Neutral Citation Number: [2012] IEHC 184

THE HIGH COURT

COMMERCIAL

[2011 No. 9378 P]

BETWEEN

JAMES MCCONNON

PLAINTIFF

AND

PRESIDENT OF IRELAND, AN TAOISEACH, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND, ATTORNEY GENERAL, COMMISSIONER OF AN GARDA SÍOCHÁNA AND ZURICH BANK IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 23rd day of May, 2012

Background

1. In 2007, the plaintiff (Mr. McConnon) applied to Zurich Bank Ireland (the Bank) for a loan of €32m. His application was successful. The money was advanced to him on foot of a letter of facility of 15th June, 2007. The monies were required in connection with the construction and completion of a shopping centre located at Main Street, Castleblayney, Co Monaghan.

2. Unfortunately, that project ran into difficulties and Mr. McConnon was unable to discharge his obligations to the Bank.

3. The Bank commenced proceedings against Mr. McConnon in this court on 30th November, 2010. Mr. McConnon was represented by senior and junior counsel and a solicitor in those proceedings. Birmingham J. heard an application for summary judgment against Mr. McConnon and on 4th March, 2011, delivered a reserved judgment on that issue. Despite the endeavours of Mr. McConnon's counsel, that judge was unable to identify any arguable case or triable issue which would justify the refusal of summary judgment. Accordingly, he gave judgment against Mr. McConnon for the full amount.

4. Mr. McConnon appealed the decision of Birmingham J. That appeal has yet to be heard. Mr. McConnon sought from the Supreme Court a stay on execution of the judgment of Birmingham J. pending the determination of his appeal. On 8th July, 2011, the Supreme Court refused that stay of execution.

5. On 20th October, 2011, Mr. McConnon commenced the present proceedings. On 7th November, 2011, he served a notice of discontinuance of the action against the first defendant, the President of Ireland.

6. On the application of the Bank, this action was transferred to the Commercial List and the Bank and remaining defendants brought motions seeking to have the respective claims against them struck out *in limine*. On the hearing of these motions on 19th April, 2012, Mr. McConnon consented to his claim against the Taoiseach, the Minister, Ireland, the Attorney General and the Commissioner of the Garda being struck out. Accordingly, only Mr. McConnon's claim against the Bank remains and this is my judgment on the Bank's application to have that claim struck out.

Mr. McConnon's Claims

7. In his plenary summons, Mr. McConnon claimed the following reliefs against the Bank:-

> *"1. An order declaring that the seventh named defendant Zurich Bank Ireland has acted ultra vires as against the plaintiff in its fraudulent, neglegent (sic) and fragant (sic) disregard to the following:-*
>
> *The Banker Books Evidence Act 1879, as amended,*
>
> *National Debt Act, 1882*
>
> *Savings Bank Act, 1893*
>
> *2. An order staying all court proceedings as against the plaintiff by the seventh name defendant Zurich Bank Ireland and in particular the enforcement of any judgment and the commencing of bankruptcy proceedings until these proceedings are determined.*
>
> *3. Damages both general and punitive.*
>
> *4. An order for directions or such other order as this honourable court shall deem appropriate.*
>
> *5. An order for costs."*

8. The statement of claim was delivered on 21st December, 2011 and seeks somewhat different reliefs against the Bank. The prayer reads as follows:-

"1. A declaration that by reason of the misrepresentation of the seventh named defendant the plaintiff was induced into entering into a loan facility agreement with the seventh named defendant on 15th June, 2007, under which the plaintiff was advanced a sum of circa €32m for the purchase of two sites and the completion of a shopping centre.

2. A declaration that by reason of the misrepresentation of the seventh named defendant, its servants and agents, the loan facility agreement is void and of no legal force and effect, and in the alternative.

3. A declaration that by reason of the misrepresentation of the seventh named defendant, its servants and agents, the plaintiff is released from his indebtness (sic) to the seventh named defendant under the loan agreement dated 15th June, 2007.

4. Further and in the alternative, a declaration that the seventh named defendant acted in breach of its fiduciary duties, contractual duties and duty of care which if (sic) owed to the plaintiff as the plaintiff's banker in the manner in which it managed the plaintiff's loan account facility.

