AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:000144

[2023] IESC 29

O'Donnell C.J.
Dunne J.
Hogan J.
Murray J.
Collins J.

Between/

MARY MUNNELLY

PLAINTIFF/RESPONDENT

-and-

MARGARET HASSETT, TIMOTHY CREMIN AND CITY LEARNING LIMITED

DEFENDANTS/APPELLANTS

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 29 of November 2023.

Background

1. The respondent and plaintiff, Ms. Munnelly, commenced working with the third named appellant, City Learning Limited ('the company') in September 2012. There is a dispute between the parties as to whether she worked as an employee or an independent contractor, and, whether she worked as a sales executive or a telesales executive during that period. What is not in dispute, however, is that Ms. Munnelly left the company in May 2015 after an incident or series of incidents involving her and Margaret Hassett the CEO of the company (the first defendant in the present proceedings. One such incident occurred on the 26th March 2015, and has resulted in the commencement of two sets of proceedings giving rise to the present appeal.

The 2016 Proceedings

2. On 2 March 2016, Ms. Munnelly issued proceedings in the Circuit Court against the company alone ("the 2016 proceedings"). The 2016 Civil Bill was, apparently, drafted by counsel. It set out the terms of a reference provided to Ms. Munnelly on leaving her employment and claimed that that reference was defamatory and damaging to her good name. The Indorsement of Claim concluded with a claim for the following reliefs:-

"(i) Damages to include aggravated punitive damages for defamation, limited to the jurisdiction of this Honourable Court.

(ii) Interest pursuant to the Courts Act, 1981.

(iii) The costs of these proceedings.

(iv) If necessary and/or appropriate a Correction Order under s.30 of the Defamation Act".

3. While the Indorsement of Claim on this original version of the 2016 proceedings contained a substantial narrative of the background circumstances giving rise to the termination of Ms. Munnelly's employment with the company, the claim was framed as one for damages (together with other relief) for defamation.

4. Subsequently, Ms. Munnelly, by this stage representing herself, sought to amend the Civil Bill. It is not clear if an amended Civil Bill was ever served or filed, but it appears that the document submitted by the plaintiff outlining her proposed amendments was thereafter treated as the amended Civil Bill. Those amendments significantly expanded upon the background narrative, and the incident on 26 March, 2015. The additions to the narrative referred to bullying, gross misconduct and constructive dismissal. The reliefs claimed now read:-

(1) "Damages to include aggravated and punitive damages for malicious actions and behaviour on the part of Margaret Hassett of City Learning Ltd leading to constructive dismissal and causing loss of earnings and livelihood to the plaintiff, limited to the jurisdiction of this Honourable Court.

Damages to include aggravated and punitive damages for defamation limited to the jurisdiction of this Honourable Court.

(2) Interest pursuant to the Courts Act, 1981.

(3) The costs of these proceedings.

(4) If necessary and/or appropriate, a Correction Order."

This version of the Indorsement of Claim included references to bullying and harassment and deceit, and it is apparent that the claim in defamation was being

supplemented by a claim alleging constructive dismissal and consequent loss of earnings and livelihood.

5. The case came on for hearing before Groarke P. in the Circuit Court on 28 November, 2018. Having heard oral evidence from Ms. Munnelly, Ms. Hassett and another witness, Groarke P. dismissed the claim with no order as to costs. The order of the Court stated as follows:-

> *"WHEREUPON and on reading the pleadings and documents filed herein and on hearing the evidence adduced and what was offered by the Plaintiff, appearing in person, and Counsel for the Defendant.*
>
> *THE COURT DOTH ORDER that the Plaintiff's proceedings herein be and the same is hereby dismissed with no order as to costs".*

6. What was said by the trial judge on that occasion is central to the issues raised on this appeal. Unusually, the only record of that is contained in the affidavit of Ms. Hassett, sworn grounding her application to have the proceedings dismissed. Paragraph 5 of that affidavit reads as follows:-

> *"On that date* [28 November, 2018, being the date of the hearing before Groarke P.] *the plaintiff unsuccessfully maintained proceedings for defamation and constructive dismissal against the third named defendant* [City Learning Limited] *arising out of the same circumstances before this Honourable Court in these proceedings. After a full hearing and having taken my oral evidence and that of the plaintiff, Groarke P., as he then was, dismissed the plaintiff's claim in its entirety. <u>He stated he was making no finding on whether the work reference provided to the plaintiff was a</u>*

good work reference, whether she was entitled to a work reference, what her job description was, whether she was an employee or in relation to her allegations of bullying and harassment. The third defendant made no application for the costs of the proceedings…". [Emphasis added]

The penultimate sentence in this passage, underlined in the extract above, is central to the resolution of this appeal.

