APPROVED **[2024] IEHC 1**

THE HIGH COURT

Record No.: 2023/5016 P

BETWEEN:

FIRST MODULAR GAS SYSTEMS LIMITED

Plaintiff

-and-

CITIBANK EUROPE PLC, BOSAI ENERGY TECHNOLOGY CORPORATION and ACCESS BANK PLC

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 12 January 2024

Introduction

1. In this application, the Plaintiff ("**First Modular**") seeks an injunction to prevent payment of US$1,650,000 to the second Defendant ("**Bosai**") on foot of a letter of credit issued by the third Defendant in February 2022 with the first Defendant as the confirming Bank. Briefly, First Modular, a Nigerian company, entered a contract with a third party, Ennovate Consultants Incorporated ("**Ennovate**"), a Canadian company, for the supply and installation of a gas plant in Nigeria. Bosai, a Chinese company, was subcontracted by Ennovate to supply the gas plant. First Modular provided a letter of credit ("**the Letter of Credit**") in favour of the second Defendant, pursuant to which the first Defendant

("**Citibank**") and the third Defendant ("**Access**") were obliged to pay sums claimed by Bosai upon the satisfaction by Bosai of the terms of the Letter of Credit. Access and Citibank were persuaded that Bosai had satisfied those terms when Bosai presented the required documentation to establish that it had shipped the goods required to Nigeria. The documentation included a bill of lading from Astline International Transport Co. Ltd ("**Astline**"). First Modular alleges that the claim for payment by Bosai is a sham and that Bosai did not dispatch the goods required at all. Inherent in that claim is an allegation that some or all of the documentation relied on by Bosai is not genuine.

2. This is the second application in which First Modular has sought almost identical relief against these Defendants. On 5 September 2023, I delivered judgment ("**the first judgment**") in proceedings in which First Modular sought an injunction in aid of a Nigerian arbitration preventing payment out on foot of the Letter of Credit ("**the first application**"). The respondents to that application were the Defendants in these proceedings together with the respondent to the Nigerian arbitration, Ennovate. In the first judgment (*First Modular v Citibank and Ors* [2023] IEHC 514), I dismissed the application for the injunction on two grounds. Firstly, I was not satisfied that I had any jurisdiction to make the order sought in circumstances where the parties to be restrained were not parties to the arbitration in Nigeria or to any arbitration agreement pursuant to which they could be joined to the arbitration. Secondly, I was not satisfied that the very high threshold to restrain payment on foot of a letter of credit – a seriously arguable case that the only reasonable inference that the claim for payment on foot of the letter of credit was fraudulent – had been met.

3. First Modular's response to the first judgment was threefold. Firstly, it commissioned Chinese lawyers to carry out further investigations in China in relation to Bosai's claim that it had shipped the goods. Secondly, and on foot of information provided by the Chinese lawyers, it made an application that I revisit the first judgment delivered in September 2023. And thirdly, also in reliance on the information from the Chinese lawyers, it issued the within proceedings.

4. Before this application and the application to re-open the first judgment came on for hearing, a ruling was given in the Nigerian arbitration in which the arbitrators refused to join Bosai to that arbitration. In those circumstances, First Modular decided not to proceed with its application to re-open the judgment, but continued with its application for an

injunction in these plenary proceedings which, it argued, were independent of the Nigerian arbitration and therefore not subject to the same jurisdictional obstacles.

5. In light of the procedural history, it is unsurprising that the first and second Defendants (as with the first application, Access has not been represented) have raised a number of procedural objections to First Modular's application, which they contend amounts to an abuse of process. In particular, they both argue that the application should be dismissed as contravening the rule in *Henderson v Henderson*.

6. Counsel for First Modular fairly acknowledges that it is necessary to satisfy the Court that First Modular should not be debarred from relief by virtue of the rule in *Henderson v Henderson, i.e.* on the grounds that this application is an abuse of process. However, as he correctly points out, that issue doesn't arise for consideration unless he satisfied the court that he has met the threshold for the injunction sought.

