Neutral Citation Number: [2023] EWCA Civ 1289

Case No: CA-2022-001946

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT WINCHESTER
Deputy District Judge Payne
His Honour Judge Berkley
Claim No's: G72YJ027 & E00SO286

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2023

Before:

LORD JUSTICE COULSON
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE NUGEE

- -

Between:

(1) PETER ORJI	**Appellants**
(2) CHINENYE ORJI	
- and –	
(1) SUKHDIP NAGRA	**Respondents**
(2) NAVRAJ NAGRA	

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Andrew Granville Stafford (instructed by way of **Direct Access**) for the **Appellants**
Marcus Croskell (instructed by way of **Direct Access**) for the **Respondents**

Hearing Date: 17 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON:

1 INTRODUCTION

1. Although the history of these proceedings has been agonisingly convoluted, the point at the heart of the appeal is straightforward. To what extent, if at all, can a claim which is in time, and found to be arguable on its merits, be struck out as an abuse of process, because of what was said (and not said) at an earlier hearing in separate but related proceedings?

2. Following incidents on 25 and 26 March 2018, Mr and Mrs Orji, the claimants and appellants (whom I shall call "the appellants") commenced proceedings against Mr Sukhdip Nagra and Mr Navraj Nagra, the defendants and respondents (whom I shall call "the respondents") and two others, claiming damages for trespass. Subsequently, the appellants were convicted of a number of charges arising out of those incidents but, on 23 December 2019, they successfully appealed all but one of those convictions. Their successful appeal led to a pre-action protocol letter, sent by the appellants to the respondents dated 15 May 2020, announcing their intention to bring a second claim for malicious prosecution. Three months later, on 12 August 2020, at a time when that second claim had not been commenced, DJ Stewart granted the appellants permission to reamend their particulars of claim in the ongoing trespass action. Those amendments did not seek to include the claim for malicious prosecution.

3. On 8 October 2020, the appellants issued their malicious prosecution claim. On 31 March 2021, some five and a half months later, the respondents applied to strike out the malicious prosecution claim because of what they alleged the appellants had said to DJ Stewart at the hearing on 12 August 2020, and the order he made permitting the reamendments. Exactly one year after the hearing before DJ Stewart, on 12 August 2021, DDJ Payne struck out the malicious prosecution claim as an abuse of process, relying on the rule in *Henderson v Henderson*. The appellants appealed against that order. On 7 December 2021, HHJ Berkley granted permission to appeal but, on 14 September 2022, dismissed the appeal. On 23 January 2023, Warby LJ granted permission to the appellants to bring this second appeal.

4. It follows, therefore that, whilst proper consideration of the judgment of HHJ Berkley is required, what really matters is the original decision to strike out the claim by DDJ Payne. It is his reasoning which matters most; HHJ Berkley was simply dismissing the appeal from DDJ Payne's decision.

5. I have no alternative but to set out the procedural history in some detail (Section 2 below), and then focus in particular on the hearing of 12 August 2020 before DJ Stewart (Section 3). Having identified the two judgments below concerned with the strike out (Section 4), and the two issues to which they give rise on this appeal (Section 5), I summarise the law relating to the rule in *Henderson v Henderson*, and analyse this case by reference to it (Section 6). I then go on to consider whether what happened on 12 August 2020, even if it did not trigger the rule in *Henderson v Henderson*, was nonetheless an abuse of process which justified striking out the malicious prosecution claim (Section 7). In undertaking this analysis I should express my thanks to both counsel for their clear written and oral submissions. In my view,

had they been involved at the critical time, it is overwhelmingly likely that none of the subsequent difficulties would have arisen.

2 THE PROCEDURAL HISTORY

6. The appellants were the respondents' tenants of a property in Southampton. The tenancy was terminated and was due to expire on 25 March 2018. A warrant for possession was granted and was due to be executed on 25 April 2018. It is alleged that there were rent arrears.

