**APPROVED**
**NO REDACTION NEEDED**

# THE COURT OF APPEAL

# CIVIL

**Appeal Number: 2024/57**

**Costello J.**
**Binchy J.**
**Allen J.**

**Neutral Citation Number [2024] IECA 232**

**BETWEEN**

**MICHAEL LEAHY**

**PLAINTIFF/RESPONDENT**

**AND**

**TIPPO INTERNATIONAL LIMITED**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice Allen delivered on the 24th day of September, 2024**

*Introduction*

**1.** This is an appeal by Tippo International Limited *("Tippo")* against the judgment of the High Court (Bradley J.) delivered on 16th February, 2024 ([2024] IEHC 98) and consequent order made on 21st February, 2024 refusing an application made on behalf of Tippo for an order dismissing an action brought against it by Mr. Michael Leahy *("Mr. Leahy")* on the grounds that it was bound to fail; and for an order – commonly referred to as *Isaac Wunder* order – prohibiting Mr. Leahy from issuing further proceedings against Tippo or its solicitors without the leave of the President of the High Court.

**2.** The appeal was heard on 9th July, 2024 and, in circumstances to which I will come, the court decided to allow the appeal and to make the orders sought by Tippo and indicated that it would give its reasons in writing later.

*Overview*

**3.** In 2008 Mr. Leahy and Tippo agreed to go into business together. On 4th September, 2018 – following mediation – the parties signed a settlement agreement by which they acknowledged the termination of their business agreement and by which Tippo agreed to pay to Mr. Leahy the sum of €550,000 in full and final satisfaction of all claims howsoever arising between the parties.

**4.** By plenary summons issued on 15th October, 2021 Mr. Leahy commenced proceedings claiming damages for negligence and/or breach of contract whereby – it was said – arising out of Tippo's failures, Mr. Leahy had suffered loss and loss of earnings and loss of opportunities.

**5.** Mr. Leahy's statement of claim – and Tippo's application to dismiss – created a fair amount of noise and smoke but Mr. Leahy's 2021 action clearly claimed damages arising out of the parties' earlier business relationship.

**6.** The High Court judge correctly identified the legal principles to be applied in dealing with an application to summarily dismiss proceedings and was properly cautious in his approach but appears to me to have been distracted by the argument made on behalf of Tippo – based on the rule in *Henderson v. Henderson (1843) 3 Hare 100* – that the claims which Mr. Leahy sought to advance in the 2021 action ought to have been made in earlier proceedings.

**7.** This is not a case in which the plaintiff sought to litigate claims which could have been but were not raised in earlier litigation which has been heard and determined. There was earlier litigation – in which the claims which Mr. Leahy now seeks to make were not

made – but that earlier action was not heard or determined. As will be seen, the dispute which immediately gave rise to the mediation arose long after the earlier litigation. Moreover, it is at least doubtful that the claims for damages for negligence and breach of contract advanced in the 2021 plenary proceedings could have been added to the claim the subject of the earlier action which was brought by way of summary summons.

**8.** As to whether Mr. Leahy's 2021 action was bound to fail, the core issue was whether the claims which Mr. Leahy sought to advance had already been settled. There being no question that the claims post dated the settlement agreement, they were plainly captured by the fact the settlement was *"... in full and final settlement of all claims howsoever arising ..."*.

**9.** Having found that Tippo had failed to persuade him to dismiss the action as bound to fail, the High Court judge went on to consider the application for an *Isaac Wunder* order but in truth if the action was not bound to fail it more or less followed that that relief would be refused also.

**10.** To explain why this court was persuaded to allow the appeal and to restrict Mr. Leahy's right to bring further proceedings against Tippo – and its solicitors – it is necessary to set out the history of previous litigation between the parties and to explain why the court considered Tippo's apprehension of further vexatious litigation to have been abundantly justified.