7. First Modular argues that the correct approach for the court to take to this application is first to ask whether there is "*material before the court that is credible and has the potential to be of real significance to the potential outcome of the proceedings*." If so, the court should then ask why the material was not before the court at the first hearing and to what extent is the Plaintiff responsible for that being so. The Defendants do not seriously dispute that that is the proper approach but contend that in circumstances where no explanation or justification is offered by the Plaintiff for having failed to bring forward the evidence it now relies on before judgment was delivered, the Plaintiff should be debarred from the relief sought.

The first judgment

8. At paragraph 63 of the first judgment, I identified the very high threshold which had to be met to restrain payment on foot of a letter of credit, by reference to the decision of the High Court (Butler J) in **Construgomes and Anor v Dragados Ireland Ltd and Ors [2021] IEHC 79**:

"Having regard to the nature of letters of credit, the Courts have made clear that the circumstances in which a Court may intervene to restrain payment on foot of such a bond are limited. In ***Construgomes****, Butler J, having examined the relevant authorities, made clear that the only ground upon which an injunction could be granted was in the case of fraud:*

> ″27. It seems to me, on the basis of this case law that the legal test applicable to the granting of an injunction to restrain payment on foot of a letter of credit or on demand bond is well settled in Irish law. The initial criteria normally applicable to an interlocutory injunction, namely, whether there is a fair question to be tried, is not the appropriate test as that would undoubtedly lead to the grant of an injunction in many instances in circumstances which would undermine the fundamental character of the bond which has been freely entered into between the parties as part of the terms of the contract between them. Instead, a higher test of "seriously arguable" applies. The courts have also expanded upon what is meant by "seriously arguable" and the judgments both in this jurisdiction and in the neighbouring jurisdiction have made it clear that in the particular context this is actually a very high threshold. As the only ground upon which such an injunction might be granted has been identified as fraud, the case law indicates that the fraud relied on must be clear, obvious or established.″"

9. The conclusions on the question of whether the threshold for an injunction had been met in the earlier application are set out at paragraphs 76 to 88 of the first judgment. As appears therefrom, I concluded that First Modular had not identified anything within its engagement with Bosai, other than in relation to the claim for payment on foot of the Letter of Credit, which would suggest that Bosai is the type of company which would engage in the type of fraudulent behaviour alleged. Although not stated in express terms in the earlier judgment, I identified that it was First Modular rather than Bosai which seemed to be trying to avoid its contractual obligations.

10. Perhaps the key conclusion in the earlier judgment is at paragraph 87:

"Although First Modular avers that it has not located the goods and there is documentary evidence – the correspondence from DHL and the Nigerian Customs

Service – which could be consistent with the alleged fraud, it does not seem to me that the only reasonable inference which can be drawn is that Bosai made a claim on foot of the Letter of Credit without sending any goods at all. There is nothing in the history of its conduct with First Modular which would suggest the likelihood of so audacious a fraud, nor is it consistent with making a claim in respect of goods not listed in the list of accessories in the Pro Forma Invoice: if nothing is being sent at all, and the Bill of Lading is only a pretence, why create an unnecessary obstacle by 'pretending' to send anything other than goods which precisely correspond with the Pro Forma Invoice? There are potentially innocent explanations for the failed delivery of the CNG cylinders. It is not necessary to speculate on what those might be, but one obvious possible explanation is that the goods were mistakenly unloaded somewhere other than Apapa Port. In light of the controversy on affidavit and the clear averments on behalf of Bosai, fully supported by Ennovate, as Laffoy J put the matter in **Fraser v Great Gas Petroleum (Ireland) Ltd** ***[2012] IEHC 523****, "*it is not possible to infer that [the Respondents] could not honestly believe at this point in time in the validity [of the] demand.*" To conclude otherwise would require me to reject the sworn evidence of Mr He, and also that of Mr Saleh, as lies. That would be wholly inappropriate on an interlocutory application conducted on affidavit only."*

The additional evidence

11. Judgment was delivered in the first proceedings on 5 September 2023. The additional evidence sought to be relied on by First Modular is a report dated 20 September 2023 from a Chinese law firm, Goodwell Law Firm Shanghai ("**the Goodwell Report**" or "**the Report**"). As appears from the Goodwell Report, it was commissioned by lawyers for First Modular on 8 September 2023, and Goodwell accepted the instruction on 12 September 2023. I will return to the issue of timing below. The Report details investigations said to have been carried out by a lawyer in Goodwell into the authenticity of the bill of lading relied on by Bosai when claiming payment on foot of the Letter of Credit.