7. The respondents visited the property on 25 and 26 March. There is a major issue as to whether they knew that the property was still occupied. On both occasions, they encountered the appellants and an altercation ensued. The respondents made a complaint to the police. This was referred to the CPS and the appellants were prosecuted for assault and public order offences.

8. On 5 April 2018, the appellants commenced a claim for trespass arising out of these events. There was a brief summary of the claim on the second page of the claim form. I note that, with the exception of two skeleton arguments prepared by Mr Granville Stafford and his attendance at a telephone hearing in May 2020 before Judge Berkley, on which very little now turns, the first appellant drafted all the relevant documents and appeared in person at all the relevant hearings.

9. After the commencement of the trespass claim, there was a delay of some months which no one could explain. However, at a hearing on 7 November 2018, DDJ Alexandre made an order adding various parties, and amending the name of another. His order envisaged, not only that a detailed particulars of claim would be served, but also that the appellants may make further amendments to the trespass claim.

10. The next month, the appellants produced new particulars of claim running to 15 paragraphs. There were some further modifications to the names of the parties. The claim was valued at a maximum of £50,000. At a hearing before DJ Sparrow on 22 December 2018, the appellants were given permission to make these amendments and rely on these particulars of claim. It has been called "Version 2" in the papers before us. The claim was allocated to the fast track.

11. On 30 January 2019, the appellants were convicted at the Magistrates' Court of various offences arising out of the incidents on 25 and 26 March 2018. Following sentence, they immediately appealed against their convictions. On 30 April 2019, in consequence of those convictions, the respondents sought to strike out the trespass claim ("the first strike out application"). It is unclear why the respondents waited three months after conviction before making that application. During that period, a month or so was lost as a result of an unsuccessful application by the appellants for specific disclosure.

12. On 6 September 2019, DDJ Collins dealt with the first strike out application. He refused to strike out the trespass claim, although he did strike out certain paragraphs of Version 2. It appears that this was because of the inadequate and unclear nature of those paragraphs, rather than the fact of the appellants' convictions. The principal element of the claim that was struck out concerned a lengthy list of allegedly damaged or stolen goods. The order of DDJ Collins went on to identify other paragraphs in

Version 2 which the court would consider striking out, if the appellants' appeals against their convictions failed. His order also indicated that the respondents could apply for judgment in default on their counterclaim for rent arrears and damage to property, on the basis that no defence to the counterclaim had been filed.

13. On appeal, the appellants were acquitted of all but one of the original offences at the Crown Court on 23 December 2019. The primary ground for the successful appeal was the Crown Court's conclusion that the respondents' evidence was unsatisfactory and therefore did not meet the criminal standard of proof. The only conviction that was upheld was the second appellant's conviction for assaulting a police officer, which was the one charge that did not depend on the respondents' evidence.

14. Following their successful appeal against conviction, on 6 January 2020, the appellants provided an amended claim form and particulars of claim, which added a claim for malicious prosecution to the trespass claim. The first appellant's witness statement in support of the proposed amendment indicated that he wanted all matters to be dealt with together. However, no formal application to amend was made and, although the respondents were aware of these amendments, and although this version of the particulars of claim, referred to as "Version 4", was included in at least one court bundle, Version 4 was never formally brought to the attention of the various judges who were dealing with the trespass claim in the first part of 2020.

15. The trespass claim was before these judges because, as had been anticipated the previous September (paragraph 12 above), the respondents had entered judgment on their counterclaim, in default of a defence to that counterclaim. At a hearing before DDJ Kirkconel on 13 January 2020, the appellants' application for an adjournment was refused, and judgment was entered on the counterclaim in the sum of £12,128.22.

16. In addition, DDJ Kirkconel valued the trespass claim at £6,475 and allocated the case to the small claims track. His valuation relied on the original claim form, which put the value of the claim at not more than £50,000, and his view that, as a result of the earlier decision (paragraph 12 above) to strike out the appellants' claim for damaged or stolen property, which he said was worth £43,525, that sum fell to be deducted from the £50,000, thus leading to a value of the trespass claim of £6,475. The only source of the £43,525 figure was Version 4 (the amended version of the particulars of claim which included the malicious prosecution claim) which had been included in the bundle before him. Regrettably, it therefore appears that, although Version 4 was used for the purposes of valuation and therefore track allocation, it was not otherwise addressed.