5. Such further other declaratory and other orders as this honourable court may deem fit.

6. Damages for misrepresentation.

7. Damages for breach of contract.

8. Damages for breach of fiduciary duties.

9. Damages for negligence including negligent misstatement and breach of duty.

10. Damages for unlawful interference with the plaintiff's economic interest.

11. Interest pursuant to the Court Act 1981.

12. Costs."

9. The Bank's application to strike out Mr. McConnon's claim is brought under a number of different headings. Aspects of the claim are said not to disclose a cause of action with any reasonable prospect of success and thus ought to be dismissed at this juncture. Other aspects of Mr. McConnon's claim are said to have already been adjudicated upon by either this Court or the Supreme Court and thus may not be the subject of a fresh claim inconsistent with those determinations. In addition, it is argued that some issues sought to be advanced in the present proceedings could have been raised by Mr. McConnon in the summary proceedings against him but were not in fact so raised by him. They are said to fall foul of the rule in *Henderson v. Henderson* [1843] 3 Hare 100 and thus may also be regarded as *res judicatae*.

Jurisdiction

10. Order 19, rule 28 of the Rules of the Superior Courts provides express authority to the court to strike out, stay or dismiss an action if the pleadings disclose no reasonable cause of action or are frivolous or vexatious.

11. Over and above that rule there is an inherent jurisdiction in the court to strike out an action if it is clear that it must fail. In describing that jurisdiction, Costello J. in *Barry v. Buckley* [1981] I.R. 306 at 308 said that:-

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

12. The purpose of this jurisdiction was described by McCracken J. in *Fay v. Tegral Pipes Limited* [2005] 2 I.R. 261 in the following terms:-

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

13. More recently, McGovern J. in Doherty v. Minister for Justice, Equality and Law Reform [2009] IEHC 246 said:-

"The courts are not to be used as a forum for ventilating complaints but, rather, for resolving genuine disputes between parties to the litigation and, where appropriate, the granting of declarations and ancillary relief, based on established right or entitlement."

Res Judicata

14. The inherent jurisdiction to dismiss or strike out proceedings *in limine* can also be invoked in circumstances where somebody attempts to relitigate matters already decided conclusively by a judicial tribunal of competent jurisdiction. Such a determination is conclusive. A party is precluded from relitigating the matters decided in the judgment or indeed from giving evidence to contradict them in subsequent proceedings.

15. In order to successfully rely on this doctrine, it must be shown that there was:-

(a) A previous decision of a judicial tribunal of competent jurisdiction.

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

(c) There must be an identity of parties.

(d) There must be an identify of subject matter.

16. In the present case it is contended that all four elements are to be found in the judgment of Birmingham J. in the summary proceedings to which I have already referred. I will in due course examine that proposition having regard to the facts. Before doing so, however, it is necessary to allude to a further legal issue.

Final and Conclusive Judgment
17. It is common case that the judgment of Birmingham J. is under appeal to the Supreme Court. Does that fact have any implications for the application of the doctrine of *res judicata*? To pose that question in a different form, can the judgment of Birmingham J. be regarded as final and conclusive for *res judicata* purposes when there is an appeal to the Supreme Court?

18. I am told that there is no direct authority on this topic in this jurisdiction and so I was referred to decisions in England and Northern Ireland.

19. In *The Sennar (No. 2)* [1985] 1 WLR 490, Lord Diplock in dealing with an issue of estoppel per *rem judicatam* said this at p. 494:-

> *"It is often said that the final judgment of the foreign court must be 'on the merits.' The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction."*

20. That passage indicates that the fact that an appeal may lie from a judgment does not preclude it from giving rise to an issue of *res judicata*.

21. The same topic fell for consideration by the High Court in Northern Ireland in the case of *Deighan v. Sunday Newspapers Limited* [1987] N.I. 105. In that case, the plaintiff brought proceedings in the High Court in Northern Ireland arising out of an alleged defamatory publication in the Sunday World Newspaper. He had already sued in respect of the same publication in this jurisdiction. In a trial before a judge and jury in February 1982, judgment was entered for the defendant. The plaintiff appealed to the Supreme Court which dismissed his appeal. Later, he made an application to the European Commission of Human Rights complaining under Article 6 of the European Convention on Human Rights that he had been denied a fair and public hearing by an independent and impartial tribunal in a number of respects, in particular, because one of the judges of the Supreme Court hearing the plaintiff's appeal, held shares in the defendant's holding company. The Commission rejected all of the plaintiff's claim as inadmissible on the ground that they were manifestly ill-founded. In May 1982, he commenced proceedings in Northern Ireland in respect of the publication of newspaper articles identical to those in respect of which he had sued unsuccessfully in this jurisdiction. An application was brought to have his action in Northern Ireland struck out on the ground of issue estoppel. It was argued that the matters in issue had already been decided by the High Court in Dublin. In the course of his judgment, Carswell J. (as he then was) said:-