7. Ms. Munnelly did not appeal the judgment of the Circuit Court to the High Court or otherwise seek to challenge it.

The 2016 Proceedings

8. On 15 March 2019, Ms. Munnelly issued the Circuit Court proceedings giving rise to this appeal ("the 2019 proceedings"). It is, I think, common case that the facts and circumstances relied upon in the 2019 proceedings, are materially similar to those of the 2016 proceedings. Again, it appears that the proceedings were prepared by Ms. Munnelly herself. The defendants named were now City Learning Limited, the company which had been the sole defendant in the 2016 proceedings, but also Ms. Hassett, described as the managing director of City Learning Limited between 1998 and 2019, and Timothy Cremin, described as a director of City Learning Limited between 1998 and 2016.

9. Again, the proceedings recited an extensive background narrative covering the relationship between the plaintiff, the company and Ms. Hassett. The proceedings referred to bullying and harassment, and gave a detailed account of the incident of 26 March, 2015. The reliefs sought were then stated in the following terms:-

"Damages to include aggravated and punitive damages for breach of Duty of Care and negligence to provide statutory Duty of Care to the Plaintiff in her workplace by the Defendants.

Damages to include aggravated and punitive damages for breach of duty by the defendants which has damaged the Plaintiff's Constitutionally protected right to earn a living.

Damages to include aggravated and punitive damages for breach of Duty by the defendants causing loss of earning to the plaintiff since May 2015.

All Damages limited to the jurisdiction of this Honourable Court.

Interest pursuant to the Courts Act, 1981.

The costs of these proceedings.

If necessary and/or appropriate a Correction Order to amend the Plaintiff's job title to Sales Executive on her written work reference from the defendants".

10. To repeat, the first and second defendants, Ms. Hassett and Mr. Cremin, had not been parties to the 2016 proceedings. All three defendants filed a full defence denying wrongdoing and sought that the proceedings be struck out on the grounds that they were alleged to offend the rule in *Henderson v. Henderson* (1843) 3 Hare 100, 67 E.R. 313 ("*Henderson v. Henderson*"), and that Ms. Munnelly had not sought the authorisation of the Personal Injuries Assessment Board ("PIAB") prior to the commencement of the proceedings. In the Circuit

Court, Her Honour Judge Linnane acceded to the defendant's application, and struck out the 2019 proceedings.

The High Court

11. On appeal, the High Court ([2022] IEHC 632, Unreported, High Court, Barr J., 17 November, 2022) reversed the decision of the Circuit Court. He held that Ms. Munnelly had a constitutional right of access to the courts and was entitled to a fair hearing and a decision in relation to the complaints made in the proceedings. He considered that the judgment of the Circuit Court in the 2016 proceedings did not decide all of the issues raised by Ms. Munnelly. Furthermore, Barr J. determined that it was not frivolous nor vexatious and did not amount to an abuse of process for Ms. Munnelly to issue the 2019 proceedings on the same or similar issues to those in the 2016 proceedings, in circumstances where she did not receive a judgment or ruling on these issues.

12. The High Court determined that the rule in *Henderson v. Henderson* did prevent Ms. Munnelly from raising the issue of defamation in relation to representations made to a client about her availability to work, and the description of her role as a "telesales executive" in the work reference, as these were dealt with in the 2016 proceedings. However, all other issues, upon which in the High Court's view Ms. Munnelly had not received a judgment in the 2016 proceedings, could be raised in the 2019 proceedings without offending the rule in *Henderson v. Henderson.*

13. The central conclusion of the High Court is lucidly expressed in paragraphs 46 – 48 of the judgment as follows:-

"46. However, it is clear from the affidavits sworn by the first defendant in the present application, that the Circuit Court judge in the first action did not deal with the question of whether the work reference provided to the plaintiff was a good work reference; whether she was entitled to a work reference; what her job description was; whether she was an employee; or in relation to her allegations of bullying and harassment.

47. In these circumstances, the court is satisfied that it is not frivolous, vexatious, or an abuse of process for the plaintiff to raise these issues again in the present action, because, while they were raised in her earlier proceedings, it is common case that she did not get any judgment or ruling on these issues.

48. The plaintiff enjoys a constitutional right of access to the courts. This means that she is entitled to bring proceedings complaining about alleged wrongdoing on the part of the named defendants. She is entitled to obtain a fair hearing in relation to her complaints. She is entitled to a decision on the complaints that she made against the named defendants".

14. The High Court also determined that the 2019 proceedings came within the definition of civil action in s. 4(1)(b)(i) of the Personal Injuries Assessment Board Act, 2003 ("the 2003 Act") and, therefore, that authorisation from PIAB was not required prior to the institution of those proceedings.

Determination of this Court

15. The appellants sought leave to appeal the decision of the High Court to this Court. The Court did not grant leave in respect of the issue regarding the PIAB authorisation. However, the Court did grant leave to appeal on the issue of whether the proceedings offended the rule in *Henderson v. Henderson*, and in particular the questions of:-

(i) Whether the rule in *Henderson v. Henderson* applies to the order made by the Court in relation to the matters pleaded, or the manner in which its decision was expressed; and

(ii) Whether the rule can be invoked by parties who were not parties to the first decision.

