THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 331

Record Number: 2017/307

Whelan J.
McGovern J.
Costello J.

BETWEEN/

MICHAEL HEMANI

PLAINTIFF/APPELLANT

- AND –

ULSTER BANK (IRELAND) LIMITED

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 20th day of December 2019

Introduction

1. This appeal arises from the judgment and order of the High Court dated the 18th May, 2017 which dismissed the appellant's claims against his landlord, the respondent, save for the claim that he suffered direct economic loss consequential upon the respondent's alleged failure to maintain premises which he occupied in Sligo town on foot of an oral periodic tenancy. The orders to strike out or in the alternative to dismiss the appellant's proceedings, were sought by the respondent primarily pursuant to the inherent jurisdiction of the Court and alternatively under the rule in *Henderson v. Henderson*.

Factual and procedural background

2. The appellant, a litigant in person, was granted an oral periodic tenancy in or about May 1978 by the respondent's predecessor over part of the 2nd Floor in a building situate at the corner of O'Connell and Grattan Street known as 52 O'Connell Street, Sligo ("the premises"). He occupied the said premises for the purpose of carrying on a printing business. Ownership of the premises subsequently passed to First Active plc. The respondent, having taken over from First Active plc, became owner of the premises in or around 1990 and thereafter the relationship of landlord and tenant subsisted between the parties.

3. The appellant alleges that since 2006, the respondent has failed to carry out essential repairs to the premises and that this failure impacted negatively on his printing business while the respondent claims that the appellant acted unreasonably by preventing access to the property, frustrating necessary repairs including those necessitated by the terms of a Fire Safety Notice.

4. An initial notice to quit was served on the appellant in 2003. A subsequent notice to quit was served on or about the 28th March, 2006. An Ejectment Civil Bill for Overholding was issued by the respondent on or about the 1st August, 2006 returnable before Sligo Circuit Court.

5. The appellant served on the respondent a Notice of Intention to Claim Relief pursuant to the provisions of the Landlord and Tenant (Amendment) Act, 1980, as amended, on the 27th November, 2006 and issued a Landlord and Tenant Civil Bill on the 5th December, 2006 seeking, *inter alia*, that the Court fix the terms of a new statutory tenancy under Part II of that Act. That action was ultimately heard by Judge Flanagan at the Circuit Court in Sligo on the 15th March, 2013 whereupon an order was made granting the appellant a new lease and fixing the terms of the said tenancy pursuant to the provisions of the 1980 Act for a term of 17 years from the 16th May, 2006 at a yearly rent of €6,100 together with a direction that the tenant be responsible for internal repairs and the landlord be responsible for external repairs and granting the appellant 50% of his costs.

6. The appellant appealed the Circuit Court order by notice of appeal dated the 25th March, 2013.

7. Subsequently, pending hearing of the appeal, a Fire Safety Notice pursuant to s. 20 of the Fire Safety Act, 1981 was served on the respondent on the 4th July, 2013 by the Fire Safety Authority, Sligo Fire Service, in relation to the entire premises. The notice identified the premises as a potentially dangerous building as defined by s. 19 of the 1981 Act and directed the respondent, as owner, to carry out essential works to fulfil the Fire Safety Authority's requirements including provision of a safe and effective means of escape. The execution of these repairs appears to have exacerbated tensions between the parties.

8. It is clear that there was some urgency attached by the Fire Safety Authority to the works being carried out. At one point the respondent had indicated the 7th January, 2014 as the likely start-date for the said works with an anticipated completion date of February, 2014. The relationship between the parties was characterised then – as now – by a high degree of mistrust with inevitable attendant mutual misunderstandings. The appellant sought that structural repairs, which he considered were necessitated by the damage caused to his demise from ingress of water from leaking of the building roof over the years, were also required to be carried out in addition to the works necessitated by conditions in the Fire Safety Notice.