12. The investigation process followed by the Chinese lawyer is set out at pages 5 to 8 of the Goodwell Report. The Report discusses conversations with a person described as the "person in charge" of Astline, and the apparent confirmation by her that Astline had not issued the bill of lading in question and that Astline doesn't ship goods to Nigeria, but rather,

only to Japan. Enquiries were also made of the owners of the ship, Pacific International Lines ("**PIL**"), upon which the goods were allegedly transported. The Report states that these enquiries indicate that the bill of lading is not found on PIL's (publicly available) website and that the container numbers on the Bill did not correspond to container numbers owned by PIL.

13. The results of the investigation are summarised at page 9 of the Report. It concludes:

> *"1. The Bill of lading (No.ASTL1968081) is not issued by ASTLINE, so it is impossible to verify whether the goods information recorded on the bill of lading is true. At the same time, through the investigation with PIL Company, the goods information could not be found in their system.*
>
> *2. As we did not obtain the custom declaration forms of the goods recorded on the Bill of lading (No.ASTL1968081) from First Modular and First Modular claimed that BOSAI ENERGY TECHNOLOGY CORPORATION did not provide the custom declaration form to the First Modular and the bank, so we cannot verify whether the cargos recorded on the bill of lading have actually been declared in custom and shipped from the Qingdao, China through the investigation with Chinese custom."*

Abuse of Process

14. Citibank contends that this application should be dismissed on the grounds that the issues forming the subject matter of this application are plainly *res judicata* or, in the alternative are an abuse of process on *Henderson v Henderson* grounds. Bosai's procedural objection emphasises the *Henderson v Henderson* ground.

15. First Modular refers to the decision in **Moffitt v ACC [2008 1 ILRM 416** to address the difference between the two doctrines, and in particular, the observation of Clarke J (as he then was) that:

> *"It is well settled that in order for a plea of res judicata to succeed, the judgment upon which it is founded must be a final and conclusive judgment on the merits."* (at p. 422)

16. In this regard, it is of some significance that the first judgment was a judgment on an interlocutory application. On First Modular's analysis, therefore, the doctrine of *res judicata* simply doesn't arise in this application. However, Citibank relies on the decision of the High Court (Butler J) in **Scanlan v Gilligan [2021] IEHC 825** to the effect that an interlocutory judgment *may* be regarded as having finally determined matters in some circumstances. Butler J referred to the decision of the Supreme Court (MacMenamin J) in **Ennis v AIB [2021] IESC 12:**

> *"Crucially, MacMenamin J. states at para. 22 of his judgment:-*
>
> > "An interlocutory order will, generally, not have the quality of finality sufficient to give rise to a plea of res judicata. It may, however, have that effect if it was intended finally to determine rights between the parties."
>
> *In my view,* Ennis v. AIB *is not an authority for the proposition that interlocutory judgments will never be regarded as having finally determined certain issues as between the parties. If the interlocutory judgment is intended to determine an issue which will not thereafter be revisited at the substantive hearing then it will have the quality of finality sufficient to give rise to a plea of res judicata. Whether in fact an interlocutory order has done so will depend on the intent of order itself and on the particular context in which it was given."*

17. Citibank contends that the first judgment finally determined the jurisdictional question – whether an injunction could be granted in aid of the Nigerian arbitration – and that since relief was refused on that ground, the judgment must be treated as a final and conclusive judgment on the merits. Although I accept that the decision *on the jurisdictional issue* could properly be regarded as a final rather than an interlocutory decision, it seems to me that **Scanlan v Gilligan** suggests that a more nuanced analysis is required. The question is not whether the judgment is a final judgment but rather whether any particular issue decided in the judgment has been finally determined. The fact, therefore, that a jurisdictional question has been finally determined in interlocutory proceedings does not mean that all issues decided must be regarded as having been finally determined. That is so notwithstanding that the resolution of a jurisdictional question might have the effect of concluding the proceedings.