> *"The only outstanding question is whether the judgment of the competent court in the Republic of Ireland is final in the sense required for the purpose of creation of an issue estoppel in this court. The plaintiff argued that because the possibility remained open that the Supreme Court might set aside its decision on the ground of interest the judgment was not final. On the finding of fact which I have made the plaintiff knew that one of the judges sitting on his appeal had a shareholding in Independent Newspapers Limited and did not raise any objection. In these circumstances one would suppose that there is no foundation for his contention that the decision should be set aside. The Irish government has successfully opposed the plaintiff's application to the European Commission of Human Rights on this very ground. It might be said, however, that it would still be open to the Supreme Court, if the matter were properly brought before it, to hold on further investigation into the facts that the plaintiff did attempt to object, or to decide in all the circumstances to set its decision aside. I shall accordingly consider the applicable law on the footing that the Supreme Court may possibly yet take this course.*
>
> *The conditions for operation of the principle of issue estoppel arising from the judgment of a foreign court were recently considered by the House of Lords in The Sennar [1985] 2 All E.R. 104."*

22. He went on to cite the passage from the speech of Lord Diplock which I have already quoted. Carswell J. continued:-

> *"In this respect the degree of finality required equates with that which must be established when a plaintiff wishes to sue in our courts on a foreign judgment, which is the obverse of the same principle. It has consistently been held in that context that a judgment of a court of competent jurisdiction may be final and binding, even though a right of appeal to a superior court remains open: see Nouvion v. Freeman [1889] 15 App. Cas. 1, 10 per Lord Herschell; Colt Industries Inc. v. Sarlie (No. 2) [1966] 3 All E.R. 85. In my opinion this principle applies to the present case. The judgment of the High Court was a final judgment of a competent court on the issues litigated in the Dublin action. An appeal brought from that decision was dismissed by the Supreme Court. Even if it remains possible that the Supreme Court might set aside its decision, that would mean no more than that the judgment of the High Court would still be subject to appeal. Such a possibility does not in my view prevent it from being a final judgment on the merits."*

23. These statements of the law of England and Northern Ireland I find to be persuasive. I am satisfied that the law of this country on this topic is no different to that of those jurisdictions.

24. In these circumstances, I am satisfied that the judgment of Birmingham J. is capable of raising a *res judicata* despite the fact that there is an appeal pending from it to the Supreme Court.

The Rule in Henderson v. Henderson
25. Part of the case made by the Bank is that issues which are now sought to be raised by Mr. McConnon could have been raised by him by way of defence to the summary proceedings. It is therefore argued that such issues are captured by the rule in *Henderson v. Henderson* and likewise are the subject of *res judicata*.

26. In *Henderson v. Henderson* [1843] 3 Hare 100, the Vice Chancellor, Sir James Wigram said:-

> *"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

27. That decision has been adopted by the Supreme Court in this jurisdiction in *A.A. v. Medical Council* [2003] 4 I.R. 302.

28. In the course of his judgment in that case, Hardiman J. said that although the principle expressed in *Henderson v. Henderson* had never been doubted, there has in recent years been a good deal of debate as to its precise legal nature and taxonomy and as to the circumstances in which and rigidity with which it should be applied. He drew attention to an article by Handley J., in the Law Quarterly Review intituled *"A closer look at Henderson v. Henderson*". That author considered that the rule had been applied in too crude and mechanistic a way in *Yat Tung Investment Co. Limited v. Dao Heng Bank Limited* [1975] A.C. 581 where proceedings were dismissed as an abuse of process which were an attempt to raise matters which *"could and therefore should have been litigated in earlier proceedings"*. Hardiman J. appears to approve of an approach which Handley J. preferred and which is found in the judgment of Lord Bingham in *Johnson v. Gore Wood & Co*. [2002] 2 A.C. 1. There, Lord Bingham said, *inter alia*:-

> *"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 proceeding 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, focussing 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."*

29. More recently, the rule in *Henderson v. Henderson* was thus described by Hardiman J. in his dissenting judgment in *Cosgrave v. The Director of Public Prosecutions* [2012] IESC 24, where he said:-