9. The appellant's Circuit appeal came before the High Court on Circuit in Sligo on the 9th May, 2014, when Mr. Justice Barry White accepted an undertaking given by the respondent that it would carry out structural repairs, that the appellant would move out of the premises, that certain pieces of large equipment, the property of the appellant and in use in connection with his printing works, would be stored safely in the premises during the carrying out of the works and that any rent due during the construction phase would be suspended. Further, the appellant was to be paid compensation during this period while he was out of the premises, together with certain other removal and advertising costs. The Court note stated: "Landlord will do the works needed." Counsel for the respondent is noted as having stated: "[Plaintiff] will be compensated for loss". The Court note continues: "Undertakings given by both sides (not sworn) … Works will take 3-4 weeks to start & 6-8 weeks to complete".

10. The appellant moved out and works were commenced around 24th June, 2014 and carried out to the premises. A dispute subsequently arose between the parties as to whether and when the premises were ready and fit for re-occupation by the appellant. The appellant further alleged that damage had been caused to his fixtures/equipment stored in the premises during the refurbishment works.

11. The appellant issued a notice of motion alleging that the respondent had been in contempt of court by reason of non-compliance with the undertakings given to the High Court in Sligo on the 9th May, 2014 referred to above. The appellant also claimed €86,999 for reimbursement of the cost of replacement of damaged equipment and loss of income. That motion and the substantive appeal of the Circuit Court orders made pursuant to the Landlord and Tenant (Amendment) Act, 1980 were heard and determined by Mr. Justice Michael White by way of Circuit appeal in 2015.

12. The appeal was heard on the 23rd, 24th, 25th and 26th February, 2015. In his judgment delivered on the 14th May, 2015 ([2015] I.E.H.C. 292) White J. considered that the matters to be determined by the Court in the Circuit appeal were as follows:

"(1) The appropriate rent.

(2) The commencement date of the Lease.

(3) The terms of the Lease.

(4) The date when the premises were ready for occupation after the refurbishment work.

(5) Does the Landlord have a responsibility to put in heating, and ancillary matters

(6) The Costs Order in the Circuit Court."

13. White J. noted in his said judgment at paras. 18-19 that: -

> "This Court does not have jurisdiction to consider the loss of income claim for a period of three years by the Plaintiff totalling the sum of €61,128.
>
> The Court has jurisdiction to consider the claim for the damage to the equipment which was supposed to be stored safely."

White J. found at paras. 23 -24 of his judgment that: -

> "The fact that substantial repairs had to be undertaken subsequent to the service of the Fire Safety Notice, indicates the Defendant did not properly observe implied covenants to repair under the Lease. There was a failure of the Defendants to address these issues over a period of years in a timely manner. The Defendant … should have been more proactive to ensure that the fabric of the building was secured and that the building complied with relevant Fire Safety Regulations. The Defendant was confronted by a lot of unreasonable behaviour on the part of the

> Plaintiff, who was … not proactive about addressing repairs…after the service of the Fire Safety Notice, this Court is satisfied that the Defendants embarked on a programme of refurbishment, which in many ways went beyond their remit, and the Court is quite satisfied that the present condition of the premises is satisfactory.
>
> There is no requirement on the Defendant to install any form of heating system, that is a matter for the Plaintiff. Likewise the issue of the phones, carpets and security meshes for windows are a matter for the Plaintiff."

14. He continued: -

> "The Plaintiff although rightly concerned about the damage to his equipment had a duty to minimise his loss and take up possession as soon as he could.... I consider it appropriate to fix the 7th January, 2015, as a date for the Plaintiff to take up possession of the premises again and when the Defendant would no longer be liable for any compensatory payments to the Plaintiff."

White J. further found that:

> "It is appropriate that the Landlord be responsible for the repair and maintenance of the exterior of the building including the roof and the windows. The Plaintiff should be responsible for the internal repairs and maintenance of the demise."

15. The Court fixed the annual rent at €5,200 per annum from 16th May, 2006 to 16th May, 2016. The respondent was ordered to pay weekly compensation to the appellant while he was out of possession for the period up until 7th January, 2015. The respondent was responsible for the repair and maintenance of the exterior of the building including the roof and windows. The appellant was held responsible for the internal repairs and maintenance. Having further reserved its decision in respect of some outstanding matters from time to time and until 31st July, 2015 and 23rd October, 2015 respectively, White J. also ordered, *inter alia*, the sums be payable to the appellant: -

> "…of €7,500 for a replacement camera and €3,000 as an omnibus figure to allow for delay in the appellant accessing the premises and any ancillary expenses in activating the machinery which had been mothballed and THE COURT refuses any further relief in respect of damage to the equipment."

