#### THE HIGH COURT

[2010 No. 6934 P.]

**BETWEEN** 

# **BRONAGH COTTER TRADING AS KATIE'S KITCHENS**

AND

### **PLAINTIFF**

# JOHN KANE, MICHAEL KANE AND RONAN KANE

**DEFENDANTS** 

# JUDGMENT of Ms. Justice Pilkington delivered on the 11th day of April, 2019.

- 1. By notice of motion dated 21st March, 2018 the defendants seek;
  - (a) Pursuant to RSC Order 25 (1) directing that a question of law be decided as a preliminary issue being;

'That the plaintiff is not entitled to re-litigate the within matter, the same issue having been litigated in a court of competent jurisdiction namely Wexford Circuit Court in proceedings entitled 'John Kane and Michael Kane v Bronagh Cotter t/a Katie's Kitchen' bearing record number 481/2007, wherein judgment was granted in favour of the two named plaintiffs in that case being two of the defendants in this case and where the defendant in that case who is the plaintiff in this case applied to have the judgment set aside, was allowed to do so on condition that she pay money into court which she did not do, where the judgment stood and where she did not appeal the judgment.'

- (b) An Order pursuant to RSC Order 25 (2) dismissing the plaintiff's claim.
- 2. From the affidavit grounding this motion and the papers submitted it appears that the history of this matter is as follows: -
  - (a) In Wexford Circuit Court in proceedings [2007 No. 481] between *John Kane and Michael Kane v. Bronagh Cotter trading as Katie's Kitchen*, the plaintiffs to those 2007 proceedings (the defendants in these 2010 proceedings save for the addition of Ronan Kane) issued proceedings arising from an oral contract entered into between the parties on 9th November, 2006 ('the 2007 proceedings').
  - (b) Those proceedings were issued on 27th April, 2007, an appearance on 6th June, 2007 and particulars raised on 2nd July, 2007.
  - (c) On 15th August, 2007, the plaintiff entered judgment in the courts office for the sum of €14,238.90 together with €624 representing costs.
  - (d) On 8th October, 2007, a notice of motion issued for review of the judgment. The matter came before Her Honour Judge Doyle on that day and she directed that the judgment obtained in the office could be set aside provided that a sum of €14,000 was lodged within three weeks from that date (8th October). There was no appeal from that judgment and no monies lodged. Accordingly, the judgment of Doyle J. of 8th October, 2007 stands.
  - (e) There were then certain steps taken in an attempt to levy execution of the monies. A summons for attendance of a debtor took place on 19th June, 2008. Certain monies had been discharged by 2nd July, 2008, but there was still a significant balance outstanding.
  - (f) On 16th October, 2008, the District Court Judge directed that the defendant to those proceedings pay the balance to the plaintiffs (then €9,894.75) together with costs, expenses and interest pursuant to the Circuit Court order of 15th August, 2007, by way of weekly instalments in the sum of €100.
  - (g) By notice of appeal to the Circuit Court, this instalment order was appealed and the Circuit Court varied the instalment order to a weekly instalment of €50 per week the first instalment to be paid on 29th May, 2009.
  - (h) On 27th July, 2010, the defendant ceased making any payments and, thereafter, failed to discharge the balance of the Circuit Court judgment until there was an undertaking given before me in court on 3rd October, 2018, that the balance would be discharged.
- 3. Thereafter, the above entitled proceedings issued in the High Court bearing record number [2010 No. 6939] on 22nd July, 2010. Within the Statement of Claim dated 28th June 2011: -
  - (a) The plaintiff seeks specific performance of what she describes as an exclusive agreement made on 9th November, 2006, for inter alia the design, supply and installation of kitchens and wardrobes in 30 houses being developed by the defendants in Kilcoole, Co. Wicklow.
  - (b) In the alternative or in lieu thereof damages for breach of contract and unjust enrichment, together with orders for all consequential or necessary consequential orders, inquiries, accounts and directions, further and other relief and seeking the costs of the proceedings.
- 4. It appears to be common case that an oral agreement was entered into by the parties on 9th November, 2006, that the plaintiff would install kitchens (she also asserts wardrobes) in a relatively modest development that the defendants were constructing. Payment of the deposit by the defendants to the above entitled proceedings ( $\le$ 14,230) was the sum sought by them in the 2007 proceedings which I have set out and described in more detail above.
- 5. As I understand it, the development has long since been completed. The plaintiff in the 2010 proceedings did not install any kitchens, an alternative contractor was engaged to complete the project and I understand that the houses have long since been sold.