> *"There is, of course, a rule to the same effect as that quoted above in relation to criminal prosecutions, which developed in relation to civil proceedings. As it happens, the rationale of this rule is perhaps better expressed in the civil cases. There is no doubt that this rule, often referred to as the rule in Henderson v. Henderson, is both a common law principle of considerable antiquity and one which has been frequently applied and often examined in recent times in this jurisdiction.*
>
> *The rule in Henderson v. Henderson [1843] 3 Hare 100, means that a litigant may not make a case in legal proceedings, which might have been, but was not, brought forward in previous litigation."*

30. In a moment, I will consider the application of these legal principles to the factual position which obtains in this case. Before doing so, I have, however, to deal with one other matter which was raised by Mr. McConnon. It relates to alleged new evidence.

New Evidence

31. Mr. McConnon states that he wishes to rely on what he describes as new evidence which he claims was not available when Birmingham J. heard the Bank's application for judgment in the summary proceedings. This new evidence has been described as an 'Executive Summary' prepared by the Bank and dated 12th June, 2007. Mr. McConnon contends that this Executive Summary was prepared by Bank officials for presentation to the Credit Committee of the Bank with a view to ensuring approval of the loan to him. He says that the material contained in it differs in at least eight material ways from information which he provided to the Bank. He contends that this Executive Summary was not available when Birmingham J. heard the Bank's application for summary judgment.

32. In his statement of claim, Mr. McConnon pleads as follows:-

> *"Unknown to the plaintiff until the end of June 2011, having received it on or about 16th/17th February 2011, an Executive Summary created by the Bank officials within the lending department of the second named defendant contained information not supplied by the plaintiff."*

33. The Bank's application for summary judgment was heard by Birmingham J. on 17th February, 2011. Mr. McConnon swore an affidavit for the purposes of defending that application on 7th February, 2011, in which he exhibited a redacted copy of the Executive Summary. This had been obtained by him from the Bank pursuant to the provisions of the Data Protection legislation.

34. A supplemental affidavit was sworn on behalf of the Bank by Richard Murray on 11th February, 2011. That affidavit purported to exhibit an unredacted copy of the Executive Summary at exhibit RM5. That exhibit was accidentally omitted from the booklet of affidavits and exhibits. However, it was furnished to Mr. McConnon's legal advisors before the hearing and was, it is said, handed into court to Birmingham J. during the course of the hearing which gave rise to his reserved judgment. This fact is sworn to by Mr. Richard Murray in this application where he says at para. 11 of his affidavit sworn on 11th January, 2012, as follows:

> *"This document (the Executive Summary) was before the court when the summary proceedings were heard. However, the document was not formally exhibited."*

35. Mr. McConnon is unable to controvert this but has asserted that he does not believe that the document was actually included in the papers presented to Birmingham J. He was, however, represented by senior and junior counsel on that hearing and it appears to be common case that the document was provided to them in advance of the hearing.

36. In a lengthy affidavit sworn by Mr. McConnon on 19th April, 2012, he appears to tacitly accept the correctness of Mr. Murray's assertion concerning the document being before the court. This is what Mr. McConnon says:-

> *"Zurich Bank go on to claim 'in reality, it is clear that the Executive Summary was in the plaintiff's possession prior to*

the summary proceedings and was available before the High Court but not put into evidence at the hearing of the Bank's motion for judgment'. I say that this claim is inaccurate in its entirety and whilst it is admitted that the Bank 'slipped in' this paperwork at the last minute, it is clear that due to the lateness of its production, this deponent did not have time to properly study and consider this document so that I might have been in a position to highlight to the court at any stage the fraudulent misrepresentations contained within this report. In summary, then, that whilst it may be the case that this report was technically in front of the court, it was not ventilated for all of the reasons set out above, and hence would not have been considered from the point that this deponent is putting forward."

37. I am thus confronted with a positive averment that the material was before Birmingham J. per Mr. Murray's affidavit. It is then admitted by Mr. McConnon that the document was produced, albeit later than he wished, and a tacit acceptance that it was before the court when Birmingham J. heard the application for summary judgment.

38. In these circumstances, I am of the view that this Executive Summary, which he now wishes to ventilate, is not new evidence for the purposes of this application. It was available to his counsel and the court when the Bank's application for summary judgment was heard.