17. On 14 May 2020, the appellants were granted permission to appeal against that decision. On 30 June 2020, the appeal against the entirety of the order of DDJ Kirkonel was allowed by consent, although the parties could not agree on the consequentials. On 6 August 2020, following a hearing on 29 July to deal with those matters, HHJ Parkes QC delivered a written judgment which, amongst other things, set aside the judgment in default on the counterclaim, on the basis that there had, after all, been a defence in place before judgment had been entered. HHJ Parkes QC ordered the respondents to pay the appellants' costs of that exercise. He also noted Version 4 which, he said, had not been drawn to his attention at the hearing in July.

18. Whilst the trespass claim was mired in the procedural wrangling caused by the respondents' ultimately unsuccessful attempt to enter judgment on the counterclaim, on 15 May 2020, the appellants sent a pre-action protocol letter in respect of what they described as the "separate claim" for malicious prosecution, which had only crystallised when the appellants' convictions were overturned on 23 December 2019[1]. The respondents replied immediately, and indicated that this second claim was disputed. I note that the malicious prosecution claim is an altogether larger and more significant claim for damages than the trespass claim because, amongst other things, it alleges that the criminal proceedings before the Magistrates led to the loss of the appellants' employment.

19. It is clear that the decision to treat the malicious prosecution claim as separate from the claim for trespass represented a change in the appellants' position (because, of course, at the start of the year, they had formulated Version 4 to deal with both claims together). The evidence that sought to explain that change of position can be found in paragraph 11 of the witness statement of the first appellant, dated 2 July 2021. He referred to the fact that the appellants took legal advice as to progressing the existing claim and amending the particulars of claim and "did not wish to obscure the issues in the existing claim" with the malicious prosecution claim.

20. In July 2020, consistent with that new approach, when the appellants sought to reamend the particulars of claim in the trespass proceedings, the reamendments were limited to that claim only. The reamendments sought to provide further particulars of the trespass claim and to reinstate more fully pleaded paragraphs to replace those which had been struck out by DDJ Collins as being inadequate. This was referred to as "Version 5".

3 THE HEARING ON 12 AUGUST 2020 AND THEREAFTER

21. On 12 August 2020, there was a telephone hearing before DJ Stewart at which, amongst other things, the appellants sought permission for Version 5[2]. The respondents were represented by counsel; the first appellant appeared in person. Through no fault of the parties, there is no transcript of that hearing. That is particularly unfortunate given that the whole basis of the respondents' subsequent application to strike out the malicious prosecution claim arises out of what was allegedly said (and not said) to DJ Stewart.

22. There is a note of the hearing, prepared by the respondents' solicitor. It does not purport to be a verbatim note. Parts of it are disputed. In those circumstances, whilst the note is an unsatisfactory starting-point for an application to strike out, this Court must have proper regard to it, to the extent that it is appropriate to do so. I propose therefore to start with what I consider to be the critical exchange, which is not disputed, before identifying other parts of the note and some of the disputed material.

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[1] See *John Dunlop v Her Majesty's Customs & Excise* [1998] WL 1042585, where Roch LJ said that "the favourable determination of the proceedings forming the basis of the action for malicious prosecution is a necessary element of the cause of action which does not accrue until all the elements of the tort are present". That was endorsed by Lord Steyn in *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 426.

[2] Mr Croskell pointed out that the version before DJ Stewart was slightly different to the version that was the subject of the July 2020 application, but the changes were minimal and nothing turns on them.

23. It appears that, not unreasonably, DJ Stewart was concerned to ensure that, given the delays in the trespass action, the appellants' claim was not repeatedly reamended. He sought and obtained an oral assurance from the first appellant that this was the final draft or final version of the claim. Paragraph 6 of the note, which is not disputed, reads as follows:

> "6 DJ Stewart says to [the first appellant] "you're telling me that this is your final draft or your final version of your claim and as time goes on you don't see yourself changing this claim or altering". [The first appellant] confirms to DJ Stewart "correct your honour"."

