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The Rule in *Henderson -V- Henderson* and Applications to Amend Statements of Case

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The rule in *Henderson -v- Henderson*[1] is a well-established procedural rule that advances the principle of finality in litigation. As originally pronounced by Sir James Wigram V-C[2] the rule requires all parties to bring their whole case to Court in a single set of proceedings. A claim that seeks to advance a cause of action against a party that could have been brought in earlier proceedings may be found to be an abuse of process and be struck out without there being a hearing on the merits. The House of Lords comprehensively reviewed the jurisdiction in *Johnson -v- Gore-Wood & Co (a firm)* [2002] 2 AC 1 where Lord Bingham of Cornhill said[3]: "*Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.*"

Whilst the jurisdiction is most commonly invoked by Defendants in an attempt to strike out subsequent claims, this note will consider to what extent the jurisdiction applies within a single action when one party, usually the Claimant, applies for permission to amend the Particulars of Claim.

This point was first considered by the Court of Appeal in *Tannu -v- Moosajee*[4]. The case involved a claim in the Queen's Bench Division by the Claimant seeking repayment of £110,000 that she alleged she had lent to the Defendant. The Defendant denied that there was a relationship of lender and borrower, instead asserting that the parties were in partnership. The Defendant specifically pleaded that it was a term of the partnership agreement that the Claimant would pay the sum of £110,000 in order to acquire a 50% share in the partnership business. The trial came on before His Honour Judge MacDuff QC (as he then was) who decided the main issue against the Claimant and found the parties to have been in partnership. In relation to the sum paid he expressly found: "*for an investment into the business by the claimant of £110,000 she would be an equal partner/owner/participant*". Having declared the existence of a partnership, the Judge directed that the partnership be wound up and adjourned the taking of all necessary accounts and inquiries to a Master of the Chancery Division. During the account proceedings, the Defendant asserted (again) that the £110,000 was paid as the purchase price for a 50% share in the partnership. The Claimant denied this and asserted that the money had been a capital contribution to the business. The Master struck out the Defendant's claim in the account but Lloyd J, hearing an appeal from that decision, reversed the Master, ruling that the Claimant could have raised the point about the capital contribution in the main action. Since she had not, the rule in *Henderson* precluded her from raising it in the account proceedings.

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[1] (1843) 3 Hare 100
[2] "*The court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*"
[3] At page 31F
[4] [2003] EWCA Civ 815

The Court of Appeal allowed the appeal from the Judge's decision and remitted the case to the Master although each member of the Court gave slightly different reasons. Mummery LJ seems to have decided the case on a strict *res judicata* basis that since His Honour Judge MacDuff QC had not decided the issue and did not need to decide the issue then it was open to the Claimant to take the point in the account proceedings. His Lordship raised the issue of the rule in Henderson's case[5] but then did not refer to the rule in his decision. Dyson LJ explained why he differed from the Judge that the rule did not apply. He was firmly of the view that the appeal Judge had been too rigid in his application of the rule, as explained by the House of Lords in *Johnson -v- Gore-Wood*[6], and that in any event there was no abuse of process in the Claimant taking the point in the account proceedings. He allowed the appeal on that basis as well as the basis laid out by Mummery LJ. Arden LJ, whilst expressly agreeing with Dyson LJ, decided the appeal more for the reasons advanced by Mummery LJ. She did though expressly make the point that although reliance on the rule in Henderson's case in a single set of proceedings was unusual it was not conceptually impossible[7].

The matter was next considered by Jackson J (as he then was) in *Ruttle Plant Hire Limited -v- Secretary of State for the Environment, Food and Rural Affairs*[8]. In that case there had been an 8-day trial on various preliminary issues concerning the Defendant's hiring of plant from the Claimant in order to deal with the outbreak of Classical Swine Fever in East Anglia in 2000. Following the resolution of those issues, the Claimant sought to amend its pleadings in order to plead further claims that it wished to bring as a consequence of the judgment on the preliminary issues. The Defendant resisted the Claimant's application on two main grounds, one of which was that the rule in Henderson's case was engaged and would prevent these new claims being brought after the judgment in the trial of the preliminary issues. Surprisingly, Tannu was not cited to the Court and the Judge decided that the rule did not apply where a party sought to plead issues at a late stage in litigation that could have been pleaded at an earlier stage. His Lordship gave four reasons for this decision[9]:

> "*1. The rule in Henderson v Henderson, both as formulated by Sir James Wigram VC, and as recast by other judges over the last two centuries, is a rule focused upon re-litigation.*

[5] Paragraph 25
[6] Supra
[7] Per Arden LJ at Paragraph 40.
[8] [2007] EWHC 1733 (TCC)
[9] Paragraph 36

2. The mischief against which the rule is directed is the bringing of a second action, when the first action should have sufficed.