*The facts*

**11.** By agreement in writing dated 21st June, 2008 the parties recorded the terms on which they had agreed to go into business together. The business – theretofore carried on by Mr. Leahy – was the manufacture and sale of kitchen worktops and related products. The agreement is variously described as a joint venture and a partnership but the bones of it were that Tippo would take over Mr. Leahy's stock and machinery as well as an agency agreement

which Mr. Leahy had with a German company and would make certain payments to Mr. Leahy in respect of consultancy and in respect of the machinery.

**12.** By summary summons issued on 23rd June, 2014 Mr. Leahy commenced proceedings against Tippo for €242,000, said to be due and owing on foot of an invoice dated 20th June, 2008 in respect of the machinery. An appearance was entered on behalf of Tippo on 25th June, 2015 and there that action rested.

**13.** On 26th October, 2016 the machinery and the building in which it was housed were damaged by fire.

**14.** By a mediation agreement in writing dated 4th September, 2018 – and signed by the parties – it was recited that Tippo – identified as the applicant – Mr. Leahy – identified as the respondent – had agreed that they wished *"... to attempt to resolve all commercial differences between the Parties (which arise in High Court proceedings entitled Tippo International Limited v. Michael Leahy) using mediation…".* By all accounts Tippo was described as the applicant because it was it who had proposed and arranged the mediation. There were commercial differences between the parties but there were no High Court proceedings in which Tippo was plaintiff.

**15.** Later on the same day, a settlement agreement in writing was signed by the parties by which the parties acknowledged the termination of their agreement of 21st June, 2008 and the termination of all and/or any variations of the said agreement entered thereafter; and Tippo agreed to pay to Mr. Leahy the sum of €550,000 by way of a payment of €100,000 on 8th October, 2018; eight monthly instalments of €50,000 on the 8th day of each [succeeding] month; and a final payment of €40,000, which was said to take into account *"an advance of €5,000 paid on 7th September, 2018"* and a contribution to the mediator's costs.

**16.** By clause 3, it was agreed that:-

*"3. The said sums to be in full and final settlement of all claims howsoever arising between the parties including but not limited to claims for machinery, fees due and notice period."*

**17.** By clause 4, Mr. Leahy agreed to discontinue the summary summons proceedings.

**18.** Clause 6 provided that in default of any one payment Mr. Leahy might pursue *"any or all claims"* against Tippo, giving credit for any sums discharged.

*Mr. Doyle's proceedings against Mr. Leahy*

**19.** Independently, Mr. Leahy was in the wars in the Circuit Court as the defendant in proceedings in which a Mr. Michael Doyle was plaintiff and in which, on 28th September, 2018 he was decreed for €29,796.00 and costs. Mr. Leahy promptly appealed to the High Court on Circuit.

**20.** In the course of the hearing in the Circuit Court, Mr. Leahy had produced a copy of his settlement agreement with Tippo of 4th September, 2018 and on 6th November, 2018 – on *ex parte* application on behalf of Mr. Doyle – an order was made by the Circuit Court directing the payment into court of €29,796.00 for the amount of the decree and €20,000 in respect of costs pending the outcome of Mr. Leahy's appeal to the High Court on Circuit against the order of 28th September, 2018. That order was made *"In respect of any monies which [Mr. Leahy] will recover in an action entitled The High Court, Michael Leahy v. Tippo International Limited Record No. 2014/1623S"* and provided for service on Tippo's solicitors, Anderson & Gallagher.

**21.** By 6th November, 2018 Tippo had paid the first instalment and the second – of €50,000 – was due to be paid on 8th November, 2018. On 6th November, 2018 Mr. Doyle's solicitors notified Anderson & Gallagher of the making of the order directing the payment into court of €49,796.00. On 9th November, 2018 Anderson & Gallagher wrote to Mr. Leahy

to say that Tippo would comply with the order and pay the balance of €204.00 into his account. Tippo duly paid €49,796 into the Circuit Court and the balance to Mr. Leahy.