At a further hearing the Court directed that the aforesaid allowed sum totalling €10,500 should not be payable directly to the appellant but rather was to be credited against the outstanding rent.

Current proceedings

16. The appellant issued a plenary summons on the 7th April, 2016. The initial statement of claim dated the 9th May, 2016 claimed damages against the respondent for, *inter alia*: -

> "1) Breach of landlord's duty to repair within a reasonable time frame.
>
> 2) Landlord's negligence to repair extending over a number of years.

3) Landlord's failure to take reasonable care to prevent the premises from becoming a source of danger.

4) Mental distress, depression, damage to reputation and loss of confidence.

5) Discomfort, inconvenience and interference with quiet enjoyment.

6) Loss of opportunity and consequential losses.

7) Expense.

8) Breach of Undertakings and negligence in complying with undertakings given in Court on 14/05/2014 including: -

   a) Failure to protect equipment.
   b) Failure to insure.
   c) Denial of access to the premises.
   d) Failure to pay weekly loss of earnings as per agreement.

9) Inordinate and unreasonable delay in completion of works and replacement of damaged equipment followed by denial of access over several months leading to further deterioration of parts in other equipment and subsequently resulting in the destruction of my 37 year old business.

10) Infringement of Constitutional right to earn a livelihood due to sufferance, oppression, negligence, and breach of landlord's duty to repair.

11) Abuse of total control assumed by the Defendant over the activities and operation of the process regarding issues mentioned herein

12) …claim for damages amounting to €509,892.00…"

17. A further document entitled "Amended Statement of Claim Part 1 Loss of Income" dated 17th May, 2017 was included the Book of Pleadings lodged in this appeal. It runs to about 50 pages in length.

The Motion

18. The respondent, by way of notice of motion dated the 18th November, 2016, sought to have the appellant's claim dismissed, or in the alternative struck out, pursuant to the inherent jurisdiction of the Court on the basis that the issues raised were *res judicata* having been determined in prior proceedings, that the claims amounted to *Henderson v. Henderson* abuse of process, were frivolous and vexatious, factually unsustainable, bound to fail and were statute barred.

Decision of the High Court

19. During the hearing of the respondent's motion on the 4th May, 2017, the grounding affidavit sworn by the respondent's solicitor dated the 16th November, 2016, which outlined the history of the proceedings between the parties from the respondent's perspective was considered in detail. Relevant passages of the said affidavit state that: -

"(5) As appears from the judgment of White J and the citation by White J from directions given by Mr. Justice Barry White on 9 May 2014, the obligations of the Bank in relation to the carrying out repairs to the premises were an issue in the Circuit Court proceedings and were the subject of an undertaking given by the Bank to the Court:

> 'The essence of the undertaking was that the Defendant would carry out essential structural repairs, that the Plaintiff would move out of the premises but certain pieces of large equipment would be stored safely in the premises during the construction phase of the work and that any rental due during the construction phase would be suspended. The Plaintiff was to be paid compensation during his time out of the premises and certain other removal and advertising costs.'

(6) …The Order of 27 November 2015 records Orders and determinations made by White J on a number of dates…

(7) As appears from the said Order, the issues referred to in the statement of claim delivered by the Plaintiff in the within proceedings have been the subject of a final and binding determination by the High Court. The state of repair of the premises and the respective obligations of the parties to address the state of repair of the premises was an ongoing issue in the Circuit Court proceedings…

(8) Accordingly, the dispute between the parties about who was obliged to repair the premises and when that was to have been done has been finally determined by the Judgment and Order of White J…"

20. Counsel for the respondent further referred to the judgment and orders of Mr. Justice Michael White and the various affidavits of the appellant, in particular, his replying affidavit dated the 22nd December, 2016; it was contended that the nearly all the issues averred to were the subject of a direct and final determination in the High Court before White J.

