THE HIGH COURT

[2024] IEHC 716

[Record No. 2015/324P]

BETWEEN

MAJELLA RIPPINGTON

PLAINTIFF

AND

THOMAS LOOMES PRACTISING UNDER THE STYLE AND TITLE OF THOMAS LOOMES AND COMPANY

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered electronically on the 20th day of December 2024

Introduction.

1. As it will be necessary to refer to the parties to these proceedings in their role in other proceedings, I will refer to the plaintiff either as "the plaintiff" or "Mrs. Rippington". I will refer to the defendant as "the defendant" or "the solicitor".

2. These are professional negligence proceedings in which the plaintiff is suing her former solicitor in relation to alleged negligence on his part in his representation of her in a will suit, which had been brought by her and others challenging her sister's will.

3. The present application is an application by the defendant for an order striking out the plaintiff's action against him on the grounds that the issues raised in these proceedings are either *res judicata*, or are caught by the rule in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (hereinafter "*Henderson v Henderson*").

4. The defendant submits that in proceedings which were commenced by him in 2014 against Mrs. Rippington, in which he had sued for recovery of his fees, Mrs. Rippington had raised a counterclaim in which she alleged that the solicitor had been negligent in the manner in which he had represented her in the will suit. On 6 March 2020, Meenan J. (then sitting as a judge of the High Court) gave a written judgment in which he found in favour of the claim for recovery of fees brought by the solicitor. He also found against Mrs. Rippington in her counterclaim brought against the solicitor.

5. On the basis of that judgment, the defendant submits that the plaintiff's claim in the present proceedings is either *res judicata*, or insofar as it encompasses any new head of claim against him, is caught by the rule in *Henderson v Henderson*.

Background.

6. This action is but one of several actions which have been brought by the plaintiff against various parties. Nearly all these cases concern the conduct and outcome of the will suit, which challenged the validity of her sister's will.

7. The will suit was encompassed in proceedings bearing Record Number 2011/8319P, where the plaintiff, her husband, and another sister, challenged a will executed by the plaintiff's sister. The defendant had been retained to act on behalf of the plaintiffs in those proceedings.

8. The defendant withdrew his services as solicitor for the plaintiffs on or about 24 July 2012. A notice of discharge of solicitor was filed by the plaintiffs in early August 2012.

9. In 2015, Noonan J. (then sitting as a judge of the High Court) delivered a judgment in which he found against the plaintiffs in the will suit.

10. The plaintiff subsequently sought an extension of time within which to appeal an order that had been made by O'Neill J. in the course of the will suit, which had appointed a particular solicitor as personal representative of the deceased for the purpose of collecting in the assets of the deceased and defending the litigation. Somewhat curiously, that order had been made on consent. The plaintiff was unsuccessful in her application for an extension of time to appeal that order. She appealed that refusal to the Court of Appeal.

11. On 19 December 2017, two judgments were delivered in the Court of Appeal. Both judgments held against the plaintiff. In the first judgment, which was delivered by Peart J. the plaintiff's appeal against the refusal of an extension of time to challenge the order made in 2012, was dismissed ([2017] IECA 332). On the same date, her appeal against the judgment and order of Noonan J., was also dismissed ([2017] IECA 331).

12. In 2014, in proceedings bearing Record Number 2014/336S, the solicitor bought proceedings for recovery of his fees against Mrs. Rippington. Those proceedings were remitted to plenary hearing. Mrs. Rippington filed a full defence and a counterclaim, in which she claimed damages for negligence against the solicitor, arising out of his allegedly negligent representation of her in the will suit.

13. In a judgment delivered on 6 March 2020, Meenan J. granted judgment in favour of the solicitor. He dismissed the counterclaim that had been brought by Mrs.

Rippington. In a subsequent order made on 5 May 2022, Meenan J. measured the fees that were due to the solicitor in the sum of €55,641.79.