The Rule in *Henderson v. Henderson*

16. Submissions were made by Mr. Michael McGrath SC, (with Anthony Slein BL) instructed by BCWM Law LLP for the appellants, and by Ms. Imogen McGrath SC, (with Elaine Finneran BL), instructed by Brian Burns of Burns Kelly Corrigan Solicitors for Ms. Munnelly It should be noted that Ms. Munnelly's team appeared pursuant to the *ad hoc* scheme under which members of both branches of the legal profession make themselves available to conduct appeals to this Court on behalf of unrepresented parties where the Court has determined that an issue of general public importance arises and has granted leave to appeal. The submissions of both sides were exemplary, showed extensive research, an ability to marshal a large quantity of documentation, information and case law, and to present persuasive and comprehensive yet succinct submissions. The

Court is particularly grateful to lawyers who are willing to appear under the *ad hoc* scheme and provide professional representation to unrepresented parties to appeals, which greatly assists the Court in its task of determining appeals containing matters of general public importance.

17. The rule in *Henderson v. Henderson* has been repeatedly invoked in recent years. It has been said that no other 19th century English decision has been cited with anything like the same frequency.[1] The most authoritative statement of the principle in Irish law is perhaps that contained in the judgment of this Court in *AA v. The Medical Council* [2003] IESC 70, [2003] 4 I.R. 302 ("*AA*").

18. In that case, the applicant medical practitioner had been acquitted on charges of sexual assault and was the subject of an inquiry under the Medical Practitioners' Act, 1978. He had unsuccessfully sought to prohibit the inquiry on grounds related to alleged double jeopardy, and then in a second set of proceedings sought to restrain the holding of the inquiry on grounds that he contended that he was entitled to legal aid to defend the proceedings. Hardiman J. delivered a judgment with which the other members of the Court, (Keane C.J., Denham, Murray and McGuinness JJ.) agreed. He quoted the well-known passage from the judgment of Wigram VC in *Henderson v. Henderson* itself:-

> *"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*

[1] KR Handley, 'A Closer Look at *Henderson v Henderson*' (2002) 118 LQR 397.

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".*

19. Hardiman J. also quoted with approval from the judgment of Lord Bingham in *Johnson v. Gore Wood* [2002] 2 AC 1, who had emphasised the flexible nature of what Wigram VC had described as (and which, notwithstanding that flexibility I also refer to throughout as) '*the rule'*. Lord Bingham stated:-

"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 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".

20. Hardiman J., for his part, observed that rules or principles so described could not in their nature be applied in an automatic or unconsidered fashion and sympathetic consideration should be given to the position of a plaintiff or an applicant who on the face of it was exercising his right of access to the courts for the determination of his civil rights or liabilities. However, applying these principles he nevertheless concluded that the case came within the principle in *Henderson v. Henderson*, and that the proceedings should be dismissed. What is important is that the decision in *AA* makes clear an essential feature of the rule in *Henderson v. Henderson* as it has developed both in the United Kingdom and in this jurisdiction, what Hogan J. in the course of his judgment in *Culkin v. Sligo County Council* [2017] IECA 104, [2017] 2 I.R. 326 well described as *'the non-automatic nature of the rule'* and consequent requirement that it not be applied by reference to *'inexorable and unforgiving logic'*.

21. A useful statement of the rule is contained in the judgment of McDonald J. in the High Court, in *George and George v. AVA Trade (EU) Ltd.* [2019] IEHC 187. At paragraph 152 of the judgment, he suggested that:-

> "*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".

In the course of submissions, this approach has been usefully described as a "could and should" test: could the issue have been raised in the earlier proceedings, and if so, should it have been so raised? If so, is there any reason why this second set of proceedings raising the issue should not be dismissed?

22. In replies to requests for clarification issued by the Court, the parties were asked to consider whether, if issues of bullying or harassment had not been pleaded (or referred to) in the 2016 proceedings, the rule in *Henderson v. Henderson* would apply to the subsequent proceedings against the company (which did plead those matters). The parties, correctly in my view, accepted that if this had been the case, the rule in *Henderson v. Henderson* would apply at least in principle to subsequent proceedings raising questions of issues of bullying or harassment.

23. However, Ms. McGrath sought to avoid the logic of this reasoning by arguing that this was not a case where an issue could have been raised but was not, but rather was a case where the issue had been raised but had not been decided. She frankly acknowledged that even in such circumstances, a disappointed party would have a remedy by way of appeal and conceivably by way of judicial review . However, as she put it, this did not preclude a third remedy, namely the commencement of separate proceedings which did not, she contended, offend the rule in *Henderson v. Henderson*, because the issue had been raised in the earlier proceedings, and moreover was not either captured by the principle of

res judicata because the issues had not in fact been decided. She contended that the Court was entitled to go beyond the pleadings and the order of the Court and look to what had transpired in the earlier proceedings in order to come to this conclusion. In this respect she relied on the decision of Clarke J. (as he then was) in *Mount Kennet Investment Company v. O'Meara* [2010] IEHC 216, [2011] 3 I.R. 547 ("*Mount Kennet*").