**22.** Mr. Leahy did not appeal against the order of 6th November, 2018 or otherwise move to have it set aside.

**23.** On 28th March, 2019 Mr. Leahy's appeal to the High Court on Circuit against the judgment and order of the Circuit Court in favour of Mr. Doyle was dismissed, with costs.

**24.** On 30th May, 2019 on the *ex parte* application of Mr. Doyle, an interim order was made by the Circuit Court freezing the remaining payments due from Tippo to Mr. Leahy. That order provided that notice of the making of the order should be given to Tippo and Anderson & Gallagher and gave liberty to Mr. Doyle to issue a motion returnable for 4th June, 2019. That motion appears to have been issued and served and adjourned from time to time with the freezing order continued pending the taxation or adjudication of Mr. Doyle's costs.

*Mr. Leahy's Circuit Court proceedings against Tippo and Anderson & Gallagher*

**25.** On 5th March, 2020 Mr. Leahy commenced Circuit Court proceedings against Tippo and Anderson & Gallagher claiming a declaration that Tippo did not have the authority to *"redirect"* the payment of €49,796.00 due to Mr. Leahy on 8th October, 2018; an order directing the Kilkenny Circuit Court Office to release the funds said to have been wrongfully paid into court by Tippo on 26th November, 2018 *"under pretence to"* the order of 6th November, 2018; and *"damages for loss"*.

**26.** The premise of Mr. Leahy's claim was that he had not recovered any monies in his 2014 action against Tippo and that the order of 6th November, 2018 had not authorised or required Tippo to pay into court the monies which were due to Mr. Leahy on foot of the settlement agreement of 4th September, 2018. The case made by Mr. Leahy was that *"it was reasonable to say"* that Tippo knew or ought to have known that the order of 6th November,

2018 did not authorise it to *"redirect €49,769.00 due to [Mr. Leahy] to court for the benefit of [Mr. Doyle]"* and that *"it was reasonable to say"* that Anderson & Gallagher had been negligent in advising Tippo to do so.

**27.** By order of the Circuit Court made on 14th July, 2020 Mr. Leahy's action against both Tippo and Anderson & Gallagher was dismissed – with costs – on the grounds that it disclosed no reasonable cause of action and was frivolous and vexatious.

*Mr. Leahy's judicial review proceedings*

***28.*** On 14th September, 2020 Mr. Leahy applied to the High Court (Meenan J.) for leave to apply by way of judicial review for an order of *certiorari* quashing the Circuit Court order of 14th July, 2020 and was directed to bring his application on notice to the Circuit Court judge, Tippo, and Anderson & Gallagher: which he did.

***29.*** Mr. Leahy's leave application was refused by the High Court (Hyland J.) on 6th July, 2021 and his appeal against that refusal to this Court was dismissed for the reasons given in a written judgment delivered by me on 18th January, 2023 ([2023] IECA 6) with which Costello and Binchy JJ. agreed.

*Mr. Leahy's 2021 action*

**30.** It was while his appeal to this Court in the judicial review proceedings was pending that Mr. Leahy issued his plenary summons in these proceedings on 15th October, 2021.

**31.** Mr. Leahy's delivered his statement of claim on 21st January, 2022. The statement of claim runs to nine pages and is not always entirely easy to follow but the particulars of the damages claimed are tolerably clear. Mr. Leahy claimed that Tippo unilaterally ended the 2008 contract after the fire – on 26th October, 2016 – failed to reinstate what he asserted was his *"commissioned production line/facility"* and failed to put him *"back in the position of the joint venture"* by reason of which he claimed (unquantified) loss of earnings for six years – presumably from the date of the fire.

**32.** The statement of claim rehearsed the establishment by Mr. Leahy of his kitchen worktop business; his securing of the agency from the German company; the making of the agreement of 21st June, 2008; the wear and tear on the machinery by its use by Tippo; the fire on 26th October, 2016; and a series of assurances said to have been given to him by Tippo in the aftermath of the fire that the machinery and production line would be reinstated. His core complaint was that in the nearly six years since the fire, the joint venture had not been restarted. There was no mention of the settlement reached on 4th September, 2018 or the money paid out by Tippo or payable by Tippo but the payment of which had been redirected and frozen on foot of the orders obtained by Mr. Doyle. The claims made for loss and damage were utterly inconsistent with the previous settlement of all claims howsoever arising. Mr. Leahy's plea that Tippo had unilaterally ended the 2008 contract after the fire was utterly inconsistent with the acknowledgement in the settlement agreement that the contract dated 21st June, 2008 had been terminated.

