recital 13 to the Directive, a high level of consumer protection. It obviously fulfils the requirement in Article 11 of the Directive that sanctions should be "*dissuasive*".

179. In addition, consistent with Article 12 of the Directive, Regulation 30 provides that any purported waiver by a consumer of a right conferred by the Regulations is void and any term contained in a distance contract for the supply of a financial service will also be void in the event that it is inconsistent with the Regulations. To my mind, these provisions reflect a public interest in the enforcement of the aims of the Directive and a public interest in the protection of consumer rights. This seems to me to be another factor which must be weighed in the balance in considering whether the continued maintenance of these proceedings (insofar as they rely on the Distance Marketing Regulations) constitute an abuse of process. In making that observation, I wish to make it very clear that I am not pre-judging in any way the allegations which have been made by the plaintiffs. It remains to be seen whether the plaintiffs are entitled to rely on the Distance Marketing Regulations as consumers and whether there has been any breach of those regulations by the defendant. However, on the face of it, an issue arises as to whether there has been compliance with the Distance Marketing Regulations.

180. Having regard to the underlying purpose of the Regulations and the importance of the dissuasive effect of the sanctions imposed by the Regulations, it seems to me to be in the public interest and in the interests of consumers generally that the distance marketing case made by the plaintiffs should be allowed to proceed to trial. It would be a very serious matter if it were found that there had been a failure to comply with the obligations under the Regulations. In my view, the enforcement of the Distance Marketing

Regulations is an issue that transcends the interests of the parties before the court and is a special circumstance to which significant weight should be attached. There is a fairly obvious analogy here with the approach taken to special circumstances in the context of applications for security for costs under s. 52 of the Companies Act 2014. While the subject matter is widely different, the principle considered in that context by Charleton J in *Millstream Recycling v Tierney* [2010] IEHC 55 and by Finlay Geoghegan J in *Webprint Concepts v Thomas Crosbie Printers* [2013] IEHC 359 is also apposite here.

181. On the assumption that the plaintiffs may establish that the Distance Marketing Regulations apply, there is a further public interest in determining whether or not the steps taken by the defendant to make its terms and conditions available on its website are sufficient for the purposes of the obligations that arise under those regulations. That is an issue which will be of benefit to the financial industry and consumers more generally. It will involve a consideration of the definition of "*durable medium*" in Regulation 3 (1) where it is defined as meaning:-

> *"anything in which information is stored, or that enables information to be stored, in a way that—*
>
> > *(a) allows future access to the information for such time as is adequate for the purposes for which the information is to be used, and*
> >
> > *(b) enables the information to be reproduced in an unchanged form,*
> >
> > *but does not include an Internet website unless it would otherwise be a durable medium as defined in this definition".*

182. While, in Case C-49/11 *Content Services Ltd v Bundesarbeitskammer* and in Case C-375/15 *Bawag PSK v Verein fur Konsumenteninformation*, significant guidance has been given by the CJEU with regard to the meaning of "*durable medium*" under related directives, the issue, in so far as I am aware, has yet to be addressed by an Irish court. Is it enough that the terms and conditions are made available in the manner set up on the defendant's website? There is a significant public interest in the resolution of that issue. It is not an issue that was ultimately addressed by District Judge Jones in the context of the 2007 Regulations. For the reasons explained in paras. 73-74 of his judgment (quoted above) he did not think it necessary to do so since any failure on the defendant's part (if there was such a failure) did not render the contract unenforceable under the 2007 Regulations.

183. Given the increased use of internet services in recent years, the resolution of this issue under the Distance Marketing Regulations has obvious implications for providers of online financial services and the customers and consumers of such services. This is particularly important in an Irish context where the financial services industry is such a significant element of the economy. A determination of the issue will assist the lawful operation of that market. Thus, the issue which arises is a very important one which transcends the private interests of the parties.

184. In light of the important public interests discussed above and in light of the additional considerations discussed in paras. 170-177, I have come to the conclusion that it would not be an abuse of process to permit the plaintiffs to pursue their claim in so far as it relies on the Distance Marketing Regulations.

185. A further factor to be borne in mind is that, in common with the position in *Moffitt*, the case sought to be made by the plaintiffs based on the Distance Marketing Regulations raises a relatively narrow legal issue and the resolution of that issue will not place a very significant burden on the defendants other than the obvious risk that if, (as Clarke J. suggested in *Moffitt*) it turns out to be a well-made point, the defendant's entitlements may be altered. However, the conduct of the litigation itself would not, in my view, be hugely burdensome.

Conclusion

186. I will therefore make an order striking out the plaintiffs' claim other than the claim based on the Distance Marketing Regulations. To that extent, the defendant's application succeeds.

187. I refuse that part of the defendant's application which seeks to strike out the plaintiffs' claim based on the Distance Marketing Regulations. In my view, the further prosecution of that issue will not give rise to an abuse of process.

188. I will hear counsel in due course as to the precise paragraphs of the statement of claim that will remain alive. If necessary, I will also deal with any argument as to costs. I hope that the parties will be able to reach agreement on both of these issues.