

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

WILLIAM EDWARD ALEXANDER MORTON

Plaintiff

v

FIRST TRUST FINANCIAL SERVICES LIMITED

Defendant

WEATHERUP J

[1] The defendant applied to strike out the plaintiff's claim as frivolous, vexatious and an abuse of process or alternatively seeking determination of a preliminary issue, namely whether the plaintiff's claim should be dismissed as res judicata. Mr Singer appeared for the plaintiff and Mr Brian Fee QC for the defendant.

[2] The Statement of Claim sets out the plaintiff's claim as follows. The plaintiff was a client of the defendant bank and a Mr Curran was employed by the defendant as a financial planning manager. In 2006 the plaintiff was advised by Mr Curran as to the investment of some £300,000 in the Merchant Place Property Partnership 57. In order to induce the plaintiff to make that investment it is said that Mr Curran made a number of representations to the effect that the plaintiff would not lose his money, that the investment would grow 6-7% per year, that when it was sold after 5 years the plaintiff would earn about £25,000 on his investment and that Mr Curran had invested some of his own money in the investment. In November 2006 the plaintiff invested a further £100,000 in the James Lang La Salle German Property Partnership after similar representations had been made by Mr Curran and the term of that investment was 7 years rather than 5 years for the first investment. Both investments failed to make the return that the plaintiff claims was anticipated by Mr Curran's advice.

[3] The plaintiff's Statement of Claim alleges that the representations made by Mr Curran on behalf of the defendant were false and that Mr Curran made them knowing that they were false or that he was reckless as to their falsity. In the alternative the Statement of Claim alleges that the representations were made negligently.

[4] On 26 April 2012 the plaintiff brought a complaint to the Financial Ombudsman Service. The claim was upheld by the Adjudicator. The defendant sought a review of that determination by the Ombudsman and on 28 April 2014 the Ombudsman upheld the Adjudicator's decision and ordered the defendant to pay the plaintiff fair compensation up to the maximum permitted under the scheme of £150,000. The plaintiff then received the sum of £150,000 plus interest from the defendant and accepted that sum while confirming that the same was not in full and final settlement of his complaint against the defendant.

[5] On 17 April 2014 the plaintiff commenced the present proceedings. In these proceedings the plaintiff claims for loss and damage arising from the failure of the investments and he particularises that loss by applying various indices to his investment of £400,000 and making due allowance for the amount received from the defendant on foot of the Ombudsman's award he claims the balance which amounts to some £440,000.

[6] The defendant's grounding affidavit sworn by Michelle Emerson, a solicitor employed by the defendant, at paragraph 9 summarises the defendant's position -

“Having regard to the terms of the Plaintiff's complaint of 28 April 2012 and the terms of his Statement of Claim, I believe that the cause of action asserted in this action is substantially the same as the factual circumstances which formed the basis of the Plaintiff's complaint to the Defendant which was, in turn, referred to the Financial Ombudsman's Service. I therefore believe that the Plaintiff's acceptance of the Ombudsman's Determination renders this claim *res judicata*.”

[7] The issue of *res judicata* in relation to decisions of the Financial Services Ombudsman has been considered by the Court of Appeal in England and Wales in Clark and Another v In Focus Asset Management & Tax Solutions [2014] EWCA Civ 118. Arden LJ referred to the Financial Services' Markets Act 2000 which set up the Financial Ombudsman Service as the dispute resolution service for customers who had disputes with providers of regulated financial services. It was noted that nothing was said in the legislation about consumers taking legal proceedings after they had accepted an award made under the statutory scheme. The conclusion of the Court of Appeal was that acceptance of an award would preclude a complainant from starting legal proceedings to pursue complaints which the Ombudsman had decided. The common law doctrine of *res judicata* applied.

[8] The approach adopted by the court was as follows.

Res judicata principally means that a court or tribunal had already adjudicated on the matter, which precluded a party from bringing another set of proceedings. The doctrine was also stated to cover abuse by a litigant of the court's process by bringing a second set of proceedings to pursue new claims which the claimant ought to have brought in the first set of proceedings (*the rule in Henderson v Henderson* (1843) 3 Hare 130, 67 ER 313) (para 6)).