**33.** By notice of motion issued on 31st March, 2022 Tippo applied for an order dismissing the 2021 action on the ground that it was bound to fail and an order prohibiting Mr. Leahy from issuing further proceedings against it or its solicitors without the prior leave of the President of the High Court. The motion was ground on an affidavit of Mr. Patrick Martin, a director of Tippo who briefly set out the background – including, of course, the mediation and settlement of 4th September, 2018 – and the various proceedings previously taken by Mr. Leahy against Tippo and Anderson & Gallagher. He also deposed that Mr. Leahy had also taken proceedings against Mr. Doyle and Mr. Doyle's solicitors and counsel.

**34.** As to the first relief sought by the notice of motion, Mr. Martin suggested that the claims made in the 2021 action related to the same matters raised by the 2014 action. That, it seems to me, was plainly wrong. If both actions concerned the machinery, the premise of the 2014 action was that it had been sold to Tippo but the premise of the 2021 action was that it

still belonged to Mr. Leahy – or perhaps was jointly owned by Tippo and Mr. Leahy – and ought to have been replaced after the fire in 2016.

**35.** Mr. Martin was on much more solid ground when he suggested that the settlement agreement clearly covered the issues referred to on the statement of claim and that in the circumstances Mr. Leahy's action could have no prospect of success.

**36.** As to the second relief sought by the notice of motion, Mr. Martin deposed that Mr. Leahy had habitually and persistently instituted vexatious or frivolous civil proceedings against Tippo and its solicitors; and suggested that there was a clear pattern of similar conduct in the proceedings which had been brought against him by Mr. Doyle.

**37.** On 2nd February, 2023 Mr. Leahy filed his affidavit in response to Tippo's motion. He deposed that his 2021 action arose in the main out of the fire at the factory in October, 2016. That was a fair synopsis of the statement of claim. He acknowledged that he had engaged in the mediation *"... regarding his substantial loss of machinery with the representation by [Tippo] that the insurance claim made by [Tippo] would only realise €350,000 to €400,000 for [Mr. Leahy's] machinery – as the insurance firm would only service the claim on the used value of the machinery on the date of the fire and not on OLD for NEW." [sic.]* Mr. Leahy accepted that he *"agreed to settle the consequences of the 2016 fire for €550,000"* but contended that Tippo had breached the settlement agreement firstly by failing to make the payment due on 8th November, 2018 and secondly by misrepresenting *"the statue and value of which [his] machinery would be treated by [Tippo's] insurance firm."*

**38.** Mr. Leahy fully justified Mr. Martin's apprehension of further proceedings by saying that Anderson & Gallagher *"... may very well be joining their colleagues [the solicitors for Mr. Doyle] in new proceedings as to their advice and treatment of the order granted by Judge O'Donoghue [recte. O'Donohoe] on the 6th November 2018 ..."* which, he asserted,

was limited to any money which he might recover in respect of his 2014 action and did not capture the money payable on foot of the settlement agreement.

**39.** Mr. Leahy, in his replying affidavit, also made the point – as far as I can see for the first time – that the order of 6th November, 2018, which had been made on *ex parte* application, did not provide him with an opportunity to be heard before the order took effect. But whatever merit there may have been in this point, it had nothing to do with Tippo or with Anderson & Gallagher.