21. The respondent argued that the only claims that were not definitively determined in prior proceedings were the claims for general damages, for mental distress, stress, depression, damage to reputation and loss of confidence and the claim for consequential losses. These claims, it was argued, were unstateable for two reasons:

    i. The factual basis for the claims had already been determined by the High Court and while it might not have had jurisdiction to deal with general damages in landlord and tenant proceedings, White J. had dealt with the question as to the rights and wrongs of the repairing position and to when the repairs ought reasonably be deemed to have been completed.

    ii. Even if there was a factual basis for bringing the claims, in the absence of exceptions to the general rule applicable to the measure of damages for breach of contract, the appellant cannot recover damages for worry and stress.

High Court decision

22. In an *ex tempore* judgment Barrett J. agreed with the submissions of the respondent that, having regard to the judgment of Mr. Justice Michael White, the majority of the appellant's claims were in "*res judicata* and/or *Henderson v. Henderson* territory", save for the loss of income claim, and were matters that had been addressed by White J. or that should have been addressed by him or should have been addressed in the prior proceedings. Barrett J. ordered that: -

> "…the within proceedings be dismissed with the sole exception of the Plaintiff's claim that he suffered direct economic loss as a consequence of the Defendant's alleged failure to maintain the premises situate at the corner of O'Connell Street in the Parish of St. John Barony of Carbury and Borough and County of Sligo ('the Premises') and that the Plaintiff do deliver an amended Statement of Claim confining his claim to the claim that he suffered direct economic loss as a consequence of the Defendant's alleged failure to maintain the Premises."

Grounds of Appeal

23. The notice of appeal encompasses the following grounds:

i. That the respondent misled and confused the Court on the 4th May, 2017 by its reference to the appellant's affidavit on damages dated the 22nd April 2014, to support its claim of *res judicata*, implying that the claim on damages had been part of previous proceedings, where in fact damages were specifically excluded from the High Court's jurisdiction, as demonstrated by the judgment of White J. of the 14th May, 2015 and supplemented by the Court transcript. (Grounds 2(a) & 3)

ii. That the affidavit of the respondent's solicitor, dated the 16th November, 2016 misled the Court in terms of *res judicata* as it included irrelevant points on the state of repair of the premises and respective obligations in circumstances where the respondent's failure to maintain the premises, making it a source of danger and causing damage to the appellant's business, was never addressed. (Ground 2(b))

iii. That the claim for damages could not have been brought in the Sligo County Circuit Court proceedings as the extent of damage caused to the premises was not fully known at this time and, per the appellant's statement of claim, the amount claimed in damages would have exceeded Circuit Court margins. The Court in these proceedings was not aware that the appellant was renting a premises that was not fire compliant or that the premises would be condemned as potentially dangerous by the Fire Safety Authority shortly after the proceedings meaning the claim for damages cannot be viewed as falling within the ambit of *Henderson v. Henderson*. (Ground 4)

iv. That, by confining the order to direct economic loss only, Barrett J. failed to address the ultimate damage incurred – damage to the appellant's reputation, the loss of opportunity and consequential losses, loss of future earnings, mental distress, depression, inconvenience and interference with the quiet enjoyment of the appellant's business and its ultimate destruction. (Ground 5)

Submissions of the appellant

24. The appellant acknowledges that he is not contesting the High Court's final and binding determination on the grant and terms of the lease, obligations for repair work and rent. He argues that the issue of general damages, including for breach of repair covenant, was not addressed in the judgment as White J. considered the issue to be outside the Court's jurisdiction. The appellant asserted that the respondent had objected at the Circuit appeal hearing to general damages being considered on the grounds that a separate claim for damages would have to be initiated. To support this, the appellant referred to the transcript of the hearing on the 26th February, 2015 (Page 46 – lines 25-27) wherein White J. states: -

> "I mean the whole issue of Damages for loss of business and stuff like that is not an issue for this Court. I have to clearly make that – but I mean the whole issue of the repairs and what impact it has on the conditions is an issue".

