

Order 58, rule 18(1)

SUPREME COURT

Respondent's Notice

Supreme Court record number	S:AP:IE:2015:000026
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Record No. 2011/ 4336P

CIARA QUINN, COLETTE QUINN, BRENDA QUINN, AOIFE QUINN, SEAN QUINN JUNIOR AND PATRICIA QUINN	V	IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION) AND KIERAN WALLACE
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Date of filing	18 June 2015
Name of respondent	Kieran Wallace
Respondent's solicitors	William Fry for Kieran Wallace
Name of appellant	Ciara Quinn, Colette Quinn, Brenda Quinn, Aoife Quinn, Sean Quinn Junior and Patricia Quinn
Appellants' solicitors	CP Crowley & Company

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	Kieran Wallace
The respondent was served with the application for leave to appeal and notice of appeal on date	

4 June 2015

The respondent intends:	<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
	<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
	<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
	<input type="checkbox"/>	not to oppose the application for leave to appeal
	<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
	<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
	<input type="checkbox"/>	Other (<i>please specify</i>)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	<input checked="" type="checkbox"/>
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Respondent's Representation

Solicitor			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	

Email	
How would you prefer us to communicate with you?	<input type="checkbox"/> Document Exchange <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Post <input type="checkbox"/> Other (please specify)

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	

Postcode			
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If the Respondent is not legally represented please complete the following

Current postal address	
Telephone no:	
Email address:	
Fax no:	
How would you prefer us to communicate with you?	
<input type="checkbox"/> Document Exchange <input type="checkbox"/> Email	
<input type="checkbox"/> Post <input type="checkbox"/> Other (please specify)	

2. Respondent's reasons for opposing extension of time

N/A

3. Information about the decision that it is sought to appeal

Name of Judge	The Hon. Mr. Justice Haughton
Date of order/Judgment	Judgment delivered on 20 May 2015. Order perfected on 25 May 2015. <i>In the Appellants' Application for Leave and Notice of Appeal filed on 4 June 2015, the Appellants refer in Section 1 (Decision that it is sought to appeal) that they are appealing an ex tempore decision of Mr Justice Haughton delivered on 21 May 2015. The Second Respondent understands that this is an error as the body of the Notice of Appeal does not refer to that decision.</i>

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

1. The Second Respondent agrees with the Appellants that this appeal does not involve a matter of general public importance.
2. The Second Respondent contends that it is not necessary, in the interests of justice, that there be an appeal to the Supreme Court in the circumstances of this appeal.
 - a. This appeal arises from a procedural motion heard by the High Court, and concerns the question of whether or not the High Court should have granted the Appellants leave to amend their pleadings.
 - b. Regardless of the complexity or commercial importance of these proceedings to the parties, the subject matter of the appeal and the principles engaged are well established and relatively unremarkable.
 - c. The recent constitutional amendment that led to the establishment of the Court of Appeal mandates that appeals of this type should be made to and heard by the Court of Appeal.
 - d. In fact, the Appellants informed the Court that because of its desire to adhere to the Trial Date they had decided not to appeal the Order of the High Court, provided the First Respondent withdrew its application to have certain evidence excluded in advance of the trial. The First Respondent did withdraw the application on that basis and agreed to leave over the question of the exclusion of evidence to the trial. In so doing, the Appellants acknowledged that the justice of the case did not require that the Order of the High Court be reversed and this reinforces the Second Respondent's contention that the interests of justice does not now require that there be an appeal from this Order to the Supreme Court.
3. The Second Respondent does not accept the contention that this Court is in a transitional phase, or that the recent establishment of the Court of Appeal requires this Court to treat appeals brought at this time differently to appeals that may be brought in the future.
4. The Second Respondent similarly does not accept that this application can be considered

exceptional on any basis.