**40.** Mr. Leahy insisted – as he had in his 2020 Circuit Court action against Tippo and Anderson & Gallagher – that the money payable on foot of the settlement agreement was not payable in settlement of his 2014 action which, he said, had been settled long before the settlement agreement on terms – he said – that he, Mr. Leahy, would retain ownership of the machinery. While suggesting on the one hand that it was ludicrous to suggest that his 2014 action for €242,000 might have been settled for €550,000, on the other hand Mr. Leahy suggested that Tippo and Anderson & Gallagher were estopped from contending otherwise.

**41.** I pause here to recall that under the settlement Mr. Leahy was to have been paid an initial payment of €100,000, eight instalments of €50,000, and a final instalment of €40,000. There was no suggestion that the six instalments of €50,000 which were to have been paid between 8th December, 2018 and 8th May, 2018 were not duly paid by Tippo and accepted by Mr. Leahy. Nor was there any complaint of the non-payment of the last two instalments, the payment of which had been frozen by the Circuit Court order of 30th May, 2019.

*The High Court judgment*

**42.** In a careful and comprehensive written judgment the High Court judge reviewed the evidence and set out the arguments offered on both sides before concluding that there was a dispute as to the facts and the law which required that the action should go to trial.

**43.** The judgment shows that much of Tippo's argument was directed to whether and the extent to which the claims pleaded in the statement of claim and the – separate – issues which Mr. Leahy sought to canvas in his replying affidavit had already been litigated and decided in the previous proceedings. Moreover – as it was on the appeal – Tippo's primary argument in the High Court was that the claims which Mr. Leahy sought to advance based on the alleged breach of contract were precluded by the rule in *Henderson v. Henderson*. The judge concluded that Tippo had not shown that the claims in the 2021 action should have been raised in the 2014 action.

**44.** As to the making of an *Isaac Wunder* order, the judge found that Tippo had not established that the case met the requirements identified by Whelan J. in *Kearney v. Bank of Scotland plc* [2020] IECA 92 as the circumstances in which such an order should be made.

*The appeal*

**45.** Tippo appealed against the judgment and order of the High Court on twelve grounds the essence of which was that the claims advanced by Mr. Leahy in his 2021 action were covered by (or offended against) the rule in *Henderson v. Henderson* and that the claims were captured by the settlement agreement.

**46.** As happened in the High Court, the grounds of appeal and the written and oral submissions on the appeal – on both sides – were complicated by Tippo's insistence that Mr. Leahy's 2021 action related to the same matters which had been raised in the 2014 action and by Tippo's misplaced reliance on *Henderson v. Henderson*.

**47.** Mr. Leahy's 2014 action was a claim for €242,000 (€200,000 plus VAT at 21%) for goods sold and delivered. The premise of that action was that the machinery identified by type, make and model in the special indorsement of claim on the summons had been sold by Mr. Leahy to Tippo on 28th June, 2008 but not paid for. Mr. Leahy's 2021 action was a claim for unquantified damages – said to be unascertainable – arising out of the alleged failure on

the part of Tippo to replace the machinery after the fire on 26th October, 2016. The premise of that action was that the machinery – at the date of the fire – was either Mr. Leahy's property or was jointly owned. Both claims were claims in respect of the machinery but they were contradictory claims. Moreover, as Mr. Leahy observed, it is difficult if not impossible to contemplate that an action for €242,000 might have been compromised by the defendant agreeing to pay €550,000.

**48.** Mr. Leahy's respondent's notice and written submissions were not altogether easy to follow but the bones of his argument were that the High Court judge had been correct in rejecting Tippo's submission in relation to *Henderson v. Henderson;* that it was nonsense to suggest that the proceedings arose out of a missed payment; and that it was nonsense to suggest that the claim arising out of the fire on 26th October, 2016 could have been pleaded in the 2014 action.

**49.** Perplexingly, Mr. Leahy in his respondent's notice contended that he had never claimed that the claims he made in the 2021 action were not covered by the settlement agreement and in his written submissions acknowledged that *"the mediation was successful in settling the issue of the termination of the 21st June, 2008 agreement arising out of the 2016 Tippo fire".* As I will come to, it is perfectly clear that the claims made in the 2021 action were covered by the settlement agreement but Mr. Leahy's concession that they were necessarily means that he was knowingly seeking to pursue claims which were already settled.