3. In all of the cases cited by counsel or unearthed by my own researches in which the Henderson rule has been applied, there have been at least two separate actions. So far as I can see, the Henderson rule has never been invoked as a ground for opposing amendment in the original action.

4. There is no need to extend the rule in Henderson v Henderson to the sphere of amendment applications. The powers of the Court to allow or disallow amendments are clearly set out in the Civil Procedure Rules. There already exists an established body of judicial authority to guide first instance judges who are faced with applications to amend. See White Book volume 1 paragraph 17.3.5. It is inappropriate to transplant into this field the Henderson line of cases which are focused upon a different juridical problem."

The next case to consider the question was *Seele Austria GmbH Co -v- Tokio Marine Europe Insurance Limited*[10]. The Claimant, a specialist glazing contractor, had designed and installed windows on a site in London. The installation was defective and had to be replaced. The Claimant brought a claim against the Defendant relying on what was alleged to be a stand-alone indemnity in the relevant insurance policy. Field J tried certain questions in relation to the policy and decided that the stand-alone indemnity relied upon by the Claimant, would only apply where there had been accidental damage to the installation before the repair works were carried out. Since the breaking of the installation in order to carry out repairs was not accidental, the stand-alone indemnity did not apply. The Court of Appeal, by a majority, reversed that finding[11]. The matter then continued on for the remaining liability matters to be decided. The Claimant applied for permission to amend its particulars of claim to assert that the damage was caused by design defects rather than defects in the workmanship[12]. This was important because the Court of Appeal had decided that where the damage was due to workmanship, each damaged window constituted a separate insurance event, each of which attracted a deductible of £10,000. The Defendant had accepted that if the defect was with the design there would only be one relevant event. The application to amend came on before Coulson J and was heard over 2 days[13]. The Defendant resisted the application on the basis of issue estoppel and

[10] [2009] EWHC 255 (TCC)
[11] [2008] EWCA Civ 441, Moore-Bick and Richards LJJ, Waller LJ dissented.
[12] Another set of amendments related to quantum issues, permission for which was granted but which are not relevant for present purposes.
[13] The judgment provides a useful summary of the principles applicable to applications for permission to amend statements of case and also issue estoppel generally see paragraphs 13 to 20.

Henderson abuse contending that the matter had in fact been decided by Field J or the Court of Appeal or should have been raised for decision by those Courts.

Coulson J refused to permit the amendments. On his analysis permission to amend statements of case should generally be granted so long as the proposed case was properly arguable and that any prejudice caused by the amendment could be compensated in costs and that no significant harm to the administration of justice was caused by the amendments. This general rule, on Coulson J's analysis is subject to exceptions, one of which is where the proposed amendment involves an abuse of process such that it would be liable for immediate striking out. Citing *Tannu*, Coulson J accepted that the rule in Henderson's case could apply to the later stages of litigation and said[14]:

> "It seems to me that there is no reason in principle why ***Henderson*** abuse should not be applicable, just like issue estoppel, to the later stages of the same action. It is however no more than common sense to observe that it might be significantly easier for a party facing a ***Henderson*** abuse allegation to defeat it if the point arose for decision in the same proceedings, rather than in a subsequent action …"

The decision made though was that the design or workmanship issue had been raised and dealt with by Field J and by the Court of Appeal and that therefore, the Claimant was issue estopped from raising the matter in the pleadings by an amendment. The Judge went on to deal with the point concerning the rule in Henderson's case and, in a detailed analysis, considered that even if there was no issue estoppel then the application for permission to amend would still have failed because of the application of that rule[15].

In *Tobias Gruber -v- AIG Management France SA*[16] Andrew Baker J had in 2018, given judgment for the Claimant in a breach of contract action and had ordered that damages were to be assessed at a separate trial. In June 2019, the Judge heard an application by the Claimant to strike out certain aspects of the Defence as being abusive. As with the other decisions, the Judge had no difficulty in accepting that the rule in Henderson's case could apply within the same proceedings. He summarised the relevant principles thus[17]:

[14] Paragraph 27
[15] Paragraphs 97 to 109
[16] [2019] EWHC 1676 (Comm)
[17] Paragraph 11

"… g. The doctrine is not restricted to cases where the alleged abuse comes in a separate, later action. It is possible to conclude that a claim or defence not initially raised ought properly, if it was to be raised at all, to have formed part of an earlier stage within a single action at which at least some matters were finally determined.

h. It is a strong thing to shut out pursuit of a point not actually decided previously against the party raising it; and it may be an even stronger thing to do so in relation only to different stages within a single action. I would though add, as to the latter, that much may depend on the nature of the stages involved. Here, the parties had their final trial of all issues, not merely, for example, a decision on preliminary issues or a summary judgment decision on some particular claim or defence or a final determination of an individual point as part of dealing with some other interlocutory application. If the doctrine be available, as indeed it is, in the context of a single set of proceedings, the potential for it to apply on the facts where those are the circumstances plainly may arise more readily than during the interlocutory life of the process."

