A Spate of Strike Outs: A Review of the Law on Res Judicata

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During January 2021 the Court of Appeal handed down three judgments on appeals relating to strike out applications under CPR 3.4(2)(b): *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7, *PricewaterhouseCoopers LLP v BTI 2014 LLC* [2021] EWCA Civ 9 and *Tinkler v Ferguson* [2021] EWCA Civ 18. To see the full judgments, please use the following links: *Allsop*, *PricewaterhouseCoopers*, *Tinkler*.

Res judicata is an important, but not the only, ground for strike out as an abuse of process. There are many types of procedural abuse which are not considered in this post.

Res Judicata: The Five Basic Principles

As Lord Sumption outlined in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [17], *res judicata* (Latin for "a matter decided") is a "*portmanteau term*" which can be reduced to five basic principles:

1. Cause of action estoppel, whereby a party may not reopen a matter that has already been determined in earlier proceedings. Cause of action estoppel involves the same party re-litigating the same cause of action and serves as an absolute bar, save in instances of fraud (as to which, see *Zurich v Hayward* [2017] AC 142).
2. Where a Claimant succeeds in an action and does not challenge the outcome, for example the amount of damages recovered, he may not bring a second action on the same cause of action, for example to recover further damages: *Conquer v Boot* [1928] 2 KB 336.
3. The doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the Claimant's sole right as being a right upon the judgment. This produces the same effect as the second principle, and is unlikely to trouble most practitioners.
4. Issue estoppel, which may arise where a particular issue forming a necessary ingredient of a cause of action has been litigated and decided and, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue: *Duchess of Kingston's Case* (1776) 20 St Tr 355; *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537; *Thoday v Thoday* [1964] P 181.
5. The rule in *Henderson v Henderson*, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised, in an earlier case: see *Henderson v Henderson* (1843) 3 Hare 100, 115 per Wigram V-C).

These substantive limitations are available for deployment under CPR 3.4(2)(b). The common purpose of these rules is to limit abusive and duplicative litigation: *Virgin Atlantic* at [25].

What is Abusive?

It is an integral part of the Court's power to prevent a misuse of its procedure. It must prevent claims which would bring the administration of justice into disrepute or be manifestly unfair to any party: *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536.

Cause of Action and Issue Estoppels

The Court should have few problems identifying abuses through cause of action or issue estoppel. The principles of such estoppels are helpfully outlined in the following cases:

1. *Zurich v Hayward* [2011] CP Rep 39 per Moore-Bick LJ at [45].
2. *Arnold v National Westminster Bank plc* [1991] 2 AC 93 per Lord Keith at p. 96.
3. *Virgin Atlantic* per Lord Sumption at [17] (as above).

Cause of action and issue estoppel can be raised by *Tomlin* or consent orders.

Other Forms of *Res Judicata*

The difficulty is that there are no hard and fast rules for what does or does not fall within the other principles of abuse of process. Each case will turn on its own facts.

The circumstances in which abuse of process can arise are very varied and are not limited to fixed categories: *Hunter* at p. 536.

The most common form of abuse is the *Henderson* type. So whilst most of the principles below are derived from those kinds of cases, they are of general application to any form of *res judicata*.

In deciding whether a claim is abusive, the following general principles should be applied:

1. In considering whether to strike out a statement of case as an abuse of process, the Court should balance all factors in a case and apply the balance of justice. A broad-brush approach is required. The Court should consider the facts of a case, and the private and public interests at play. The focus of the exercise should be asking the crucial question of whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue which could have been raised before: *Henderson*; *Laing v Taylor Walton* [2008] PNLR 11.
2. It is wrong to say that because a matter could have been raised in earlier proceedings it renders the raising of it in later proceedings necessarily abusive. That approach is too dogmatic: *Johnson v Gore Wood & Co* [2002] 2 AC 1 at [30]-[34].
3. The private interest at play is that of a party not being vexed twice for the same reason and the public interest is that of the state in not having issues repeatedly litigated: *Michael Wilson & Partners Ltd v Sinclair* [2017] 1 WLR 2646; *Hunter*; *Arthur J S Hall & Co v Simons* [2002] 1 AC 615. Both or either of these interests may be engaged.
4. Unless the later proceedings involve what the Court should consider an "*unjust harassment*" of a party, the proceedings will rarely be abusive: *Johnson* at [30]-[34].
5. The Defendant in the later action may need to persuade a Court that such an action is "*oppressive*" and that is a high burden to discharge: *Johnson* at [59]-[61].
6. The burden of proving "*unjust harassment*" is on the Defendant to the later proceedings: *Aldi Stores Ltd v WSP Group Plc* [2008] 1 WLR 748; *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 14.
7. Similarly, there is no presumption that where a party brings new proceedings in relation to issues that have been decided in prior proceedings it is an abuse: *Bragg v Oceanus* [1982] 2 Lloyd's Rep 132.
8. A Court should only exercise its power to strike out a statement of case as an abuse where justice and public policy demand it: *Arthur J S Hall*.
9. Where there is abuse, the Court has a duty, not a discretion, to prevent it: *Hunter* at p. 536.

Conclusion

The power to strike out for abuse of process on grounds of *res judicata* is flexible and wide-ranging. It exists to uphold the finality of litigation and the proper administration of justice. It is a draconian step to strike out a claim, so the Court must practise care when considering whether to exercise that power. It must balance all of the factors and take a broad-brush approach in deciding whether its processes are being misused.

Looking forward, there is an interesting argument to be had applying *Dow Jones & Co Inc v Jameel* [2005] QB 946, which confirms that the court has the power to strike out a claim as abusive where it discloses "*no real or substantial tort and where, colloquially, the flame would not be worth the candle*": see *Tinkler* at [33]. This calls for an assessment by the Court (and the Claimant) of the value of the claim set against the likely cost of the litigation. This line of argument is particularly useful where a claim is obviously pointless or wasteful: *Vidal-Hall v Google Inc* [2016] QB 1003.

For more on this topic, look out for my upcoming co-authored piece with Thomas Herbert on the Ropewalk Disease Blog.