**50.** Mr. Leahy in his written submission also attempted to launch an impermissible collateral attack on the Circuit Court orders 6th November, 2018 for the payment of the money into court; and of 14th July, 2020 by which his action against Tippo and Anderson & Gallagher was dismissed. Mr. Leahy also sought – at great length – to criticise the decision of the High Court on Circuit in the action in which Mr. Doyle was plaintiff. In each case

what Mr. Leahy had to say was irrelevant to the issue as to whether the claims against Tippo were bound to fail. However, it provided strong support for Tippo's apprehension of further litigation arising out of matters already finally disposed of by a court of competent jurisdiction.

*Discussion and decision*

**51.** Shortly before 4th September, 2018 the parties agreed to go to mediation. It is not absolutely clear how that came about but on Mr. Leahy's account, Mr. and Mrs. Martin's children, who had succeeded them *"... had issues with [Mr. Leahy] a perceived outsider remaining engaged in the business – following on from the factory rebuild and commissioning – [Tippo] dictated the dissolving of the working partnership between [Mr. Leahy] and [Tippo] – [Mr. Leahy] left with no option entered mediation with [Tippo] in 2018."*

**52.** The mediation agreement of 4th September, 2018 was inelegantly drafted. The title suggested that there were some sort of proceedings in which Tippo was the applicant and Mr. Leahy was the respondent. It is common case that there were no such proceedings and it appears that Tippo was described as the applicant because it was it which had proposed and arranged the mediation. The recital suggested that the parties wished to resolve all commercial differences between them: which, as I will come to, it is evident on the face of the settlement agreement that they obviously did. Yet the recital went on to suggest – parenthetically – that the disputes arose in High Court proceedings between Tippo and Mr. Leahy: which they obviously did not. In the first place, there were no proceedings in which Tippo was plaintiff and Mr. Leahy was defendant. More to the point, the settlement agreement shows that the starting point of the settlement was to bring to an end – or to put a stake through the heart of – the business relationship in its entirety.

**53.** Even if the immediate objective of the mediation had been to discuss the resolution of a specific dispute, it would not have been at all unusual that the discussions might have been expanded to other matters and – as those skilled in the art are wont to put it – that the size of the pie, or the breadth of the issues to be resolved, might have been expanded in the course of the mediation.

**54.** The settlement agreement, however, was perfectly clear. It did perpetuate the suggestion that there were proceedings in being in which Tippo was applicant and Mr. Leahy was respondent but I do not see that that detracted in the slightest from the substance of the agreement. Perhaps for the avoidance of any conceivable doubt or perhaps in the forlorn hope of forestalling any later argument as to the scope of the settlement, the full and final settlement of *"all claims howsoever arising between the parties"* was expressed to include *"claims for machinery, fees due and notice period."*

**55.** The claim the subject of the 2014 proceedings was unquestionably a claim for machinery. So also was the claim that the production line ought to have been but was not reinstated after the fire. It was no great concession, but Mr. Leahy agreed that the claim the subject of the 2021 action was caught by the settlement agreement.

**56.** On any view, the settlement agreement was perfectly clear. The business relationship between the parties was at an end and Mr. Leahy was to be paid €550,000 in full and final satisfaction of all claims whatsoever. Save in the event contemplated by clause 6 of the non-payment of any instalment, the settlement of all claims whatsoever necessarily precluded any further claim arising out of the business agreement and so any prospect of a later dispute that either party had failed to bring forward any claim that had not been made.

**57.** The first instalment of €100,000 was duly paid by Tippo to Mr. Leahy on or before 8th October, 2018. The second instalment of €50,000 was also paid by Tippo: as to €49,796.00 into the Circuit Court and as to €204.00 to Mr. Leahy. The next six instalments

were duly paid to and accepted by Mr. Leahy. There was never any contest as to the effect of the Circuit Court order of 30th May, 2019 or any suggestion that the non-payment of the last two instalments amounted to a default on the part of Tippo.