25. The appellant contends that the phrase "and stuff like that" as used by the judge demonstrates that the non-jurisdiction applied to more than just loss of income and that Barrett J. failed to take account of or have sufficient regard to the full and proper meaning of White J.'s assertion and the context in which it was made. The appellant further argues that the respondent misled the Court (Barrett J.) on the 4th May, 2017 by referring to various affidavits and implying that the claim on damages had been part of previous proceedings and thus amounted to *Henderson v. Henderson* abuse of process and/or *res judicata*.

26. The appellant submits that Barrett J. failed to have sufficient regard to the direct and obvious link between various aspects of economic loss suffered and damage inflicted as an inevitable result of a want of care on the respondent's part and that by confining the order to direct economic loss only, the High Court failed to address the ultimate damage incurred.

27. The appellant argues that the trial judge erred in failing to give any proper consideration and not showing any flexibility in his consideration of *Henderson v. Henderson* and/or *res judicata* resulting in the appellant being denied the opportunity of ever having a hearing on the issue of damages inflicted upon him as a result of the respondent's negligence and failure to observe express and implied repair and quiet enjoyment obligations in a timely manner.

Submissions of the respondent

28. Counsel for the respondent fairly conceded in oral submissions that, pursuant to Deasy's Act, 1860, the covenant of quiet and peaceful enjoyment was implied in the oral periodic tenancy. The respondent agrees that the appellant did not bring a claim for damages for the alleged breach of the covenant to repair in the Circuit Court proceedings. The appellant is thus entitled to bring a claim for damages for breach of covenant to repair and breach of covenant for quiet enjoyment of the premises – but the respondent argues that such a claim is confined to the period prior to the repair works being carried out.

29. The respondent submits that the appellant cannot seek to re-litigate in these proceedings matters that were the subject of a final and binding determination in the Circuit Court proceedings. The respondent submits that the appellant cannot bring any claim in respect of the period when the property was under repair or the period following completion of the repairs in circumstances where the nature of the repair works, the efficacy of the manner in which they were carried out and the payment of compensation to the appellant in respect of the period when he was obliged to leave the premises have all been the subject of a final and binding determination in the High Court.

30. The respondent contends that the appellant's characterisation of Barrett J.'s decision is incorrect insofar as it suggests that by confining the order to solely economic loss, he failed to address the ultimate damage alleged to have occurred or that the trial judge erred in failing to give any proper consideration or show any flexibility in his consideration of the *Henderson v. Henderson* principle and/ or *res judicata*. The respondent argues that while the trial judge dismissed some of the appellant's claims on the ground they were *res judicata*, other claims were dismissed on the ground that they were bound to fail having regard, *inter alia*, to the findings made by White J.

31. The respondent argued that there is no basis for the proposition that the personal injuries or other damages claimed by the appellant arose as a result of the condition of the premises in the period prior to the repair works being carried out. His complaints are concerned with the outcome of the Circuit Court proceedings and the fact that – for the reasons identified by him – his business closed when he did not go back into occupation.

Discussion

Res judicata

32. The essential prerequisites for a successful *res judicata* plea were identified by Kelly J. (as he then was) in *McConnon v. President of Ireland* [2012] 1 I.R. 449 where he observed at paras. 14-15: -

> "The inherent jurisdiction to dismiss or strike out proceedings *in limine* can also be invoked in circumstances where somebody attempts to relitigate matters already decided conclusively by a judicial tribunal of competent jurisdiction. Such a determination is conclusive. A party is precluded from relitigating the matters decided in the judgment or indeed from giving evidence to contradict them in subsequent proceedings.
>
> In order to successfully rely on this doctrine, it must be shown that there was:-
>
> (a) A previous decision of a judicial tribunal of competent jurisdiction.
>
> (b) That decision must have been a final and conclusive judgment.
>
> (c) There must be an identity of parties.
>
> (d) There must be an identity of subject matter."