- 6. The plaintiff seeks specific performance of a contract which is no longer capable of enforcement and the itemised claim of the plaintiff for damages totals just in excess of €76,400.
- 7. The initial issue before the court is two-fold: -
  - (a) whether the plaintiff is restricted to and entitled to the reliefs sought within the notice of motion seeking reliefs pursuant to O. 25 (1) and (2) of the Rules of the Superior Courts; or
  - (b) whether a broader "sweep" as contended for by the plaintiff is permissible in seeking to strike out the 2010 proceedings on the basis of *res judicata* and/or the rule in *Henderson v Henderson*.
- 8. It has been pointed out that the plaintiff in the above entitled proceedings has separately instituted proceedings against her former solicitors for events which occurred within the 2007 proceedings. That, of course, is a matter for this plaintiff.
- 9. The plaintiff in the above entitled proceedings contends that the subject matter of the issues pleaded within the 2007 and 2010 proceedings are entirely separate and distinct and raise separate issues of fact and law which are now required to be determined at trial. The plaintiff also points out that within the above entitled proceedings a third defendant is added and accordingly, the parties are not identical to those in respect of the Circuit Court proceedings referred to above. That is factually correct.
- 10. The defendants claim on the basis of matters set out within their grounding affidavit that they are entitled to also pursue a claim of *res judicata* or in the alternative that the above entitled proceedings constitute an abuse of process and contravenes the rule in *Henderson v. Henderson* [1843] 3 Hare 100.
- 11. None of these matters are set out within the reliefs sought on the face of the notice of motion and there was no application to amend it. However, it is noteworthy that in the written and oral submissions of both parties before this Court, the issues of *res judicata* and the rule in *Henderson v. Henderson* were dealt with at considerable length. Accordingly, I propose to consider it within this application.
- 12. The concept of *res judicata* is generally understood as the inherent jurisdiction of a court to strike out proceedings where someone attempts to re-litigate matters that have already been decided conclusively by a court of competent jurisdiction.
- 13. In ACC Loan Management v. Stephens [2017] IECA 229, Irvine J. explained the doctrine as follows: -

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

14. In Vico v. Bank of Ireland [2016] IECA 273 Finlay Geoghegan J. stated as follows: -

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

- ". . . But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."
- 15. The distinction between the two was set out by Clarke J. in Moffitt v. Agricultural Credit Corporation plc [2007] IEHC 245 as follows: -

"Res judicata per se applies where the matter sought to be litigated has already been decided by a court of competent jurisdiction. Res judicata can relate to the cause of action (which may involve a consideration of whether two separate causes of action arise) or an individual issue (issue estoppel). In the latter case the issue sought to be litigated must be identical to the issue decided in the previous proceedings.... The rule in Henderson v. Henderson, on the other hand, applies where a new issue is raised which was not, therefore, decided in the previous proceedings but is one which the court determines could and should have been brought forward in the previous proceedings.

The importance of the distinction lies in the consequences. If a matter is *res judicata* then, in the absence of a defence to the application of the doctrine such as fraud, the availability of fresh evidence in respect of issue estoppel only, estoppel, or other special cases, the plea will necessarily succeed.

On the other hand, where reliance is placed on the rule in *Henderson v. Henderson* to the effect that it would be an abuse of process to now allow the party concerned to raise a different issue which could have been raised in the original proceedings, it is well settled that the court adopts a broader based approach".

- 16. On the basis of the above, the defendants contend that the Circuit Court has rescinded the contract the subject matter of the High Court proceedings, accordingly it has therefore been determined by the original court of competent jurisdiction (the Circuit Court). In such circumstances, it is contended the 2010 proceedings are *res judicata* and in the absence of the plaintiff seeking to appeal the original 2007 Circuit Court proceedings, she is bound by its terms. Furthermore, to the extent that she now seeks to plead or claim any additional reliefs that should properly have been adduced before the Circuit Court and her failure to do so offends the rule in *Henderson v. Henderson*.
- 17. The plaintiff contends that the above entitled proceedings seek different reliefs to that within the Circuit Court proceedings including a claim of damages it is her submission that the issues have not previously been raised and accordingly they cannot be bound by any issue estoppel where the issue has not previously been determined by any court.
- 18. They also point out that the present proceedings involve an additional defendant (Ronan Kane) who was not a party to the Circuit

Court proceedings. Essentially, the plaintiff contends that on the facts of the case pleaded within this action as opposed to the matters pleaded and more importantly adjudicated in the Circuit Court proceedings, that there is no abuse of process, any issue of res judicata, and by reason of different issues having been raised, that the rule in *Henderson v. Henderson* does not apply.