18. I do not think that my conclusion in the first judgment that the threshold for restraining payment on foot of the letter of credit had not been met could be regarded as a final and conclusive judgment on the merits of the Plaintiff's claim that the demand for payment was based on a fraud. Nor could it be elevated to a final determination on that issue by the separate conclusion that this court had no jurisdiction to grant the relief sought. Looked at another way, the conclusion on the jurisdictional issue was determinative of the first application. The conclusion on whether the evidential burden had been met was not necessary to dispose of the injunction application and ought not, therefore, be regarded as something which was conclusively determined in those proceedings.

19. The Plaintiff does not seek to re-agitate the conclusion in the first judgment on the jurisdictional issue, only the question of whether – in light of the additional evidence – the evidential burden has been met. Accordingly, in my view, the doctrine of *res judicata* is not engaged in this instance.

20. However, as the Plaintiff acknowledges, the rule in *Henderson v Henderson* encompasses broader considerations. It refers again to the decision in **Moffitt**:

> *"3.7 A second, and analogous, issue arises in relation to the so called rule in Henderson v. Henderson (1843) 3 Hare 100. This rule is concerned with a similar, although different, situation than that to which the doctrine of res judicata strictly speaking applies. Res judicata per se applies where the matter sought to be litigated has already been decided by a court of competent jurisdiction. Res judicata can relate to the cause of action (which may involve a consideration of whether two separate causes of action arise) or an individual issue (issue estoppel). In the latter case the issue sought to be litigated must be identical to the issue decided in the previous proceedings. (See for example Royal Bank of Ireland v. O'Rourke (1962) I.R. 159). The rule in Henderson v. Henderson, on the other hand, applies where a new issue is raised which was not, therefore, decided in the previous proceedings but is one which the court determines could and should have been brought forward in the previous proceedings."*

21. The Plaintiff also highlights, per **Moffitt**, that a court has wider discretion when considering a plea based on the rule in *Henderson v Henderson* than in relation to a plea of *res judicata* to *"consider what the result should be having regard to the competing interests of justice."*

22. On the day following the hearing of this application, the Supreme Court delivered judgment in **Munnelly v Hassett and Ors [2023] IESC 29,** in which the court (O'Donnell CJ) considered the applicable principles when applying the rule in *Henderson v Henderson*. The parties in this case brought that decision to the court's attention but did not seek to make any further submissions in relation to it. The Chief Justice referred to the decision in **AA v Medical Council [2003] IESC 70, [2003] 4 IR 302** as the "*most authoritative statement of the principle in Irish law*", emphasising the passages in that judgment which made clear that the rule was a flexible one which should not be applied in a dogmatic way. He also referred with approval to the formulation of the test proposed by McDonald J in a recent High Court decision:

> *"A useful statement of the rule is contained in the judgment of McDonald J. in the High Court, in* George and George v. AVA Trade (EU) Ltd. *[2019] IEHC 187. At paragraph 152 of the judgment, he suggested that:-*
>
> > "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:- (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".
>
> *In the course of submissions, this approach has been usefully described as a "could and should" test: could the issue have been raised in the earlier proceedings, and if so, should it have been so raised? If so, is there any reason why this second set of proceedings raising the issue should not be dismissed?*

23. Strictly speaking, First Modular has not sought to advance a new issue in these proceedings. Rather, it has sought to re-visit the same issue but by reference to new material. I note that in **Re McInerney Homes Limited [2011] IEHC 25**, Clarke J (as he then was) did not distinguish between the advancing of a new argument and the advancing of an argument based on new evidence when discussing *Henderson v Henderson* (see paragraph 3.11). Bosai, in its submissions, refers by analogy to the rules concerning the introduction of fresh evidence on appeal. It refers to the three-limb test set out by Finlay CJ in **Murphy v Minister for Defence [1991] 2 IR 161**:

> "*1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;*
>
> *2. The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;*
>
> *3. The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."*

24. The 'could and should' test proposed by McDonald J in **George v AVA Trade** and endorsed by the Supreme Court in **Munnelly** focuses on whether the new argument or evidence to be relied on could and should have been before the court in the earlier hearing. This is reflected in the first limb of the test in **Murphy v Minister for Defence**. That test, addressed as it is to the admissibility of new evidence, also emphasises that the significance and strength of the evidence are factors to which regard should be had. Having regard to the flexibility required in the application of the Rule in *Henderson v Henderson*, these are matters which can be considered in determining whether a party should be permitted to advance a second claim based on material which could and should have been put before the court in an earlier claim, having regard to "*the competing interests of justice*".

25. Counsel for First Modular fairly admits that the new evidence could have been obtained earlier and does not offer any explanation for his client's failure so to do. The speed with which it was sought and then obtained would make it impossible for him to argue otherwise. He relies entirely on the significance of the new evidence and, in particular, what he says is the clear evidence of fraud to answer the Defendants' objection that this application is an

abuse of process. The flexibility of the rule in *Henderson v Henderson* means that the justice of the case might necessitate that decisive new evidence be admitted notwithstanding that it could and should have been brought forward in an earlier application. However, where the new evidence would not, in any event, alter the outcome of the earlier application, no consideration of the interests of justice arises. In the circumstances, it is convenient first to consider the significance and strength of the new evidence before, if necessary, considering whether, notwithstanding First Modular's effective admission that it does not satisfy the 'could and should' test, it should nonetheless be entitled to pursue this second application for injunctive relief to restrain payment on the Letter of Credit.

Assessment

26. First Modular argues that the Goodwell Report provides evidence of a clear and obvious fraud sufficient to justify an order restraining payment on foot of the Letter of Credit. Counsel for First Modular highlights that the findings of the Report now corroborate the claim made by it in the first proceedings. He also relies on the failure of Bosai to provide any convincing reply to the findings in the Report.

27. The Defendants, and in particular Bosai, argue that the Goodwell Report adds little to what was before the court in the first proceedings and falls far short of the requirement to show a clear and obvious fraud. Bosai argues that the Report is not even admissible evidence in circumstances where the Report itself is clearly hearsay – it is not verified by an affidavit from the author – and is, in turn, based on hearsay since it largely reports what was said to the author by the third parties.

28. In the replying affidavit of James Jianjun He, for Bosai, he again emphatically denies any allegation of fraud. He again avers that his procurement manager witnessed the goods being loaded onto trailers at the factory of the company Bosai contracted to supply the goods, Jichai Limited ("**Jichai**"), for transport to the port. Of course, as in the first application, this is also hearsay evidence. He avers that Jichai will not provide any further assistance to Bosai because Bosai owes them money due to the delay in payment under the Letter of Credit and that the shipping company will not deal with Bosai in circumstances where they were contracted by Jichai.

29. Each side has criticised the other for having provided slightly different versions of events than those provided in the first application.

30. As this is an interlocutory application, the parties are entitled to rely on hearsay evidence. As noted by Irvine J (as she then was) in **Taite v Beades [2019] IESC 92**, this is expressly provided for in Order 40 of the Rules of the Superior Courts. However, a court may attach less weight to hearsay evidence to reflect the indirect nature of that evidence.

31. There are a number of reasons why significantly less weight should attach to the new evidence relied on by First Modular in this application to reflect the fact that it is clearly hearsay. Firstly, there is the fact that no explanation is provided for the reliance on hearsay evidence. The Report was finalised three weeks before the new proceedings were commenced. A further six weeks elapsed before the injunction application was heard. There were, therefore, no considerations of urgency which would explain why reliance was placed on hearsay evidence at that hearing and no explanation for the failure to have the author of the Report swear an affidavit verifying the Report was offered.