Res judicata may apply either because an issue has already been decided or because a cause of action has already been decided. The case was concerned with res judicata of the latter kind, known as cause of action estoppel (para 7).

Two issues had been argued. One was whether the decision of the Ombudsman was a decision of a judicial body for the purposes of the res judicata doctrine. The other was whether, and if so under what conditions, complaints to the Ombudsman and causes of action relied on in subsequent proceedings are the same (para 51).

The Court must focus on the substance of what occurred before the Ombudsman and what is involved in the new proceedings. Importantly the burden of proof is on the adviser (para 52).

It is sufficient that the Ombudsman decides whether the facts underlying a cause of action give rise to any claim as between the complainant and the adviser and whether the claimant has any remedy against the adviser relative to those facts. The fact that the remedy is not the same as would be awarded in a court of law is not a requirement of res judicata (para 77).

There will be occasions when a complainant may bring court proceedings against an adviser even though he has accepted an award to which section 228(5) applies. Whether that can happen depends on whether the substance of the proceedings asserted before the courts is the same as that before the Ombudsman's Service. Fresh proceedings are not permitted if based on the same cause of action so a complainant cannot use proceedings to top up his award for that wrong. The burden of showing that the requirements for res judicata are made out on the facts of the two sets of proceedings will fall on the adviser (para 89).

[9] The present plaintiff contends that the claim in these proceedings is not in substance the same as that referred to the Financial Ombudsman. The claim in these proceedings includes the alleged fraud of the defendant and that was not a matter that was before the Financial Ombudsman.

[10] It is necessary to examine the nature of the complaint that was made to the Ombudsman's Service. By a letter of 26 April 2012 the plaintiff stated his complaint to the Ombudsman's Service as follows -

".... I have become seriously concerned with two property investment products sold to me by your bank.
[The adviser told me] I would not lose my money ... he had personally invested £50,000 of his own money ... I would have to be classed and vetted as a sophisticated investor.
I would now like the bank to explain to me why they invested my money in a highly geared risky investment and on what basis the bank classed me as a sophisticated investor."

[11] The defendant replied on 10 December 2012 -

"Due to your commercial property experience, accumulated wealth and demonstrable business acumen you were considered a sophisticated investor
Your attitude to risk for the investment was noted as 9 to 10 - Very Speculative, on a scale of 1 - 10.
Risk warnings detailed in the Personal Financial Report and the Information Memorandum highlighted that the investment should be viewed as high risk...."

[12] The plaintiff lodged a complaint form on 13 November 2012 which summarised the complaint as "Customer feels he was mis-sold the investment of £400,000 into property partnership investments. Customer feels he was mis-sold the investment based on his level of risk and understanding of the products."

[13] The Adjudicator issued his decision on 5 November 2013 and stated -

"My understanding is that this complaint relates to the advice provided to Mr Morton
Mr Morton has said he was incorrectly classified as a 'sophisticated investor' and that due to the high risk of those investment vehicles, they were unsuitable for him.

....my recommendation is that the complaint is upheld.
My reasons for this are given below.

It not clear precisely what steps were taken to establish what level of risk Mr Morton was prepared to take with this part of his capital.

[His businesses] were not property purchased on a speculative basis so I am not persuaded that that is his own business. I am not persuaded that this necessarily makes him a 'Sophisticated Investor'. Mr Morton's businesses were not investment or finance related and any investments he held were managed by investment professionals.

It is my opinion that the investment advice from the firm exposed Mr Morton to inappropriate risk and is responsible for the consequences suffered in this case.

[The investments] were mis-sold to him."

[14] The Ombudsman issued his decision on 28 April 2014. He stated that the complaint should be upheld for substantially the same reasons as the Adjudicator. He awarded the maximum compensation of £150,000.