- 19. With regard to the trial of a preliminary issue, the plaintiff contends that the issue for determination is not at all clear. More importantly that the question of law has not been properly identified. It is also pointed out that generally speaking the intent or purpose behind the direction for the trial of a preliminary issue is in order to save time and costs. Given the facts of this case as outlined above, this may well be a pertinent issue.
- 20. I find the precise preliminary issue upon which the defendants seek adjudication very difficult to discern. It appears to be seeking the trial of a preliminary issue to the effect that this plaintiff is precluded from proceeding with the above entitled litigation any further by virtue of the 2007 proceedings. In other words a preliminary issue akin to the argument of *res judicata* now before this Court.
- 21. I also note that if the defendants were to succeed and the Court were make orders in terms of RSC O. 25 (1) directing the trial of a preliminary issue (however it is construed), then a significant amount of time and expense will have been occasioned dealing with this issue. If unsuccessful there would then have to be a hearing of the entire matter. Given the relatively modest sums claimed (the plaintiff's claim just comes within the jurisdiction of the High Court) it seems to me that any risk that this matter would have to be heard initially by way of preliminary issue and thereafter a subsequent hearing would have to be very carefully considered.
- 22. In my view, the present proceedings and the Circuit Court proceedings have significant points of difference. It is the same oral contract (not the identical parties) and the same building development at issue. Nevertheless the claim within the Circuit Court proceedings by the defendants (the plaintiffs in the Circuit Court proceedings) was for the return of the deposit. Whilst in my view it would have been entirely proper and preferable should any of the reliefs now sought by the plaintiff had been made by way of counterclaim to the 2007 Circuit Court proceedings, nevertheless the matters upon which the plaintiff seeks to litigate are in my view separate and distinct (it may ultimately go to a question of costs but that of course is a matter for the trial judge).
- 23. Within the 2007 proceedings the defendants (as plaintiffs) contended (and succeeded in that contention) that they were entitled to the return of their deposit. That matter has been determined. The plaintiff on the other hand contends that arising from the same contract, she is entitled to damages for steps she took on foot of it. That may or may not be a matter upon which she succeeds at trial, but it is in my view a separate and distinct cause of action. It may arise out of the same facts, but in my view, I cannot see how the award of the deposit monies to these defendants (absent Mr. Ronan Kane) can be tantamount to the rescission of that contract. At its height, the award of the deposit to the defendants was in my view an acknowledgement that the contract did not proceed and that the defendants were entitled to the return of their deposit. That the contract did not proceed has given rise to issues of which this plaintiff now seeks to complain. In my view, the fact that judgment was entered in the Circuit Court office against this plaintiff does not and cannot be tantamount by implication or otherwise, to the fact that this contract now stands rescinded.
- 24. As stated in my view there are significantly different issues between the matters contended for within each set of proceedings. In my view, therefore, there is no applicability of the doctrine of *res judicata* or indeed the rule in *Henderson v. Henderson*.
- 25. With regard to the trial of a preliminary issue, in my view there appears to be no unanimity as to the precise facts or matters upon which such a preliminary issue should be determined. I find the phraseology within the notice of motion difficult to follow and perhaps inappropriate for the determination of a preliminary issue in any event. Given its lack of clarity I decline to direct reliefs pursuant to RSC O. 25 (1).
- 26. I also take the view that the possible trial of this preliminary issue would not in the circumstances of this case be appropriate and accordingly I also exercise my discretion to refuse it. Given the relatively modest amount sought by this plaintiff within this action and furthermore that there has already been Circuit Court litigation, in my view it would be inappropriate to risk a further set of costs in determining a preliminary issue which may not succeed. That would then occasion a full hearing and in my view this is not a case where any trial of a preliminary issue in the terms sought within the defendants' notice of motion is appropriate.
- 27. I have further considered the issues of res judicata and the rule in Henderson v. Henderson and I find that the doctrine and rule do not apply upon the specific facts of this case.
- 28. Accordingly, in my view whilst refusing the reliefs sought by the defendants, in my view urgent steps must be taken to now ensure that this matter is expedited and also proper consideration given to alternative dispute resolution on the facts of this case.