39. In these circumstances, it is not necessary to further consider this question of new evidence.

40. I now turn to the orders sought by the Bank on this application.

The Plenary Summons Reliefs
41. The first relief sought against the Bank in the plenary summons is for an order declaring that it has acted *ultra vires* as against Mr. McConnon in its alleged *"fraudulent, negligent and fragrant (sic) disregard"* of three statutory provisions. They are the Bankers Books Evidence Act 1879, as amended, the National Debt Act 1882, and the Savings Bank Act 1893.

42. I am unable to find any provision in those statutes creating obligations on the part of the Bank which could justify the making of an order of the type contemplated. Quite apart from there being an absence of any legal basis for such an order being made, I am unable to identify any factual material to justify the making of such an order even if it were possible to do so.

43. Accordingly, insofar as this relief is concerned, I am satisfied that it has no reasonable prospect of success, and accordingly, in the exercise of my inherent jurisdiction, I dismiss it.

44. The second relief sought in the plenary summons is for an order staying all court proceedings as against Mr. McConnon by the Bank, and in particular, the enforcement of any judgment and the commencement of bankruptcy proceedings until such time as the instant proceedings are determined.

45. The question of a stay on the judgment of Birmingham J. has already been decided by the Supreme Court. By its order of 8th July, 2011, it refused to place a stay of execution on his order. It is not open to this court to revisit that decision. That is what this court is being invited to do in respect of this second relief. Accordingly, I dismiss Mr. McConnon's claim for this relief.

46. There follows on the plenary summons a claim for damages both general and punitive. The statement of claim also seeks damages and I will consider those reliefs in that context presently.

The Statement of Claim Reliefs
47. The first five reliefs prayed for in the statement of claim are declaratory. They all rely on alleged misrepresentations on the part of the Bank. The first seeks a declaration that Mr. McConnon was induced to enter into the loan facility agreement by virtue of misrepresentations. The second seeks a declaration that the loan agreement is void and of no legal force and effect because of such misrepresentations. The third seeks a declaration that Mr. McConnon is released from his indebtedness under the loan agreement because of the alleged misrepresentation. The final declaratory relief seeks to have the Bank declared to have acted in breach of its fiduciary duties, contractual duties and duty of care in the manner in which it managed Mr. McConnon's loan account facility.

48. There then follows a claim for damages for misrepresentation, breach of contract, breach of fiduciary duty, negligence and for unlawful interference with the plaintiff's economic interests.

49. The contention of the Bank is that all of these claims, both for declaratory relief and damages, are all *res judicate* as either having been decided by Birmingham J. or falling with the ambit of the rule in *Henderson v. Henderson*.

50. It is necessary now to look at the decision of Birmingham J. on the application for summary judgment.

The Judgment of Birmingham J.
51. That judge identified four possible defences to the application for summary judgment. All four were argued by Mr. McConnon's Senior Counsel.

52. These four possible defences were:-

(a) What the judge described as "*the condition of contract point*";

(b) Estoppel;

(c) Frustration and

(d) The "*code of conduct point*".

53. Under the condition of contract point, the judge had to consider clause 18 of the facility letter which dealt with conditions precedent. Mr. McConnon attempted to rely on that condition as providing him with a defence. Birmingham J. was unequivocal in his view of this line of argument. He said:-

"For my part, I can see no basis whatever for the suggestion that clause 18.1 is one on which the borrower can rely. If there was ever any doubt about that, and I do not believe that there was, any such doubt would be entirely removed by clause 18.2 which says 'the bank has the right to waive any and all of the conditions precedent'. I regard the suggestion that the defendant is entitled to rely on an alleged failure on the part of the bank to subject the valuations to scrutiny

as fanciful . . .

The threshold to be overcome if the defendant is to be given liberty to defend is a very low one, but, on this issue, low as it is, it has not been made out. In my view, the question which Hardiman J. says is to be posed, namely, whether it is very clear that the defendant has no case admits of only one answer - so far as this suggested defence is concerned, the defendant has no case."

54. The judge then went on to deal with what he described as the estoppel point.

55. Insofar as this argument was concerned, the judge was no less forthright. He said:-

"It seems to me that the defendant's arguments fundamentally misunderstand the nature of the relationship between the bank and the defendant. The relationship was not that of partners with a common interest, sharing a risk, rather, the relationship was that of lender and borrower.

A part of the doctrine of estoppel is the requirement that there would be an element of unfairness or unconscionability in permitting the promissor to welch on what he has offered. Leaving aside that what the bank offered was limited to offering a standstill period, I can find nothing unfair or inequitable or unconscionable in a party that has lent money seeking to be repaid.