[15] Thus the plaintiff contends that the complaint to the Ombudsman's Service was not in substance the same as these proceedings because of the new ingredient now added, namely the fraud of the defendant alleged in the Statement of Claim. Is the allegation of fraud of such a nature as to change the substance of the proceedings? Paragon Finance PLC v DB Thakerar & Co [1999] 1 All ER 400 concerned a series of mortgage frauds in relation to the purchase of flats. The plaintiff was the lender and the defendants were the solicitors who acted for the plaintiff as well as the borrowers. On completion of the transactions each of the borrowers made immediate default. The plaintiff recovered possession but when they realised their security by resale of the properties they incurred substantial losses which they claimed from the defendant by reason of breaches of contract and duty of care and fiduciary duty. The plaintiff alleged negligence but not dishonesty or intentional wrongdoing. However at a later date the plaintiff applied for leave to amend their pleadings to add fraud and conspiracy to defraud and fraudulent breach of trust and intentional breach of statutory duty. By that stage the limitation period of 6 years had elapsed. Under the Limitation Act the court could not allow an amendment after the expiry of the relevant limitation period unless the new cause of action arose out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

[16] In the judgment of the court it was said to be incontrovertible that an amendment to make a new allegation of intentional wrongdoing by pleading fraud, conspiracy to defraud, fraudulent breach of trust or intentional breach of fiduciary duty, where previously no intentional wrongdoing had been alleged, constitutes the introduction of a new cause of action.

[17] The next stage for the Court in Paragon Finance was whether the new cause of action arose out of the same or substantially the same facts as the cause of action already pleaded. It was stated that it would be contrary to common sense to hold that a claim based on allegations of negligence and incompetence on the part of a

solicitor involved substantially the same facts as the claim based on allegations of fraud and dishonesty. The Court refused leave to introduce the amendment to plead fraud. Millett LJ concluded –

“In all our jurisprudence there is no sharper dividing line than that which separates cases of fraud and dishonesty from cases of negligence and incompetence.”

[18] The issue in the present case is whether the matters relied on in the Statement of Claim are in substance the same as those that were before the Ombudsman. In relation to the allegation of fraud I am satisfied that the claim is not in substance the same. The issues of dishonesty and intentional wrongdoing were not before the Ombudsman.

[19] In relation to the allegations of negligence, I am satisfied that the claim is in substance the same as that before the Ombudsman. The incompetent advice offered to the plaintiff is the substance of the complaint to the Ombudsman and of the allegation of negligence in the Statement of Claim.

[20] The additional aspect of res judicata is abuse of process under *the rule in Henderson v Henderson* where a claim ought to have been included in an earlier claim. In Clark and Another v In Focus Asset Management & Tax Solutions it was stated that under this rule fresh proceedings are not automatically precluded and the court has to reach a broad merits based judgment as to whether the court proceedings were an abuse of process and in that regard different factors might arise (para 90). *The rule in Henderson v Henderson* did not arise in Clark.

[21] In relation to whether the claim for fraud ought to have been raised in the earlier proceedings so as to give rise to abuse of process under *the rule in Henderson v Henderson* I have concluded that it would require a fuller examination of the nature and context and character of the complaint made to the Ombudsman and the nature and context and character of the complaint made in these proceedings in order to conclude that the failure to raise the issue in the earlier proceedings amounts to abuse of process. I do not propose to conduct such an exercise on paper. Accordingly I refuse to strike out the plaintiff’s claim based in fraud.

[22] I have found that the claim in negligence is substantially the same as that raised before the Ombudsman and is thus res judicata. If I am wrong in that conclusion the claim in negligence falls to be considered as an abuse of process under *the rule in Henderson v Henderson*. In that regard I am satisfied that the matters constituting the claim in negligence ought to have been raised before the Ombudsman and the allegations concerning the cause of action in negligence will be struck out as an abuse of process.

[23] The Statement of Claim will require amendment to remove the cause of action in negligence. The claim in fraud will remain in place. The plaintiff has 14 days to amend the Statement of Claim.