Henderson v. Henderson

The succinct explanation of the rule in *Henderson v. Henderson* given by Cooke J. in the High Court in Re: *Vantive Holdings & Others and the Companies Acts 1963-2006* [2009] I.E.H.C. 408, at paras. 32 to 33 and set out hereafter, was cited with approval by Murray C.J. in Re: *Vantive Holdings* [2010] 2 I.R. 118, at para. 21: -

> "The rule in *Henderson v. Henderson* is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of *res judicata* applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."

33. This Court subsequently in *Small v. Governor and Company of the Bank of Ireland & others* [2018] I.E.C.A. 393 considered the *Henderson* doctrine in the context of an assertion of res judicata observing as follows at paras. 56 – 61: -

> "The decision of Wigram V.C. in Henderson v. Henderson was relied upon as authority for the wider sense of res judicata classifying it in effect as part of the law of abuse of process.
>
> Subsequently, the statement of Wigram V.C. came to be considered in detail by the House of Lords in *Arnold v. National Westminster Bank PLC* [1991] 2 A.C. 93.
>
> The partly *obiter* judgment of Lord Keith of Kinkel stated at p. 104:
>
> > 'Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of [a] new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened.'
>
> The judgment continues at p. 105:
>
> 'Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided on in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue.'

It is now generally accepted, based on the dictum of Lord Keith that, in relation to issues not determined in the earlier litigation, *Henderson v. Henderson* offers:

> '…the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action.' (p. 105)

The judgment of Lord Keith suggests that where the first decision has determined the relevant point the result will differ as between cause of action estoppel and issue estoppel:

> '… there is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel where the subject matter is different.' (p. 108)"

34. I accept this to be a correct statement of the relevant law.

Inherent Jurisdiction

35. There is unquestionably an inherent jurisdiction in the Court to strike out an action if it is clear that it must fail. That jurisdiction was described by Costello J. in *Barry v. Buckley* [1981] I.R. 306 at p. 308 where, in his judgment he observed that: -

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

As to the exercise of that jurisdiction, Costello J. stated that it was to be "…exercised sparingly and only in clear cases".

36. The rationale for this approach was explained by McCarthy J. in his judgment in the unanimous decision of the Supreme Court in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 at p. 428 were he said:

> "Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought. Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceeding; often times it may appear that the facts are clear and established but the trial would disclose a different picture. With that qualification, however, I recognise the enforcement of a jurisdiction of this kind as a healthy development in our jurisprudence and one not to be disowned for its novelty though there may be a certain sense of disquiet at its rigour."

37. It follows from this that a court should be particularly cautious when its inherent jurisdiction is invoked at an early stage in proceedings such as in this case where the pleadings have not yet closed.

It will be recalled that in *Sun Fat Chan* McCarthy J. sounded a note of caution at p. 428: -

> "By way of qualification of the jurisdiction to dismiss an action at the statement of claims stage, I incline to the view that if the statement of claim admits of an amendment which might, so to speak, save it and the action founded upon it, then the action should not be dismissed."

Frivolous and vexatious

38. Ó Caoimh J. in his judgment in *Riordan v. Ireland* (No. 5) [2001] 4 I.R. 463, at p. 46 cited a Canadian decision of the Ontario High Court in *Re Lang Michener & Fabian* (1987) 37 D.L.R. (4th) 685 at p. 691 which had categorised a series of factors which generally tended to show litigation as being vexatious in the following terms:

> "(a) The bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
>
> (b) Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain reliefs;
>
> (c) Where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) Where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) Where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;
>
> (f) Where the respondent persistently takes unsuccessful appeals from judicial decisions".

I am not satisfied at this stage, in light of the jurisprudence, that the proceedings can fairly be categorised as frivolous and vexatious nor should the entire proceedings be struck out or dismissed pursuant to the inherent jurisdiction of the Court.