- a. The Appellants framed their proposed amendments on the basis that they were prompted or suggested by the Judgment of this Court on 27 March 2015.
- b. The Second Respondent accepts that a consideration of that Judgment is of central importance to the disposal of the amendment application. However, the Second Respondent does not accept that there is any basis for the contention that this Court suggested the proposed amendments.
- c. Moreover, the Second Respondent suggests that there is no basis for the contention that this Court should be called upon to grant leave to appeal simply because one of the proposed issues canvasses differing views about the meaning or parameters of a judgment of this Court.
- d. The judgment of this Court is a final and conclusive judgment, and there is no basis why the Judgment of this Court of 27 March 2015 falls to be considered in a different way to any other judgment delivered by this Court.
- e. If the Appellants were correct in suggesting that this Court should entertain an appeal on a routine procedural application simply because the appeal was likely to involve differing contentions about the scope of application of a previous judgment of this Court, it is readily apparent that such a basis could be offered in connection with almost any appeal.
- f. The proposition also engages practical questions, such as whether a court comprising the same five justices who were on the panel that delivered the Judgment of 27 March 2015 should hear this appeal. The Second Respondent suggests that by merely posing that question the practical difficulties inherent in the Appellants' contention become apparent.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Preliminary matters – issues arising from part 4 of the Appellants' notice seeking leave to appeal.

1. First, the Second Respondent does not consider it appropriate or necessary to rehearse in a detailed way the findings of this Court in its Judgment of 27 March 2015. However, the Second Respondent contends, that in describing the Judgment of this Court in section 4 of their Application Notice, the Appellants have sought to isolate a single paragraph of that Judgment with a view to asserting that this Court implicitly invited the application to amend. The Second Respondent contends that such a construction is not warranted on a proper consideration of the Judgment.
2. Second, the learned Judge did not find, as contended for by the Appellants, that the matters sought to be introduced by the Appellants constituted a real matter in controversy between the parties. To the contrary, at paragraph 31 of the judgment, the learned Judge stated that it was "*far from clear*" that the case that the Appellants now wish to make was a matter of real controversy at any time prior to the Judgment of this Court on 27 March 2015.
3. Third, the learned judge did not find that there would be no 'logistical prejudice' to the First Respondent if the application to amend was granted. Rather the learned Judge was satisfied that any such prejudice could be met by deferring the then trial date (3 June 2015) for a period of perhaps four weeks to allow the First Respondent to address the new issues. This was significant, the Second Respondent contends, because the Appellants had been steadfast in opposing any postponement of the trial date.
4. Fourth the Appellants have not drawn attention to the fact that these proceedings were admitted on their application to the Commercial list of the High Court in May 2011 and have been the subject of close case management since that time. In addition the case was provisionally listed for trial in April 2013, listed for trial on 14 April 2015, and again listed for trial on 3 June 2015. The Appellants never adverted to a need to include the new pleas at any time prior to the Judgment of this Court on 27 March 2015.
5. The matters at (2) and (3) above are of particular significance because it is well established that the questions of 'issues of real controversy between the parties' and 'logistical prejudice' are both important factors to be considered by a court faced with an application to amend.

Reasons for opposing the appeal if leave to appeal is granted.

1. The Specific grounds and Errors of Law contended for by the Appellants.

1. The learned Judge did not err in holding that the Plaintiffs' application to amend the Statement of Claim constituted an abuse of process pursuant to the principles established in the matter of *Henderson v. Henderson* (1843) 3 HARE 100. The Second Respondent will contend that where a discrete category of issues within a single set of proceedings has been determined conclusively and finally it is an abuse of process to seek to amend the proceedings to litigate matters that were or ought to have dealt with as part of the determination of those discrete issues.
2. The learned trial Judge did not err in principle in finding that the rule in *Henderson v. Henderson* applies where a preliminary issue is set down and decided in a case. The determination of a preliminary issue constitutes a final and conclusive determination of those issues, such that the party affected is not entitled to re-litigate the matter whether by amending their pleadings or commencing fresh proceedings.
3. The learned trial Judge did not err in not affording the Plaintiffs the benefit of the established

exceptions to the rule in *Henderson v. Henderson*. The learned judge was entitled to find and was correct to find that prior to the decision of the Judgment of this Court in this case the Appellants were in a position to decide whether or not to make the case that the impugned security was unenforceable even if the lending was enforceable. The First Respondent does not accept that the decision of this Court brought about any change in the law, as contended for by the Appellants.