24. In *Mount Kennet* the plaintiffs had brought proceedings for specific performance which included a claim for damages for breach of contract and/or damages in lieu of specific performance. The High Court, after a hearing, granted the plaintiffs an order for specific performance. After the retirement of the High Court judge who had heard the case, the plaintiffs brought an application to re-enter the proceedings for the purposes of assessing damages for breach of contract and/or damages in lieu of specific performance and to have another party joined to the proceedings. The defendants contended that this constituted an abuse of process by analogy with the rule in *Henderson v. Henderson* or indeed, the principle of *res judicata*. It was contended that the claim for damages did not form part of the previous order of the High Court and must be taken to have been dealt with (and dismissed) by the High Court. Clarke J. (as he then was) held it was not an abuse of process on the part of the plaintiffs to prosecute a claim for damages for delay because on his analysis of the procedural history of the action, it was apparent that what had occurred in the High Court was in effect a split or modular trial where the entitlement of the plaintiff to a degree of specific performance was dealt with first and the matters for damages deferred.

25. It is apparent that looked at broadly, the plaintiff's claim in these proceedings, against the company in particular, is at a minimum very similar to the claim advanced in the 2016 proceedings, arising as it does from the same set of facts. It is convenient, therefore, to approach this case by analysing the basis upon which the plaintiff in these proceedings has submitted that the proceedings are not captured by the rule in *Henderson v. Henderson* and are not precluded by the principle of *res judicata*.

26. As discussed above, the case made on Ms. Munnelly's behalf is that neither the rule in *Henderson v. Henderson* nor the principle of *res judicata* has any application here. The issues which are sought to be litigated in the 2019 proceedings were not issues that could have been raised but were not raised in the 2016 proceedings; rather they were issues that were positively raised, and were not determined. In essence, the argument suggested that something had miscarried in the 2016 proceedings, leading to a failure to determine an issue or issues properly brought before the Circuit Court, and while there might be other remedies available to Ms. Munnelly for this suggested default (either appeal or judicial review) there was no reason, in principle, why a further remedy should not be available, in the shape of the commencement of separate proceedings to have those issues determined.

27. It was also argued that if, contrary to the first argument, *Henderson v. Henderson* might have application in principle, then there were considerations in this case which should lead the Court to apply that principle flexibly and sympathetically and to permit the second set of proceedings to continue. In this regard it was said that it was important that Ms. Munnelly was at both relevant

points – the dismissal of the 2016 proceedings and the commencement of the 2019 proceedings – an unrepresented litigant. Ms. Munnelly relied in this regard on a passage in the judgment of Clarke J. (as he then was) in *Moffit v. ACC* [2007] IEHC 245 [2008] 1 ILRM 416 ("*Moffit*"), at paragraph 4.8 as follows:-

> *"4.8 In those circumstances 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, (though it would not have been relevant in respect of a pure* res judicata *point) 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".*

28. *Moffit* involved debt collection proceedings commenced against the plaintiff in the late 1980s, resulting in a judgment for a specific sum together with costs. That judgment was registered as a judgment mortgage against lands allegedly owned by the plaintiff contained in a number of folios. Proceedings seeking well charging orders were brought, and a well charging order made. A second well charging order in respect of the lands was obtained by another lender. A dispute arose between the two lenders as to how the matters should proceed, as a result of which accounts and inquiries were not taken on foot of the Circuit Court order until much later, in 1999. In the meantime, some of the lands contained in those

folios specified in the well charging order were transferred to other folios. The plaintiff was the registered owner of one of those folios, but some of the transferred land went to folios owned by third parties.

29. In 1999, the defendant financial institution applied to the Circuit Court to resurrect the accounts and inquiries directed to be held in the Circuit Court. That order was made and affirmed on appeal. The plaintiff applied for leave to seek judicial review, which was refused and an appeal of this refusal to this Court was not pursued. Subsequently, the plaintiff instituted proceedings seeking an order restraining the defendant from enforcing the well charging order made by the Circuit Court on the basis that he contended that the order for sale was statute barred. The plaintiff was not represented in those proceedings and on the defendant's application, the proceedings were dismissed as disclosing no reasonable cause of action and being bound to fail. The decision was appealed by the appeal was struck out and an application to reinstate the appeal was refused by this Court.

30. Subsequently, the plaintiff commenced a second set of proceedings in which he sought a declaration that the order for sale of his lands by the Circuit Court was statute barred. The plaintiff had not been legally represented when he commenced the proceedings, but he obtained legal representation before they came on for hearing. The defendant brought a motion seeking to have the proceedings dismissed as being bound to fail, on the grounds that the issues were *res judicata* and/or that the matter was an abuse of process. It was argued on behalf of the plaintiff, however, that a number of legal issues arose which had not been determined in the earlier proceedings. In particular, there was a

question concerning the enforceability of a well charging order in circumstances where some folios had been transferred and, in any event, it was said that the well charging order did not travel with the land, when a folio was transferred. Clarke J. considered that these were net legal issues, that the litigation itself would not be burdensome, and that the case was one which presented the special circumstances identified by Hardiman J. in *A.A.* and it was appropriate therefore, to allow some latitude to the plaintiff. Accordingly, Clarke J. permitted the amendment of the pleadings to raise the two identified issues alone and directed they be determined.