**58.** Mr. Leahy contested the entitlement of Tippo to have paid the €49,796.00 into court and on 5th March, 2020 commenced Circuit Court proceedings against Tippo and its solicitors to recover that money. Specifically, Mr. Leahy claimed that Tippo ought to have paid the money directly to him. On 14th July, 2020 that action was dismissed by the Circuit Court on the grounds that the Civil Bill disclosed no reasonable cause of action and that it was frivolous and vexatious. In plain English, the Circuit Court found that the case which Mr. Leahy sought to make as to Tippo's entitlement – and obligation – to have paid the money into court was not even arguable. There was no appeal against that order. The High Court refused Mr. Leahy's application for leave to challenge it by way of judicial review and his appeal to this Court was dismissed.

**59.** The first of the two arguments made by Mr. Leahy as to why he should now be at large as to the claims he would make against Tippo in respect of alleged breach of the agreement of 21st June, 2008 was that Tippo breached the settlement by failing to pay directly to him the instalment which fell due on 8th November, 2018. That is not a claim or argument that could and should have been but was not made in previous proceedings which might be captured by the rule in *Henderson v. Henderson.* It is a claim or argument which was in fact made in the 2020 action, which was heard and determined by a court of competent jurisdiction. The issue is *res judicata*. The rule in *Henderson v. Henderson* is simply not engaged.

**60.** As far as the prospects of success of the 2021 action are concerned, Mr. Leahy's application for a judicial review of the order of the Circuit Court of 14th July, 2020; his appeal from the order of the High Court refusing leave; and the decision of this Court

refusing that appeal are simply irrelevant. In principle, Tippo's obedience to a court order as to the payment of the instalment cannot have been a breach of the settlement agreement.

**61.** The second of the two arguments now advanced by Mr. Leahy as to why his 2021 action is not caught by the settlement agreement is that Tippo misrepresented the *"statue [recte. status?] and value of which [his] machinery would be treated by [Tippo's] insurance firm."*

**62.** As to this, the agreement of 21st June, 2008 provided that:-

> *"Tippo is to insure the machinery to the value of its replacement value and insure against any loss of earnings in case of fire and all general risks."*

**63.** The statement of claim – with no disrespect – is a bit woolly, but the substance of it is that Tippo was required to – but did not – protect Mr. Leahy's machinery from the risk of fire; insure the machinery on a new for old basis; and otherwise *"use the financial tool of leasing"* to allow it to replace the machinery as wear and tear required.

**64.** In his affidavit filed on 2nd February, 2023 Mr. Leahy deposed that the settlement agreement was grounded on what he by then had come to believe was a misrepresentation by Mr. Martin that his machinery destroyed in the 2016 fire *"would only realise the financial used value of [his] machinery on the date of the fire"* which would not put him back in the position prior to the 2018 contract when in fact the machinery was replaced *"by the insurance CRITERIA of OLD for NEW. [sic.]"*

**65.** Allowing that this is the opposite of what he said, I understand Mr. Leahy's complaint to be that the basis of the settlement agreement was that Mr. Martin misled him as to the extent of insurance cover for the loss of the machinery by fire; specifically, as to the availability of cover to replace ten year old machinery which had been worked hard with brand new machinery. But this – if made out – would not avail Mr. Leahy. The agreement of 21st June, 2008 said what it said about Tippo's liability to insure. If, as Mr. Leahy would now

contend, Tippo was bound to insure on a new for old basis, that issue was live at the time of the settlement agreement. If the insurance which Tippo had put in place was less than was required by the business agreement, Mr. Leahy knew that before he agreed to settle. If the insurance which Tippo had in place was greater than was required by the business agreement, there was no basis on which Mr. Leahy could have been entitled to the benefit of any such additional insurance.