32. Secondly, not only is the Report hearsay evidence, in its own terms it relies to a significant extent on hearsay evidence, *i.e.* what the author was told by third parties in various telephone calls he made. It may even be that those third parties were themselves relying on hearsay. One of the calls relied on by the author of the Report was to a customer services representative from PIL; it is not clear that this customer services representative purported to provide information on matters within her own knowledge.

33. Thirdly, there is the timing of the Report. I simply cannot ignore that at the time the Report was commissioned the Plaintiff had the benefit of the first judgment, which set out the basis upon which relief was refused in the first application. The Plaintiff's affidavits fail to acknowledge that the Report was commissioned to address the findings in that judgment – the affidavits are regrettably silent on that point – but, having regard to the timing, the commissioning of the Report can only be understood as a response to the first judgment. Leaving aside for present purposes whether it is permissible to pursue a second application for the same relief at all, where First Modular had, in effect, been given a roadmap to the proofs necessary to secure that relief, the failure to secure the best or direct evidence of those proofs undermines to a material degree the reliance which can be placed on this hearsay evidence.

34. Fourthly, the conclusions of the Report are somewhat equivocal. Although Bosai places some reliance on this aspect of the Report and, in particular, the fact that the Report only concludes that shipment of the cargo could not be "verified", in truth, the findings of the Report are, on their face, more damning than that conclusion might suggest. At the very least, the authenticity of the bill of lading relied on by Bosai is clearly impugned.

35. Taking all these considerations together, it is appropriate to afford some weight to the evidence contained in the Report while remaining mindful of the limitations of that evidence.

36. In addition to relying on the new evidence, First Modular places some emphasis on the failure of Bosai to comprehensively refute the allegation of fraud. There is some force in the contention that Bosai's failure to put documentary evidence before the court to support the averments in Mr He's affidavit tends to support First Modular's allegation of fraud. It is surprising, though not inconceivable, that Jichai would not provide assistance if such assistance might ultimately enable Bosai to pay money that it claims to owe to Jichai. More difficult to explain is why Bosai would not be in a position to provide further evidence of the transactions it claims to have engaged in – payments to contractors and its agreement with Jichai – without needing Jichai's assistance at all.

37. On the evidence available, the possibility of fraud certainly could not be ruled out and may well be established at trial. The evidence contained in the Goodwell Report, whatever its limitations, clearly suggests that there was something amiss with some of the documentation relied on by Bosai for the purpose of securing payment on foot of the Letter of Credit, which could readily, as First Modular contends, be explained by fraudulent conduct on Bosai's part. While protesting its innocence, Bosai could have done more to establish that there was no such fraud on its part.

38. However, the test for an injunction to restrain payment on foot of a letter of credit is not met by showing that there is a reasonable basis for suspecting fraud. Rather, as stated in **Construgomes**, the fraud relied on must be "clear, obvious or established". I concluded that First Modular had failed to show a clear, obvious or established fraud in the first judgment, and I am not persuaded that the additional evidence now relied on is sufficient to reverse that conclusion. First Modular was prepared to provide a Letter of Credit to the benefit of

Bosai, necessarily placing some trust in Bosai's ability to meet its contractual obligations. It did not identify anything in the conduct of Bosai prior to Bosai's claim on the Letter of Credit which suggested that Bosai had failed to meet those obligations. It was First Modular, not Bosai, who sought to avoid the agreement for the supply of the gas plant and its obligations under the Letter of Credit. Bosai has repeatedly averred that it has not acted fraudulently and that it arranged the supply and shipment of the gas plant equipment required by First Modular. Ennovate and Citibank supported Bosai in the rejection of First Modular's allegations in the first application, and Citibank has continued to do so in these proceedings, to which Ennovate is not a party.

39. The evidence adduced by First Modular does give rise to a concern that there may have been fraudulent conduct by some party in and about the supply of the gas plant equipment, and there is, in my view, undoubtedly a case for Bosai to answer. However, the case law is clear. Having regard to the nature of a letter of credit, only a clear, obvious or established fraud would justify an injunction to restrain payment. This reflects two features of letters of credit. First, that by granting the benefit of a letter of credit, a party takes on the risk that the beneficiary will obtain payment under its terms notwithstanding some default in the performance of its obligations to the grantor. In this respect, it is little different than paying in advance for goods or services and taking on the risk that those goods or services will not be provided. Secondly, any loss occasioned by payment on foot of a letter of credit will, by definition, be a monetary loss, readily compensatable in damages. That is why payment must be made unless it is seriously arguable that there has been a clear, obvious or established fraud.