I can see no arguable basis for suggesting that an equitable remedy would involve extinguishing the right of a bank that has lent a very large sum of money for a commercial development to be repaid.

Again, I am satisfied that the defendant has failed to make out even an arguable defence based on the invocation of the doctrine of estoppel."

56. The next matter that the judge had to consider was an argument made by reference to the doctrine of frustration.

57. In the course of his judgment, he refers to a decision of my own in *Ringsend Property Ltd. v. Donatex* [2009] IEHC 568, where I quoted with approval a passage from *Chitty on Contracts* where it is stated:-

"The courts do not wish to allow a party to appeal to the doctrine of frustration in an effort to escape from what has proved to be a bad bargain: frustration is 'not likely to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains."

The judge said:-

"In my view, it is just that which the defendant is seeking to do. The defendant first became involved with this project as far back as 2004, some three years before the plaintiff bank was on the scene. Thereafter, it appears the plaintiff (sic) was assiduous in pursuing sources of funding. Like every development project, it contains within it the possibility of success and of failure. Certainly, with the benefit of hindsight, the project on which the defendant embarked was an overly ambitious one, but I can discern no basis whatever as to how invoking the doctrine of frustration could provide an arguable defence."

58. Finally, the defendant raised a point in respect of the Consumer Protection Code issued by the Financial Regulator in August 2006. The judge comprehensively rejected any suggestion of a defence under this code. He gave consideration to an argument that the code formed an implied term of the contract between the parties, a breach of which created rights for the defendant. He rejected this argument also.

59. Birmingham J. concluded his judgment with some general observations. They included a comment that this:-

"Was not a question of a bank forcing funds on a reluctant, but gullible, borrower. Even before the plaintiff bank ever entered on the scene, the defendant had embarked on the project and had expended €10 million . . .

The defendant decided to proceed and borrow the money and I can see no arguable basis whatever for suggesting that he can be absolved from liability to repay. Accordingly, I am satisfied that this is one of the rare cases where a plaintiff is entitled to summary judgment."

As is clear from the above, Birmingham J. was confronted with comprehensive argument on various lines of defence by Mr. McConnon's counsel. He rejected all of them. They included arguments which were made that the Bank failed to inform Mr. McConnon that it was not intending to scrutinise or otherwise consider valuations provided by him. He alleged that the Bank misinformed or otherwise misled its own decision making process. It was also alleged that the Bank had misled its internal process as to the net worth of Mr. McConnon. He also alleged that there was a failure to avoid or disclose conflicts of interest.

60. On a consideration of the judgment of Birmingham J. and what is now pleaded against the Bank in Mr. McConnon's statement of claim, I am satisfied that neither the declaratory relief nor the claim for damages are capable of being pursued in this litigation because they are subject to the *res judicata* rubric. Either these allegations were raised (albeit perhaps in a somewhat different form) or ought to have been raised. That they were not so raised renders them subject to the rule in *Henderson and Henderson* and, applying that rule in the fashion identified by Lord Bingham in *Johnson v. Gore Wood*, they are, in my view, no longer justiciable.

61. In these circumstances, I dismiss all of the claims which are made against the Bank in the statement of claim.

62. Insofar as it may be suggested that Mr. McConnon is seeking relief in respect of an alleged tort of reckless lending and that that does not fall within the ambit of material which was or ought to have been raised before Birmingham J., I am satisfied such a tort does not exist as a civil wrong in Irish law. In this respect, I agree with the judgment of Charleton J. in *ICS Building Society v. Grant* [2010] IEHC 17. Thus, even if that allegation does not fall to be dismissed on the basis of *res judicata*, it is dismissed as having no reasonable prospect of success.

Practice Direction

63. Mr. McConnon alleged that there was a failure on the part of the Bank to adhere to a practice direction issued by the President of the High Court on 26th July, 2010, in respect of this application. It is not necessary for me to adjudicate on that issue, since even if

there was a failure, no mischief resulted. The motion to dismiss was adjourned by me on a number of occasions to facilitate Mr. McConnon in obtaining legal advice. Thus, even if there was a failure to fill out the requisite forms at the appropriate time, this had no adverse consequences for Mr. McConnon and, accordingly, there is no exposure to a liability for costs which is what the practice direction contemplates in respect of a failure to comply with it.

Result

64. The reliefs claimed by Mr. McConnon, both in the plenary summons and the statement of claim against the Bank are dismissed.