Analysis

31. Thus presented, the argument puts the case for the plaintiff in the most favourable light. I regret however, for a number of reasons I am unable to accept it.

32. First, it should be said that in my view this argument, and indeed the judgment of the High Court, overstate the nature and effect of the observations made by the learned President of the Circuit Court while delivering his judgment. It is relevant that this is a second-hand account of a what is clearly only a portion of an oral ruling explaining the decision to which the President had come in dismissing the claim. That account does not include the President's reasons for dismissing the claim nor does it refer to the course of the proceedings before the President. However, there is no doubt about the decision that was made: it was to dismiss Ms. Munnelly's claim, which must be taken to be the claim in its entirety.

33. Second, even if the account of the President's remarks is to be treated as authoritative and comprehensive (and for the reasons set out above, it cannot be so treated) I do not think it can be properly characterised as a clear failure or refusal to determine a claim advanced in the proceedings. This is an essential building block in the plaintiff's argument and is critical to her reliance on the decision in *Moffitt*. If the Court cannot be satisfied that there was a flagrant and almost inexplicable failure to do justice in this case and to determine the matter properly brought before the Court, then the launching pad for the plaintiff's argument simply falls away, and the appeal to constitutional rights of access to court, to a fair hearing and a decision on issues properly raised, loses all of its force.

34. Looking more closely at what the learned President is reported to have said and comparing it to the proceedings, I think it is apparent that no separate cause of action was alleged for, either a good reference, or to have an entitlement to any reference at all. Indeed, I do not think any such cause of action is recognised in law. Of course, it could be said that the question of the nature of the reference was in some sense referred to in the proceedings, and in that sense could be said to be an issue of fact. But it cannot be said to be an issue which required to be determined in order to come to a decision in the case. For example, it would have been quite possible to dismiss the claim in defamation without determining the question of the plaintiff's correct job description, either because the occasion of the publication was deemed to be one of privilege, qualified or absolute, or because it was considered and found that the statement even if untrue, would not be defamatory in the sense of reducing the plaintiff's reputation in the eyes of right thinking people. Similarly, it may not be necessary to resolve any issue

of alleged bullying or harassment, in order to properly dismiss a claim for wrongful dismissal (if that indeed was what was being claimed). On the facts of this case for example, it was clear that even as pleaded, the plaintiff had remained in employment for some time after the incident on 26 March, 2015 of which she complained and only left by agreement in May of that year. It is entirely possible therefore, to determine that the plaintiff was not dismissed from her employment or that such dismissal was not wrongful, without having to determine precisely what had occurred between the plaintiff and Ms. Hassett on 26 March, 2015.

35. These observations are important as there are many reasons why the proper exercise of the judicial function may result in a judge expressing themselves in much the same way as was attributed to the President of the Circuit Court in this case. In circumstances where it has been determined that a party is going to lose a case, it is often good practice to attempt to make it clear where this is possible that the dismissal of a claim on legal grounds does not necessarily involve any reflection upon the veracity or integrity of the plaintiff or the correctness of their evidence. In my view the observations of the learned President are at least as open to the interpretation that he was simply letting the plaintiff down gently, rather than as claimed, singularly failing to perform part of his judicial function.

36. Even if, however, the circumstances of the case are to be understood as a dismissal of the defamation claim, and an inexplicable but wrongful failure to determine the claim for wrongful dismissal, including claims of bullying and harassment, and therefore avoiding the application of the rule in *Henderson v. Henderson*, or the principle of *res judicata* , there remains the inconvenient fact

from the plaintiff's point of view, that this would only allow the plaintiff, even on her argument, to advance that claim (dismissal) which it was alleged had been made but not determined. But the 2019 proceedings do not make any such claim. Instead, in the claim set out at paragraph 9 above the plaintiff makes a separate case for breach of duty or negligence. If indeed, this is a separate and distinct claim as the plaintiff asserted, then it would appear to be a classic example of the principle in *Henderson v. Henderson*, since plainly it could have been advanced in the 2016 proceedings and should have been.

37. Furthermore, and although it is not perhaps necessary to decide this definitively for the purposes of these proceedings, I do not consider that the decision in *Mount Kennet* should be taken as an authority that in cases in which either *Henderson v. Henderson* or *res judicata* is pleaded, that the Court should engage in a detailed scrutiny of what transpired in court on the earlier occasion. The principal focus of a claim of *res judicata* or the rule in *Henderson v. Henderson* is <u>what</u> was decided, not <u>how</u> it was decided. If a party considers a case was wrongly decided there are remedies, but the case remains decided, even if wrongly or even improperly, unless and until set aside on appeal, or in some circumstances, quashed by way of judicial review.