It is striking that *Tannu* was not cited in *Ruttle* and that *Ruttle* was not cited in either of the later High Court decisions. It is also noteworthy that the raising of the plea on the application to amend or to strike out led the first instance judges to long and detailed examinations and analyses of what had occurred in the earlier hearings.

In *Kensell -v- Khoury* [2020] EWHC 567 (Ch) Zacaroli J, in considering an appeal against a decision to grant permission to the Claimants to amend the particulars of claim, reviewed all of the authorities. In that case, the Court had before it a dispute between neighbours arising out of the construction of a house on land that had formerly been in the ownership of the Claimants and which had been transferred to the Defendant. The Claimant was contending that the Defendant had constructed the house in breach of covenant. The only basis that the Claimants were entitled to enforce the covenant to be found within the original pleadings was on the basis of a building scheme. The Defendants pressed for details of the scheme and, when they were not forthcoming, applied for summary judgment on that aspect of the claim (by that stage, the Claimants had amended their claim to add a claim for damages for nuisance). A Judge granted summary judgment on the Defendant's application and struck out the claim for breach of covenant. The Claimants appealed against that decision and between the first instance hearing and the appeal, applied for permission to amend the particulars of claim to rely an alternative basis for being able to enforce the covenant[18]. At the hearing of that appeal, (coincidentally by Zacaroli J), the Judge refused to entertain the application for permission to amend the statement of case. However, in dismissing the appeal, the Judge noted that the Claimants were free to apply to the County Court for permission to amend the pleading. That

[18] Section 56 of the Law of Property Act 1925

application was made and was granted, notwithstanding the Defendant's reliance on the rule in Henderson's case. A curious feature of the case is that the only authority cited to the Judge who heard the application was Henderson's case itself. As a consequence of that, at first instance, the Judge held that the rule did not apply to applications made within one set of proceedings.

Zacaroli J decided as a matter of principle that it was established by *Tannu* and the cases relying on it that the rule in Henderson's case could apply within one set of proceedings. In doing so, he ruled that the fact that an issue had been decided on a summary basis made no difference. However, given that the first instance Judge had not had cited to him all relevant authorities he was able to exercise the discretion afresh and, on a consideration of all relevant matters, he permitted the amendments on the basis that they did not amount to an abuse. However, that discretion did not extend to the proposed plea seeking a mandatory injunction as a remedy for breach of covenant; that was refused. On a proper analysis though, it would appear that that particular proposed amendment was refused on basic principles, that being that it did not have a reasonable prospect of success.

It is certainly arguable that the comments about the rule in Henderson's case made in *Tannu* were obiter, given that the main decision in the case appears to have been that the trial Judge had simply not decided the issue, did not need to decide the issue and that it was available for decision in the account proceedings. Indeed, the Court was clear that it was to be expected that in that sort of case, issues would arise on the taking of the accounts that had not been envisaged in the trial of the main action. In addition, Dyson LJ made the point that if the Claimant was precluded from making her contention in the account proceedings, then so should the Second Defendant, leading to the absurd situation that neither party could make the argument in the account proceedings on an issue that the Judge had not needed to decide in the main action. His view was that abuse simply did not exist. Further, the proceedings in that case were more akin to the more traditional application of the jurisdiction than its application on a strict interim basis given that there was a trial where the Judge found the existence of a partnership, which was then followed by account proceedings with fresh witness statements. It is unfortunate that the decision in *Tannu* was not cited to Jackson J in *Ruttle* because the four reasons given by that Judge as to why the rule in Henderson's case would not apply on an interim basis were forceful reasons, in particular reasons 3 and 4. However, given the later High Court decisions, in particular that of Coulson J in *Seele Austria*, it is difficult to argue with the conclusion of Zacaroli J that the jurisdiction is now well-established in relation to interim matters such as applications to amend a statement of case. However, one theme that runs through all of the cases, is that they all involved a final decision of some sort having been made on some issue in the litigation before the relevant application was made. In cases where permission to amend a statement of case is sought where there has been

no such final decision, it is difficult to imagine the circumstances where an application of the general principles would point to permission being granted but that the application of the rule in Henderson's case would ultimately lead to permission being refused.

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