Claim for mental distress arising from breaches of the contract of tenancy

39. The respondent correctly relied on the Supreme Court decision in *Murray v. Budds & ors.* [2017] 2 I.R. 178 which decided that damages for worry or mental distress which have not given rise to psychiatric injury arising out of a breach of contract are not recoverable. In that judgment Denham C.J. observed at paras. 34-35: -

> "It was established in *Addis v Gramophone Co. Ltd* [1909] AC 488, that Courts would not in general permit damages for worry or upset as a consequence of a breach of contract…

Lord Atkinson stated pp. 494 to 496: -

> ‘I have always understood that damages for breach of contract were in the nature of compensation, not punishment.
>
> …
>
> In *Sikes v Wild* (1861) 1 B. & S. 587, at p. 594, Lord Blackburn says:
>
> > “I do not see how the existence of misconduct can alter the rule of law by which damages for breach of contract are to be assessed. It may render the contract voidable on the ground of fraud or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself.”
>
> There are three *well-known exceptions to the general rule applicable to the measure of damages for breach of contract*, namely, actions against a banker for refusing to pay a customer’s cheque when he has in his hands funds of the customers to meet it, actions for breach of promise of marriage, and actions like that in *Flureau v Thornhill* (1776) 2 W. BI. 1078, where the vendor of real estate, without any fault on his part, fails to make title. I know of none other.
>
> …
>
> In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action; *Thorpe v Thorpe*, (1832) 3 B. & Ad. 580. One of these consequences is, I think, this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.’ (emphasis added)
>
> This has long remained the foundation case identifying the jurisprudential rationale for the limits on such damages in a contract action, with the few exceptions to the general principles as identified by Lord Atkinson…”

Denham C.J. continued at para. 38: -

> “The law was further described in *Watts v Morrow* [1991] 1 WLR 1421 by Bingham L J: -
>
> > ‘A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the *very object of a contract* is to provide pleasure, relaxation, peace

of mind, or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead.' (emphasis added)"

40. In McDermott & McDermott, *Contract Law* (2nd edition, Bloomsbury Professional, 2017) at paras. 23.76 – 23.77, the theory behind the exclusionary rule was provided: -

> "Many factors explain the courts restrictive approach to non-pecuniary losses. The *Addis* decision reflects the individualist orientation of traditional contract law under which contracts are impersonal relationships, concerned primarily with economic exchange, and do not typically involve other elements of the parties' personalities. It also reflects an historical desire not to restrict unduly the ability of employers to dismiss employees and a mistrust of exemplary damages (which appeared to be what the plaintiff was seeking in *Addis*). In *Baltic Shipping v Dixon* [1993] 176 CLR 344, Mason CJ observed that: -
>
> > 'The conceptual policy foundations of the general rule are by no means clear. It seems to rest on the view that damages for breach of contract are in essence compensatory and that they are confined to the award of that sum of money which will put the injured party in the financial position the party would have been had the breach of contract not taken place.'
>
> Mason CJ held that the policy is based on an apprehension that the recovery of compensation for injured feelings will lead to inflated awards of damages in contract cases. Other reasons put forward include: -
>
> (i) It is too harsh on the defendant to have to pay damages for mental distress.
> (ii) Mental distress is incapable of exact proof.
> (iii) The risk of mental distress is voluntarily assumed by the plaintiff upon entering into the contract."

41. No stateable basis has been identified which would take any of the impugned aspects of the appellant's claim within any of the narrow exceptions to the principle in *Addis* which have evolved in the jurisprudence. Accordingly, those aspects of the claim are not maintainable and were correctly struck out by the High Court.

Conclusions

i. The allegations in the notice of appeal that the respondent and its legal advisors misled the High Court are demonstrably groundless and ought not to have been made. Such allegations were made without any reasonable or objective justification and I reject same in their entirety.

ii. The aspects of the appellant's claim which seek compensation for alleged damage to his reputation, loss of confidence, mental distress, depression and various articulations of same are not justiciable, require to be struck out and were correctly dealt with by the trial judge. The legal position was reviewed by the Supreme Court in *Murray v. Budds* where Denham C.J., upholding earlier common law authorities,

reaffirmed the position that in general as a matter of public policy a party who breaches a contract is not in law, subject to limited exceptions which do not arise in the instant case, liable for any mental distress, frustration, depression, anxiety, displeasure, annoyance, tension or aggravation which same may cause to the innocent party.

iii. A generalised claim based on alleged damage to the appellant's reputation is likewise not maintainable and was correctly struck out by the trial judge.