14. Mrs. Rippington was successful in her appeal against the measurement of the solicitor's fees in the High Court. In an *ex tempore* judgment delivered on 31 March 2023, Allen J. set aside the measurement of fees that have been carried out in the High Court. The court directed that the solicitor's bill of costs be sent for adjudication before a Legal Costs Adjudicator.

15. In the present proceedings, which were commenced by plenary summons issued on 16 January 2015, the plaintiff is seeking damages for breach of contract and negligence against the defendant arising out of his allegedly negligent representation of her in the will suit. Her claim against the defendant was set out *in extenso* in a statement of claim delivered on 17 January 2016. The court was also furnished with an amended statement of claim dated 7 March 2024. However, it is not clear whether any order was made by the High Court granting the plaintiff liberty to amend her statement of claim. No such order has been exhibited.

16. Finally, the plaintiff issued proceedings against Ireland, and the Attorney General, and a large number of other defendants, including officers of the Probate Office and the County Registrar, claiming that they had acted wrongfully in and about the processing of documents and the taking of steps in the will suit.

17. An application was brought by a number of the defendants in those proceedings seeking to have the action against them struck out as being frivolous and vexatious. Those applications were successful in the High Court, where Simons J. struck out the proceedings against those defendants. He also made an Isaac Wunder order against the plaintiff, restraining her from bringing any further action against named individuals without leave of the President of the High Court.

18. Mrs. Rippington appealed that decision to the Court of Appeal, where she was largely unsuccessful. The appeal was dismissed, save that a slight reduction was made to the extent of the Isaac Wunder order ([2021] IECA 97).

The Issue for Determination.

19. The notice of motion that was initially brought before the court by the defendant in this application, contained a number of reliefs. These were essentially seeking to strike out the proceedings on several different grounds. At the outset of the hearing, the plaintiff raised a preliminary objection to the effect that the within application was an abuse of process of the court because the defendant had brought an identical motion on a previous occasion, but had withdrawn it. It was submitted that it was an abuse of the process of the court for the defendant to bring the same motion a second time.

20. The court held with the plaintiff in relation to her preliminary objection. The court noted that, in a notice of motion dated 5 June 2018, the defendant had sought almost identical reliefs to those sought in the notice of motion that is before the court on this application. The court noted that by order dated 7 March 2019, the court had directed that the previous motion be struck out, on the application of counsel for the defendant, who had been the moving party in the motion. The court held that, in these circumstances, it was an abuse of the process of the court for the defendant to bring the same motion on a second occasion, when he had instructed his counsel to withdraw the motion on a previous occasion.

21. However, as the defendant had been given liberty to amend his notice of motion to include a new relief, that the proceedings should be struck out as being *res judicata*, the court allowed that sole issue to proceed.

22. Thus, the only issue for determination by the court on this application, is whether the present proceedings ought to be struck out against the defendant on the basis that the issues raised in the present proceedings are either *res judicata*, or are caught by the rule in *Henderson v Henderson*.

The Law.

23. In recent years, there have been a number of judgments which have considered the issue of *res judicata* and the rule in *Henderson v Henderson*: see *AA v The Medical Council* [2003] 4 IR 302; *S.M. v Ireland (No. 1)* [2007] 3 IR 283; *Re Vantive Holdings* [2010] 2 IR 118; *Vico Ltd & ors v. Bank of Ireland* [2016] IECA 273; *Carney v Bank of Scotland Plc* [2017] IECA 295;.

24. In *Carty & ors v Harte* [2023] IEHC 296, Simons J. gave the following succinct analysis of the interaction between the doctrine of *res judicata* and the rule in *Henderson v Henderson*:-

> *"12. The term res judicata is often used as an umbrella term, embracing a number of related principles all of which seek to advance the public interest in the finality of litigation. The strictest form of res judicata is cause of action estoppel, whereby a party is precluded from pursuing a particular cause of action in consequence of a final judgment in earlier proceedings. The next form of res judicata is issue estoppel, whereby a party will, generally, be precluded from relitigating an issue of fact or law which has previously been determined against them in earlier proceedings. The determination of that issue must have been necessary to the outcome of the earlier*

proceedings, i.e. the finding on the issue must have been fundamental rather than merely collateral or incidental.