4. In deciding not to permit the Plaintiffs to amend the Statement of Claim, the learned trial Judge gave sufficient weight to the principle of the public interest in the finality of litigation, i.e., that all potential claims as between the parties ought to be litigated in a single set of proceedings. The Second Respondent will contend that this ground of appeal is wrong and grounded in a mis-categorisation of what has occurred. A final and conclusive determination of a preliminary issue leads to finality in litigation, as that matter is no longer an issue in the existing proceedings and operates as a bar to further proceedings in relation to the same issues. This Court's Judgment was not one that involved "*creating new law*" and the Court did not find "*that the Plaintiffs could potentially maintain a particular case but not on the current pleadings*".
5. The learned Judge was entitled to find and correct to find that the Appellants had delayed before bringing their application to amend the Statement of Claim. In particular, the learned Judge was entitled to find and correct to find, in paragraph 35 of the judgment, that the possibility of making a case that the impugned securities were unenforceable even if the underlying lending was enforceable, was foreseeable from May 2012. The May 2012 date was identified by the learned Judge because it was the date when the First Respondent delivered its written legal submissions in the appeal that gave rise to the Judgment of this Court on the 27 March 2015. In those submissions, the First Respondent identified that the claims made by the Appellants in their pleadings did not encompass any 'stand alone' challenge to the enforceability of the securities that were impugned by them, and that their claims were made on the sole basis that if the lending supported by the securities was invalid by reason of illegality then the securities should be found invalid.
6. The learned Judge was entitled to find and correct to find that the Appellants had not given sufficient reasons for the delay in seeking to amend the Statement of Claim, and in particular in finding that the application could have been brought from May 2012.

II. *Legal Principles identified by the Appellants*

1. The primary issue in this appeal relates to the contention, accepted by the learned judge, that the application herein constituted an abuse of the process of the court. The second issue relates to the general application of the principles applicable to motions to amend pleadings.
2. Taking the second point first, the Second Respondent will contend that, as in any consideration of an application to amend pleadings, the principle legal test is that set out in Order 28 of the Rules of the Superior Courts 1986, as amended, as interpreted in the authorities. In that regard, the Second Respondent agrees that the case of *Croke v Waterford Crystal* [2005] 2 IR 383 is a central, albeit not the only, authority.
3. Considering the principles identified in the authorities, the Second Respondent contends that the issues raised in the proposed amendments have never been "real issues in controversy" between the parties.
4. In addition the Second Respondent will contend that the legal analysis of this application is influenced by the fact that in this case there has been significant and unexplained delay in bringing the application.
5. This factor, it is asserted, carries greater weight in the context of case managed litigation in the Commercial list of the High Court that is close to trial.
6. Finally the Second Respondent will contend that there is a question of logistical prejudice to

be addressed. The full extent of any such prejudice will not be apparent unless or until the proposed new claims have been the subject of detailed notices for particulars.