38. It is not I think, unreasonable or unduly punctilious to expect precision and accuracy in legal proceedings. The fundamental question, therefore, in any claim of *res judicata* or invocation of the rule in *Henderson v. Henderson* is to be determined by reference to the pleadings, which establish what was raised (and by deduction was not raised) and the subsequent order of the relevant Court. In any pleadings, it is important to distinguish between the pleading of

facts on the one hand, and the cause(s) of action advanced and the relief(s) claimed on the other. In *Mount Kennet* the issue was not what had been said in passing by the judge, or even pleaded in the narrative of the claim. It could be said that the order of the Court was in one sense ambiguous, in that it was open to the interpretation that it either had dismissed a claim for damages or deferred it. The question was therefore whether the order of the Court as drawn up accurately reflected the order made orally in court. That was, as it was put during argument in this case, essentially a question of speaking to the minutes of the order, even if the outcome was in the particular case very significant since it permitted a claim for in excess of two million euro to proceed. While the distinction is perhaps a fine one , here there was never any doubt about the order made in court or that it was accurately reflected in the written order – the action was dismissed in its entirety. The plaintiff was seeking to rely on how that decision was arrived and what the judge was reported to have said, not to correct or rectify the order of the court , but rather to avoid its plain legal effect. Certainly, I do not consider *Mount Kennet* can be treated as authority for looking beyond the pleadings and order in the way suggested in this appeal.

39. I consider that in the first place at least, issues of *res judicata* or *Henderson v. Henderson*, should be addressed by as forensic a scrutiny as possible, of what case had been pleaded, and what the court decided, and a subsequent court should be reluctant to accept an invitation to go behind what the documents show. In this case, it is clear that the plaintiff's claim was dismissed in its entirety. Whatever was encompassed in that claim could not be litigated as being *res judicata*, and anything which could and should have been raised but was not, is captured, at least in principle, by the rule in *Henderson v. Henderson*.

40. Finally, in this regard I would also not accept, at least as a general proposition, the contention that the fact that a party is unrepresented is a reason to apply the rule in *Henderson v. Henderson* with greater flexibility in their case. *Moffit* was an unusual case. It was a long running dispute where the financial institution had left matters in abeyance for a considerable period of time and where, if there was any merit to the legal points advanced, the sense of grievance the plaintiff might already feel about the proceedings might be accentuated. It can sometimes be a counsel of prudence that a claim like this should at least be permitted to be ventilated, and if necessary, should be defeated on its merits on the field of battle as it were, rather than dismissed on a preliminary issue if that can be achieved without imposing an undue burden on the other party or indeed the court. As Clarke J. noted, the issue was a net legal one, and the cost of litigating it comparatively small. The case is an illustration of a particular decision on unusual facts and does not represent any more general principle.

41. It is similarly often a counsel of prudence to seek to ensure that where unrepresented litigants advance cases, that their claims should be given sympathetic consideration, and that the process of litigation should not force them across a procedural minefield of preliminary motions and arguments about procedure if that can reasonably be avoided. However, any litigant whether represented or unrepresented must obey the same fundamental rules, and a self-representing litigant must adhere to the same principles as are applicable to proceedings in which the parties are represented by lawyers. The Court is entitled to seek precision and clarity from all parties, as that is essential if the Court is to be in a position to best perform its function and administer justice between them. It is often regrettably the case that parties who are unrepresented

will seek to revisit old disputes or seek to advance new grounds in an attempt to avoid the consequences of a past failure. That is precisely the conduct which the allied rules of *res judicata* and the principle in *Henderson v. Henderson*, are designed to guard against, and it would in my view, be wrong to suggest that the fact that a defendant is not represented is, in itself, a reason not to apply the rule in *Henderson v. Henderson*.

42. In the circumstances it is clear that the rule in *Henderson v. Henderson* is applicable in this case, and there is no reason that it should not be applied at least in the case of the company, which was the successful defendant in the 2016 proceedings. Permitting the 2019 proceedings to be pursued to trial would inevitably put the company to the cost and inconvenience of defending a further set of proceedings, arising from essentially the same facts and circumstances as were the subject of the 2016 proceedings. While the reliefs sought by Ms. Munnelly may differ from the reliefs sought in the 2016 proceedings (though there is some overlap), all of the reliefs now sought could – and should – have been sought in those earlier proceedings but were not. Such a scenario is precisely what the rule in *Henderson v Henderson* is intended to avoid.

Whether the Rule in *Henderson v. Henderson* can be invoked by New Parties

43. The remaining question is whether Ms. Hassett and Mr. Cremin, who were not parties to the 2016 proceedings, can nevertheless rely on the rule in *Henderson v. Henderson* to defeat the present proceedings. It should be said that Ms. Munnelly did not particularly press the claim against Mr. Cremin who had, in

any event, left the company by the time of the proceedings. The main focus of the argument was the claim against Ms. Hassett, the Chief Executive Officer.