13. Put otherwise, notwithstanding that the judgment in earlier proceedings may not have entailed a final determination on the legal right asserted in subsequent proceedings, it may nevertheless have determined an issue which is common to both sets of proceedings. Provided that the determination of this issue had been an essential part of the rationale for the earlier judgment, then the finding on the issue will, generally, be binding in the subsequent proceedings.

14. There is a third species of res judicata, whereby a party will, generally, be precluded from litigating an issue in a second set of proceedings if that party should have—but failed—to raise the issue in an earlier set of proceedings. This principle is described as the rule in Henderson v. Henderson, but recent case law confirms that it too is grounded in the principle of res judicata (Arklow Holidays Ltd v. An Bord Pleanála [2011] IESC 29, [2012] 2 I.R. 99 (at paragraphs 46 and 57)).”

25. The rule in *Henderson v Henderson* was considered by the Supreme Court in *Munnelly v Hassett & ors* [2023] IESC 29, where the court began its analysis by quoting the well-known passage from the judgment of Wigram VC in *Henderson v Henderson*:-

“I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except

> *under special circumstances) permit the same parties to open the same subject of litigation in respect of a 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 a reasonable diligence, might have brought forward at the time."*

26. The court went on to endorse the statement of the rule as contained in the judgment of McDonald J. (then sitting as a judge of the High Court) in *George & George v AVA Trade (EU) Ltd* [2019] IEHC 187, at para. 152:-

> *"...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:-*
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> *(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."*

27. The court went on to note that the test set down by McDonald J. in that case had been usefully described as a *"could and should*" test. Meaning that the test was

could the issue have been raised in the earlier proceedings, and if so, should it have been so raised? If so, was there any reason why the second set of proceedings raising the issue should not be dismissed?

28. The court also endorsed *dicta* in decisions of the UK Supreme Court, to the effect that the rule in *Henderson v Henderson* was both a rule of public policy and an application of the law of *res judicata*. The two principles had been described as distinct, though overlapping principles, with a common underlying purpose of limiting abusive and duplicative litigation. The Supreme Court stated that it had to be understood that the rule in *Henderson v Henderson* was a species of abuse of process which was derived from and related to the doctrine of *res judicata*. The court further noted that the principle is not limited to the protection of parties, but was also rooted in the need to protect the court process itself.

29. Finally, the court noted that it would be wrong to suggest that the fact that a party may not be represented, was in itself, a reason not to apply the rule in *Henderson v Henderson*. The court did not accept the general proposition that the fact that a party was unrepresented, was a reason to apply the rule in *Henderson v Henderson* with greater flexibility in their case. The court held that any litigant, whether represented or unrepresented, must obey the same fundamental rules. A litigant in person must adhere to the same principles as are applicable to proceedings in which the parties are represented by lawyers (see paras. 40 and 41).

Conclusions.

30. I am satisfied that any claim by the plaintiff that the defendant acted negligently or in breach of contract in and about his representation of her in the will suit, has been heard and determined by a court on a previous occasion. It is clear that

this issue was raised by the plaintiff in her counterclaim to the summary proceedings which had been bought by the solicitor for recovery of his fees. Those proceedings had been remitted to plenary hearing. They were heard by way of oral evidence before Meenan J.

31. In his judgment in *Loomes v Rippington & Others* [2020] IEHC 237 delivered on 6 March 2020, Meenan J. dealt with the allegations of negligence and breach of contract brought against the solicitor as follows:

> *"13. In her Defence and Counterclaim, Ms. Rippington, on behalf of herself and the second named defendant (there is also a Defence on behalf of the third named defendant), once again seeks to attack the Order of 23 July 2012 and alleges, without stating any particulars, that the legal services provided by the plaintiff were "not up to a professional standard". In her Counterclaim, Ms. Rippington and the second named defendant seek an order striking out the plaintiff's claim for summary judgment, an order for plenary hearing and "further or in the alternative, damages, costs and outlay".*
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> *14. The only matter of substance raised by Ms. Rippington is a general allegation of professional negligence against the plaintiff. As mentioned, no particulars are given and no expert report was obtained. In the course of the hearing, Mr. Thomas Loomes, Solicitor, gave evidence. In his evidence, he stated that he was instructed by Ms. Rippington and the other defendants to issue the probate proceedings, to obtain advices from counsel, to attend in court and to obtain the Order of 23 July 2012. Mr. Loomes also gave evidence of the difficulties encountered in representing Ms. Rippington and the other*

defendants and the upset and stress caused to him by her making baseless allegations against him to the Law Society.

15. Mr. Loomes was cross-examined by Ms. Rippington to little effect. In the absence of an expert report, Ms. Rippington's scope for cross-examination was limited. However, she did produce to the Court a document entitled "book of evidence". An examination of this document and the various enclosures did not reveal any defence to the plaintiff's claim.

[Para 16 is not relevant for this judgment.]

17. Having heard the evidence of Mr. Loomes, which I fully accept, I am satisfied that his firm was instructed by Ms. Rippington and the other named defendants and provided the professional services set out in detail in the Bill of Costs produced to the Court. Ms. Rippington has failed to substantiate in any way her allegation of professional negligence on the part of the plaintiff. Therefore, the plaintiff is entitled to succeed."

32. The court is satisfied that that judgment dealt with the plaintiff's claim of negligence and breach of contract against the solicitor. The judge dismissed that claim. Those issues are clearly *res judicata*. They cannot be relitigated in these proceedings.

33. Turning now to deal with the rule in *Henderson v Henderson*, the court holds that this rule is so closely allied to the doctrine of *res judicata*, that it is covered in the plea in the amended notice of motion that the plaintiff's proceedings are *res judicata*.

34. Insofar as the plaintiff seeks to raise any additional allegations of impropriety against the defendant arising out of his provision of professional services to her in the

conduct of the will suit, those claims are caught by the rule in *Henderson v Henderson*.

35. The plaintiff had her opportunity to ventilate whatever grievances she had against the solicitor in her counterclaim to the summary proceedings. If she had any allegations to make against her solicitor, she should have raised them at that time.

36. The whole purpose of the rule in *Henderson v Henderson* is to prevent people suing a defendant over and over again in relation to the same set of circumstances. To that end, they must bring forward all their claims against a party arising out of a particular set of circumstances in the one set of proceedings. They are not permitted to split their claim, so as to raise some allegations in one set of proceedings, while at the same time, holding back other allegations, which are said to arise out of the same set of circumstances, for determination in a subsequent set of proceedings.

37. That is precisely what the plaintiff is trying to do here. She is trying to relitigate her allegations of negligence and breach of contract against the defendant, which have already been determined in the judgment delivered by Meenan J. in 2020. Alternatively, she is trying to raise new allegations of impropriety, which ought to have been included in her previous counterclaim.

38. The court accepts that the rule in *Henderson v Henderson* is not an absolute prohibition on subsequent proceedings. There can be special circumstances which would justify a person being permitted to bring subsequent proceedings against the same defendant. However, the court is also mindful of the *dicta* in the *Munnelly* case that just because a person is a litigant in person, that does not mean that the rule in *Henderson v Henderson* does not apply with equal force to them. The court is not satisfied that there are any special circumstances in this case which would warrant a departure from the application of the rule in *Henderson v Henderson*.

39. I am satisfied that these proceedings are the very mischief that the principle of *res judicata* and the rule in *Henderson v Henderson* are designed to avoid; namely an abuse of court processes.

40. The defendant is entitled to an order striking out the proceedings against him.

41. As this judgment is being delivered electronically, the parties shall have four weeks within which to deliver brief written submissions of not more than 1,000 words in relation to the terms of the final order and on costs.

42. The matter will be listed for mention at 10.30 hours on 21 January 2025 for the purpose of making final orders.