**66.** And in any event, the case pleaded was that Tippo ought to have been in a position to replace Mr Leahy's *"'commissioned production line/facility' after the fire of 26th October 2016 irrespective of [Tippo's] duty owed to [Mr. Leahy] as of [Tippo's] successful financial relief within [Tippo's] insurance claim."* In other words, on Mr. Leahy's case, Tippo's obligation to replace the machinery was independent of the extent of its insurance cover and so the availability of insurance to cover Tippo's liability to Mr. Leahy under the business agreement – if it was not irrelevant – was a live issue at the time of the settlement.

*Isaac Wunder order*

**67.** The primary justification offered by Mr. Leahy for seeking to re-open the settlement was that Tippo had defaulted in the payment to him of the instalment which fell due on 8th November, 2018. That was an attempt to re-litigate an issue which had been finally decided by the order of the Circuit Court of 14th July, 2020 and was, accordingly, an abuse of process.

**68.** In his affidavit in response to Tippo's motion, Mr. Leahy portended further litigation arising out of the same dispute. Tippo was entitled to ask the court to take into account, also, the fact that following the final disposal Mr. Doyle's action, Mr. Leahy had sought to re-open that dispute by bringing proceedings against Mr. Doyle and his solicitors and counsel, and had portended that Anderson & Gallagher might be joined as a defendant to those proceedings.

**69.** If there was any room for doubt as to Mr. Leahy's intentions it was dispelled by an e-mail sent by Mr. Leahy to Tippo and Anderson & Gallagher on 8th July, 2024 – the very eve of the hearing of the appeal – in which he said that he had had an appointment in the Central Office of the High Court on 27th June, 2024 to file a further summons but decided to defer doing so. He expressed confidence in holding the High Court judgment but said that he would file the summons *"after tomorrow"*. In other words, although he expected to win the appeal, he was nevertheless intent on issuing further proceedings. Mr. Leahy confirmed to the Court that that was his intention.

**70.** At the conclusion of the oral hearing of the appeal my colleagues and I were unanimous that the appeal should be allowed. In the ordinary way, the Court would have reserved judgment so that the parties would have the reasons before any order was made. In the circumstances, however, the Court determined that it was appropriate to forestall the risk that Mr. Leahy would embroil Tippo and its solicitors in further litigation before a judgment could be written and therefore ordered there and then that the appeal would be allowed, the action dismissed, and that Mr. Leahy should be enjoined from issuing any further proceedings without leave.

*Conclusion*

**71.** By the settlement agreement dated 4th September, 2018 the parties agreed to settle all claims between them howsoever arising, including any claims for machinery. It is common case that the settlement included any claim that Tippo was obliged to replace the machinery.

**72.** I can see how the judge was distracted by the arguments that the claim advanced in the 2014 action was the same as that advanced in the 2021 action, which it plainly was not; and by Tippo's reliance on the rule in *Henderson v. Henderson* which – in my firm view – had nothing to do with it and which the judge was quite correct to reject. However, I am persuaded that the judge did not sufficiently engage with what was put up as an alternative

argument, that the 2021 claims were captured by the 2018 settlement agreement and that there was no substance whatsoever in Mr. Leahy's arguments that it was not binding.

**73.** The action was bound to fail and Tippo was entitled to an order dismissing it *in limine*.

**74.** Mr. Leahy had previously ventilated his grievances against Tippo and Anderson & Gallagher and Tippo had established that there were good grounds for believing that Mr. Leahy would issue further proceedings in which he would seek to agitate the same issues. In the circumstances it was appropriate to impose what Whelan J. described in *Kearney* as an early stage compulsory filter.

**75.** Tippo having been entirely successful on its appeal, my provisional view is that it is entitled to an order for its costs of the appeal as well as the application in the High Court. If Mr. Leahy wishes to contend for any other costs order, I would allow him the opportunity within fourteen days from the electronic delivery of this judgment to file and serve a brief written submission – not exceeding 1,000 words – in which event Tippo will have fourteen days to reply.

**76.** As this judgment is being delivered electronically Costello and Binchy JJ. have authorised me to say that they agree with it.