44. In the course of his judgment in *Johnson v. Gore-Wood,* Lord Bingham approved the thesis advanced by Lord Hailsham in *Vervaeke v. Smith* [1983] 1 AC 145, 157 that the rule in *Henderson v. Henderson* was '*both a rule of public policy and an application of the law of res judicata'. Henderson v. Henderson* and *res judicata* were thus described in *Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd.* [2013] UKSC 46, [2014] AC 160 as '*distinct though overlapping principles with the common underlying purpose of limiting abusive and duplicative litigation'.* Once it is thus understood that the rule in *Henderson v. Henderson* is a species of abuse of process derived from and related to *res judicata* then it becomes clear that the fact that a party raising the rule was not a party to the earlier proceedings, does not preclude the application of the rule. The basis of the contention is that the party to the second proceedings could and should have been joined to the first set of proceedings and therefore in principle the argument ought to be open to a new party. This consideration of principle is reinforced by a recognition of the fact that the principle is not limited to the protection of parties but is also rooted in the need to protect the Court process. It was said by Murray C.J. in *Re Vantive Holdings* [2010] 2 I.R. 118 at paragraph 25 that:-

> "*Underlying the rule in* Henderson v. Henderson*... is the policy of the need to protect the due and proper administration of justice from an abuse of process and uphold the principle of finality in legal proceedings"*.

45. However, it is also logical that a court will scrutinise more carefully a claim to dismiss proceedings if brought by a party who has never been involved in the earlier proceedings, than where the application is brought by a party who has been subject to those earlier proceedings and who contends, that the present claim ought to have been raised in the earlier case when the parties were present and the same or related issues were in contest.

46. These observations of principle are reflected in the leading decision in this area, *Vico Limited & ors v. Bank of Ireland* [2016] IECA 273. Those proceedings concerned the appointment by a secured lender of a receiver over a property in which a number of individuals were residing and which was owned by a limited company Vico Limited. The individuals brought proceedings seeking to have the mortgage, guarantees and indemnities upon which the receiver had been appointed, declared void. That claim failed and an order was made that the individuals concerned vacate the property. Those orders were upheld on appeal.

47. Subsequently, fresh proceedings were commenced by the individuals together with the company, seeking similar relief on grounds which it was said raised different legal issues. The proceedings also sought the overturning of the orders made in the High Court and the Supreme Court. An application was brought by the defendants to dismiss the proceedings on the grounds of *res judicata* and the rule in *Henderson v. Henderson* which was successful in the High Court. The decision was appealed to the Court of Appeal.

48. The Court of Appeal first determined that the rule in *Henderson v. Henderson* was applicable to the case, in respect of the individual plaintiffs who had been parties to the earlier proceedings. In concluding that the proceedings brought by

the limited company could also be dismissed, the Court approved of the judgment of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co*. (*supra*). At paragraph 29 of her judgment Finlay Geoghegan J. said:-

> "*In the same decision* [Johnson v. Gore Wood] *Lord Bingham addresses the position where one or more of the parties to the second set of proceedings was not a party to the first proceedings. This is relevant given the addition of Vico [which was not a party to the Gorse Hill proceedings] as a plaintiff in the current proceedings. Lord Bingham at p. 32 determined that the courts below in those proceedings had correctly rejected a submission that the rule in* Henderson v. Henderson *did not apply because the personal plaintiff, Mr. Johnson had not been a party to the first action, but rather a company had been. He then identified as the correct approach that formulated by Sir. Robert Megarry V.C. in* Gleeson v. J. Wippell & Co. Ltd. *[1977] 1 WLR 510, where he said:-*
>
> > '*Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter*

> *ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be* ***a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party.*** *It is in that sense that I would regard the phrase "privity of interest".'"* [Emphasis added]

49. Applying that principle, Finlay Geoghegan J. observed that the individual defendants had become shareholders in the company shortly before the appointment of the receiver. Indeed, they brought an application to join it as a defendant to those proceedings but did not proceed with that application. While they argued that at certain times the company had been struck off the register in the Isle of Man, Finlay Geoghegan J. considered that this was not relevant since at all material times the company was owned by the individuals, and it was within their power and procurement to join it as a party to the proceedings, and they had in fact arranged to have it restored to the register prior to the commencement of the proceedings before the court. Furthermore, it was clear that while Vico Limited had not been a party to the first set of proceedings, the judge had necessarily considered and determined certain claims in relation to the alleged *ultra vires* act of the company in granting the security, and the alleged breach of duty of the then directors which had been raised in the later proceedings. Accordingly, following the approach of Lord Bingham in *Johnson v. Gore Wood* she concluded that the High Court had been correct, that all the plaintiffs, including the company, were engaged in an abuse of process of the Court by seeking to raise in the proceedings issues which either had been raised or could have been raised in the first set of proceedings and that there were no

circumstances which would render the striking out of the proceedings excessive, unfair or disproportionate.