40. In the circumstances, I will again refuse an injunction on the grounds that the evidential threshold for an injunction has not been met, and that the evidence doesn't disclose a clear or obvious fraud. Although the new evidence relied on has bolstered First Modular's claim, it falls short of what is required. Despite the additional evidence comprised in the Goodwell Report and Bosai's less than compelling response to it, in light of the evidence overall, including the evidence in the first application, First Modular has not evidenced a clear and obvious fraud which would justify the court's intervention.

41. In those circumstances, it is not strictly necessary for me to consider whether, if a seriously arguable case of fraud had been established, I should nonetheless refuse relief

because of the rule in *Henderson v Henderson* or because the application amounts to an abuse of process. For completeness, however, I will address that question briefly.

42. Counsel for First Modular accepts, to borrow the language from **Munnelly,** that it could and should have put the evidence it now relies on before the Court in the first application. He argues, however, that there are special circumstances which justify its admission in this application, that the evidence discloses fraud by Bosai. As he puts it, no doubt correctly, the Court should be slow to close its eyes to fraud. However, it seems to me that a distinction should be drawn between those cases where the new evidence sought to be relied on discloses fraud for the first time and those cases where the existence or otherwise of fraud was the entire subject matter of the first application. In the first scenario, a court faced for the first time with an allegation of fraud might very well consider that evidence of that fraud constituted special circumstances justifying a relaxation of the rule in *Henderson v Henderson*. But in the second scenario, the admission of the *additional* evidence of fraud would involve allowing precisely the sort of litigation conduct the rule is intended to prevent. In **Emerald Meats v Minister for Agriculture [2012] IESC 48**, O'Donnell J (as he then was) stated the following (in relation to the admission of fresh evidence on appeal):

> *"36 The rules on the admission of fresh evidence on an appeal are quite strict. This is as it should be. There are very few cases in which the losing side does not regret that different witnesses were called, evidence given or points made either in cross-examination or in submission. But a trial is not a laboratory experiment where one element can be substituted and all other elements maintained and a different outcome obtained. It is important that parties are aware of the finality of litigation, and bring forward their best case for adjudication."*

43. Those observations are equally apposite in applications to which the rule in *Henderson v Henderson* may apply. Where the very matter that the Plaintiff was required to establish in the first application was a seriously arguable case of fraud, it seems to me that the same Plaintiff could not, without more, rely on the fact that the new evidence added further support to that allegation of fraud to avoid the consequences of the rule in *Henderson v Henderson*. Of course, each case must turn on its own facts and might depend on the extent to which fraud had been established. Although a seriously arguable case is a very high bar, it still falls short, for instance, of an established or admitted fraud. The justice of a case

might well require a court to disregard a breach of the rule in *Henderson v Henderson* where fraud had been established or was admitted.

44. In this case, where I have concluded that the seriously arguable threshold has not been met, it is not necessary to resolve the question further. However, in the particular circumstances of this case, it would have taken something more compelling than evidence meeting even that high bar to justify rejecting the Defendants' objections that the Plaintiff's second bite at the cherry was an abuse of process. Insofar as the competing interests of justice required to be considered, the fact that damages are clearly an adequate remedy for any loss which First Modular may suffer, although not, of itself, an automatic basis for refusing injunctive relief (see **Merck, Sharp and Dohme v Clonmel Healthcare [2019] IESC 65**) would have made it possible to mitigate any risk of injustice by the refusal of relief on *Henderson v Henderson* grounds.

Conclusion

45. In light of the foregoing, I will refuse the relief sought. I will list the matter at 10.30 am on 19 January 2024 for the purpose of making final orders and giving directions, if required, for the balance of the proceedings.