7. Turning to the question of abuse of process, a significant feature of the pleadings in this case was that the Appellants sought to claim that the impugned securities were invalid or unenforceable because the lending they supported had been given in breach of section 60 of the Companies Act 1963 and / or the Market Abuse Regulations (the "relevant legislation"). The Appellants' case at all time prior to the proposed amendments was that if the lending was unenforceable it followed that the securities likewise were unenforceable.
8. In December 2011, and with a view to reducing the complexity, in terms of fact and law, of the ultimate trial of the proceedings, the High Court fixed the trial of a preliminary issue. The purpose of the preliminary issue trial was to determine whether the Appellants herein had the standing or entitlement to rely upon the alleged or any breaches of the relevant legislation in aid of any of their claims for declarations of invalidity or unenforceability of the impugned securities. The High Court judgment on the preliminary issue was delivered in February 2012, and found against the Defendants. That decision was appealed and the Judgment of this Court was delivered on 27 March 2015. This Court determined that the Appellants did not have the standing or entitlement to rely upon the alleged breaches of the relevant legislation in aid of their claims for declarations of invalidity in respect of the impugned securities.
9. The abuse of process arises because the Appellants have sought to amend their pleadings in order to overcome the effects of the Judgment of this Court. That application at all times was strongly opposed by both Respondents. Furthermore the application to amend was the second such late application to amend; an earlier amendment on a different issue had been sought initially in February 2015.
10. The Second Respondent contends that in these proceedings the Judgment of this Court is final and conclusive in respect of the questions that were the subject of the preliminary trial. There is no question but those specific matters now are *res judicata*.
11. Furthermore, as a matter of legal principle the Second Respondent contends that at any point prior to the hearing of the appeal that led to the Judgment of this Court the Appellants could have sought to apply to amend their claims. By not taking that step, the Appellants permitted all issues concerning the enforceability of the impugned securities arising from any alleged statutory illegality to crystallise in the Judgment of this Court.
12. As such, the proposed amendments constituted an abuse of the process of the court by seeking to introduce matters that should have been introduced at an earlier stage of the proceedings and well in advance of the final determination of the preliminary issues. The Second Respondent in that regard relies, inter alia, on the cases of *Henderson v Henderson* (1843) 2 Hare 100; and *LSREF III Investments Limited v Morrissey*, and *Morrissey v IBRC & Ors* (unreported High Court, Costello J, 11 March 2015).
13. The Second Respondent contends that the Appellants' attempt to amend their pleadings at this stage is designed unequivocally to undermine and defeat the Judgment of this Court, and to subvert the very purpose of the trial of the preliminary issue. The Appellants were aware from at the latest May 2012, when the issue was raised in the Second Respondent's written submissions to this Court, that these potential new claims were not part of the pleaded case. No adequate explanation has been given for that delay.
14. Further, the Second Respondent will contend that the Judgment of this Court that the Appellants herein did not have the standing or entitlement to rely upon the alleged or any breaches of the relevant legislation in aid of their claims for declarations of invalidity or unenforceability of the impugned securities is now *res judicata* for the purposes of these proceedings and / or gives rise to an issue estoppel, such that the Appellants may not seek to agitate matters that are the subject of the proposed amendments.