50. Applying the tests of "privity of interest", or "sufficient degree of identity" and even a more demanding standard of "alter ego", it seems to me that this is a classic case where a party to current proceedings is entitled to rely on the fact that a claim could have been brought in earlier proceedings, even if the moving party was not a party to the earlier set of proceedings. It is absolutely clear that the claim made against the company was one which was directed to, and derived from, the alleged conduct and actions of Ms. Hassett. It was not even suggested that this was a circumstance in which the company was vicariously liable for the conduct of Ms. Hassett. Rather it appears to have been alleged that the conduct of Ms. Hassett was the conduct of the company. Thus, for example, the claim included in the amended Civil Bill in the 2016 proceedings, set out at paragraph 4 above, claimed damages against the company "*for malicious actions and behaviour on the part of Margaret Hassett of City Learning Limited leading to constructive dismissal… etc*". Similarly, the 2019 set of proceedings described the first defendant as "*Margaret Hassett Managing Director of City Learning Limited from 1998 to 2019*". There was, therefore, an unusual degree of identity between Margaret Hassett and the company in the two claims which was, in my view, more than sufficient to render it just that Ms. Hassett should be entitled to rely on the existence of the earlier proceedings against the company to invoke the rule in *Henderson v. Henderson*. Ms. Hassett was a central witness in those proceedings, and those proceedings involved, almost exclusively, complaints made by Ms. Munnelly in respect of the conduct of Ms. Hassett on behalf of the

company, over a time period and in respect of incidents which are central to the present proceedings against her personally.

51. In coming to this conclusion, I do not lose sight of the fact that the modern restatements of the application of the rule in *Henderson v. Henderson*, have all emphasised the flexibility of the rule and counsel against either a mechanical or overly rigid application of the rule. As Kearns J observed in *SM v. Ireland (No. 1)* [2007] IESC 11, [2007] 3 I.R. 283 at 296, the rule in *Henderson v Henderson "should not be blindly or invariably applied, particularly where there are special circumstances in the case which would suggest that the imposition of the limitation would be either unfair, excessive or disproportionate"*. The close connection between, and common derivation of, the rule in *Henderson v. Henderson* and the principle of *res judicata*, means that they will often be encountered in the same case. In this case for example, any claim for defamation arising out of the terms of the reference provided, is *res judicata*, whereas any claim of breach of duty is captured by the rule in *Henderson v. Henderson*. But it is important to note the distinction between them. In *res judicata*, there is a determination that the claim has already been raised, considered, adjudicated upon, and determined to finality. The rule in *Henderson v. Henderson* involves the dismissal in advance of a hearing of a claim that has never previously been advanced, heard or adjudicated upon. That in itself explains why the principle must be applied with a degree of flexibility. These considerations apply perhaps with greater force where the claim is one against a party who has never previously been sued by the plaintiff. It is also the case as observed by Hardiman J. in *AA v. The Medical Council* that the principle may have to be applied even more flexibly in the field of public law where broader considerations may apply.

This means that the adjudication of an application to dismiss proceedings by reference to the rule in *Henderson v. Henderson*, should proceed in two phases, with different approaches. In the first place, the Court should, in my view, conduct as forensic an exercise as possible to determine what was pleaded and determined in the first set of proceedings, what could have been raised in those proceedings, and what has been raised in the subsequent proceedings. This should involve a precise, and if necessary rigorous analysis of the pleadings and order of the Court. Thereafter, however, the Court should consider whether, even if the circumstances fall within the scope of the rule, the Court should proceed to dismiss the subsequent set of proceedings, which *ex hypothesi* have never been determined on their merits, and where in some cases, no litigation whatsoever may have previously advanced against the particular party. The Court hearing such an application has, in my view, a degree of latitude in that regard, and there are many circumstances which may lead that court to conclude that notwithstanding the fact that on an analysis the claim is one which falls within the scope of the rule, nevertheless the proceedings should not be dismissed.

52. Here however, the learned High Court judge did not conclude that this was a case within the scope of the rule, but which did not warrant the dismissal of the proceedings. Rather, he concluded that the case did not come within the scope of the rule at all. This in my view, was an erroneous application of the law, albeit perhaps motivated by concern that the Circuit Court proceedings had been unsatisfactory, and a laudable desire to ensure that the plaintiff's complaints were addressed and determined on their merits. The judgment, if left undisturbed, would however introduce a significant degree of uncertainty into

the law, in an area where clarity is particularly necessary. Both *res judicata* and *Henderson v. Henderson* will almost always involve preliminary applications. It would be counterproductive if the law was so uncertain and unpredictable that such applications would be contested and perhaps regularly result in appeals and inconsistent results, and a real possibility that the application would only have resulted in additional cost and lost time. In my view, the appeal must be allowed, the order of the High Court set aside, and an order substituted dismissing the plaintiff's claim against the three defendants.