iv. In regard to the respondent's contention that the claim ought to be dismissed or struck out as being *Henderson v. Henderson* abuse of process, it is noteworthy that the litigation instituted by the appellant before the Circuit Court in 2006 arose procedurally from the prior service of a statutory Notice of Intention to Claim Relief and concerned the fixing of the terms of a new tenancy under Part II of the 1980 Landlord and Tenant (Amendment) Act, 1980. Order 51 Rule 2 (8) of the Circuit Court Rules (S.I. No. 510 of 2001) provides: -

> "Any application under the 1980 Act may be brought together with any other application or applications upon the same Civil Bill."

v. Whilst at least some such claims, insofar as they related to events said to have occurred prior to December 2006, might have been brought within the ambit of the 2006 Landlord & Tenant Civil Bill and were not, such an approach by the appellant was not unreasonable in the context of that litigation and the circumstances which obtained at the date of the institution of the said proceedings in 2006.

vi. I am not satisfied as a matter of law that any omission to pursue other claims arising in relation to alleged breaches of covenant including the covenant to repair and the covenant for quiet possession reaches the threshold of *Henderson v. Henderson* abuse of process properly understood. It would be "...excessive, unfair or disproportionate…" in the language of Cooke J. in *Vantive Holdings* to shut out the claims of the appellant for damages for breach of covenant to repair and breach of covenant for quiet enjoyment based on the *Henderson* doctrine in the circumstances of the case.

vii. The claims in damages for breaches of covenants – express and implied – arising prior to as well as after the grant of the written lease are not *res judicata* insofar as they relate to assertions of breach of covenant of quiet possession and breach of covenant to repair. Same were not the subject of adjudication in the prior litigation between the parties save and except as expressly provided for in the orders made by White J. in the High Court on Circuit referred to above.

viii. Whereas the High Court judge correctly noted in his judgment that "… the dispute between the parties about who was obliged to repair the premises and when that was to have been done has finally been determined by the Judgment and Order of White J…", the discrete issue regarding the claims for damages for breaches of

specified covenants remains appropriately before the High Court and fall to be determined.

ix. The appellant is not entitled to pursue any claim in these proceedings which has been the subject-matter of a final determination encompassed in the orders made on various dates by Mr. Justice White such as, for instance, where the said judge measured compensation for damage to certain of the appellant's equipment, fixtures and fittings which occurred during the carrying out of remedial works at the premises the subject matter of the demise, stating; "€7,500 for a replacement camera and €3,000 as an omnibus figure to allow for delay in the appellant accessing the premises and any ancillary expenses in activating the machinery which had been mothballed…"

x. The issue of the Statute of Limitations was raised by the respondent and is a specific ground relied on in their original notice of motion. The provisions of the Statute are generally a matter for pleading and can be raised by the respondent in their defence as they see fit.

xi. The appellant succeeds to a limited extent only in his appeal. He is entitled to pursue – in addition to the claim permitted by the High Court judge, namely "that he suffered direct economic loss as a consequence of the Defendant's alleged failure to maintain the premises…" – a claim for reliefs, including damages, for breach of express or implied covenants. This includes the covenant to repair. As Wylie, *Landlord & Tenant Law* (3rd edition, Bloomsbury Professional, 2014) at 14.11 notes such a claim "…may include loss of interest or loss of profits in the case of a business premises." As referred to above, White J. in his Circuit appeal judgment at para. 18 noted that the Court did: - ".. not have jurisdiction to consider the loss of income claim…" Further, the appellant is entitled to pursue his claim for damages for breach of covenant for quiet enjoyment of the premises. However, the appellant must confine these claims to the period prior to the date White J. determined that it was reasonable for him to go back into possession, the 7th January, 2015.

xii. I would direct that the appellant do deliver an amended statement of claim confining his claim to the specific grounds identified above in addition to the ground that he suffered direct economic loss as a consequence of the respondent's alleged failure to maintain the premises as was permitted by order of the High Court. The amended statement of claim should be served within 28 days of the perfecting of the order of this Court and should comply with the rules of the Superior Courts and not be unduly prolix.

I would dismiss all other grounds of appeal.