6. Additional grounds on which decision should be affirmed

1. The proceedings herein are complex commercial proceedings that engage multiple issues of law and fact.
2. The proceedings herein were commenced on 16 May 2011, admitted into the Commercial List of the High Court on 30 May 2011, and have been the subject of close case management since that date. When this application was moved before the High Court, a trial date of 3 June 2015 had been fixed and was very imminent.
3. In these proceedings, the Appellants have challenged the validity and enforceability of six share charges and six guarantees given between 2003 and 2009 ("the impugned securities"). In addition, there are claims for damages under a number of headings, all of which are claimed to arise from the circumstances in which the impugned securities were obtained and enforced by the First Respondent.
4. A significant feature of the pleaded case was that the Appellants sought to claim that the impugned securities were invalid or unenforceable because the lending they supported had been given in breach of section 60 of the Companies Act 1963 and / or the Market Abuse Regulations (the "relevant legislation"). The Appellants at all times contended that if the lending was unenforceable it followed that the securities likewise were unenforceable.
5. In December 2011, and with a view to reducing the complexity, in terms of fact and law, of the ultimate trial of the proceedings, the High Court fixed the trial of a preliminary issue. The purpose of the preliminary issue trial was to determine whether the Appellants herein had the standing or entitlement to rely upon the alleged or any breaches of the relevant legislation in aid of any of their claims for declarations of invalidity or unenforceability of the impugned securities. The High Court judgment on the preliminary issue was delivered in February 2012, and found against the Defendants. That decision was appealed and the Judgment of this Court was delivered on 27 March 2015. This Court determined that the Appellants did not have the standing or entitlement to rely upon the alleged breaches of the relevant legislation in aid of their claims for declarations of invalidity in respect of the impugned securities.
6. The Appellants subsequently sought to amend their pleadings in order to overcome the effects of the Judgment of this Court on the trial of the preliminary issue. That application at all times was strongly opposed by both Respondents. Furthermore the application to amend was the second such late application to amend; an earlier amendment on a different issue had been sought initially in February 2015.
7. As set out above, the Second Respondent contends that in these proceedings the Judgment of this Court is final and conclusive in respect of the questions that were the subject of the preliminary trial. As such the proposed amendments constituted an abuse of the process of the court by seeking to introduce matters that should have been introduced at an earlier stage of the proceedings and well in advance of the final determination of the preliminary issues. The Second Respondent in that regard relies, inter alia, on the cases of *Henderson v Henderson* (1843) 2 Hare 100; and *LSREF III Investments Limited v Morrissey*, and *Morrissey v IBRC & Ors* (unreported High Court, Costello J, 11 March 2015).
8. The Second Respondent contends that the Appellants' attempt to amend their pleadings at this stage is designed to undermine and defeat the Judgment of this Court, and to subvert the very purpose of the trial of the preliminary issue. The Appellants were aware from at the latest May 2012, when the issue was raised in the First Respondent's written submissions to this

Court, that these potential new claims were not part of the pleaded case. No adequate explanation has been given for that delay.

9. Further, the Second Respondent will contend that the determination by this Court that the Appellants herein did not have the standing or entitlement to rely upon the alleged or any breaches of the relevant legislation in aid of their claims for declarations of invalidity or unenforceability of the impugned securities is now *res judicata* for the purposes of these proceedings and / or gives rise to an issue estoppel, such that the Appellants may not seek to agitate matters that are the subject of the proposed amendments.
10. Without prejudice to the foregoing, and separate to the abuse of process/*res judicata* issues that arise in connection with the amendment application, the Second Respondent will contend that the issues raised by the proposed new amendments are not intended to clarify existing pleas or to ensure that the real questions in controversy in the litigation are determined. Instead the Appellants seek to introduce new claims to avoid the implications of the determination by this Court of specific issues that were in controversy in the proceedings.
11. The Second Respondent draws the attention of this Court to the fact that after the Orders that are the subject of this Appeal were made and in order to induce the First Respondent to withdraw an application for directions that certain witness statements should be withdrawn in light of the Judgment of this Court, the Appellants expressly confirmed that they would not appeal the Orders that they now seek to appeal.
12. The Second Respondent will contend that whether or not that assurance to the High Court debars the Appellants from pursuing this Appeal, the concession demonstrates beyond any doubt that the Appellants were satisfied that the trial of the real issues in controversy in the litigation could proceed *without* the need for these amendments.
13. Finally and also without prejudice to the abuse of process arguments, the Second Respondent contends that the learned Judge was entitled to find and that this Court should find that, by reference to the established jurisprudence, the application to amend should be refused by reason of the combined effects of the logistical prejudice arising from such a late application to amend and the culpable and unexplained delay of the Appellants in making their application.

Are you asking the Supreme Court to:

Depart from (or distinguish) one of its own decisions?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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If Yes, please give details below:

Make a reference to the Court of Justice of the European Union?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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If Yes, please give details below:

Will you request a priority hearing?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
If Yes, please give reasons below:	
In the event that this Honourable Court grants the Appellants' application for leave to appeal, the Second Respondent respectfully requests that the substantive appeal is heard as soon as this Honourable Court can accommodate so as to ensure that the appeal is heard and any decision handed down in advance of the commencement of the trial, which is set for 12 January 2016.	

Please submit your completed form to:

The Supreme Court Office
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.

WF-12968162-2