24. That seems to me to be the high watermark of the respondents' case now. Other paragraphs relied on by Mr Croskell as being oral confirmations of finality by the first appellant are essentially different versions of the same point (see in particular paragraphs 3, 4 (which is disputed) and 8 of the note).

25. Mr Croskell also referred to other exchanges when, for example, the respondents' counsel made a reference to the need to avoid more claim forms, and DJ Stewart warned that they must avoid going round in circles. Mr Croskell said that the first appellant remained silent during these observations, and sought to rely on that silence as also creating the promise of finality. I am not persuaded that this adds anything to the first appellant's direct answers: moreover, it could hardly be right to criticise a litigant in person for staying silent when counsel or the judge are talking.

26. Although it was known to both parties that a specific claim for malicious prosecution had been made and/or was intended to be made, the note makes plain that the words "malicious prosecution claim", or any version of them, were never uttered at that hearing, by anyone. That said, some of the paragraphs suggest that at least the possibility of such a separate claim and its possible later consolidation with the trespass claim was envisaged. Indeed, it is the appellants' case that DJ Stewart said something express to this effect, when he told the court that he could not bar the appellants from bringing a fresh claim. However, that is not in the note and is disputed by the respondents, so I discount it.

27. But paragraph 16 of the note records DJ Stewart telling counsel for the respondents that he could only deal with the application (to reamend the trespass claim) that was before him. That rather suggests that he felt he was being asked to take into account other matters (such as the possibility of another claim) which were not before him. At paragraph 27, counsel for the respondents went on to say that she had "no confidence" in the appellants saying that they did not foresee "anything on the horizon to reamend their claim or add to it"; again that suggests an awareness of a possible future claim.

28. Also of significance are the references in the note to a claim for £300,000, a figure taken from HHJ Parkes' QC's judgment as being the approximate value of the malicious prosecution claim. At paragraph 30, DJ Stewart is reported as saying that the appellants would have to pay a court fee "to amend or re-amend to include the sum of £300,000", which again appears to be a reference to the possible making of a claim for malicious prosecution in the future. He appeared to refer to that possibility again at paragraph 34.9 of the note, with its express reference to "consolidation".

29. In my judgment, these references show that the possibility of a future claim for malicious prosecution hung, like Banquo's ghost, over the hearing, with everyone aware of it to some degree or other but no-one, for whatever reason, prepared to articulate the point expressly. Perhaps both sides saw an advantage in this sort of shadowboxing, although that is not the way to conduct litigation in the twenty-first century. Be that as it may, by a "fine margin", DJ Stewart allowed the application to reamend the trespass claim to introduce Version 5.

30. On 8 October 2020, the appellants issued a separate claim form setting out the malicious prosecution claim. This had apparently been drafted on 14 August, just two days after the hearing before DJ Stewart. The respondents put in a defence to that claim a month later which dealt with the merits, but subject to the caveat that they would seek to strike out the malicious prosecution claim as an abuse of process in accordance with the rule in *Henderson v Henderson*. Subsequently, various orders were made in respect of both the trespass claim and the malicious prosecution claim, concerned with allocation and the like. It was not until 31 March 2021 that the respondents made their second application to strike out, this time in respect of the malicious prosecution claim.

4 THE JUDGMENTS BELOW

4.1 DDJ Payne: 12 August 2021

31. The application to strike out the malicious prosecution claim was put on two grounds: first, there were no reasonable grounds for bringing the claim (CPR 3.4(2)(a)); the second was that to bring the claim now "would amount to an abuse of process" (CPR 3.4(2)(b)). The rule itself is replicated in full at paragraph 55 below.

32. DDJ Payne at [4]-[5] rejected the first ground of the application. Although he thought the chances of success of the malicious prosecution claim were on the low side, he could not say that it was a hopeless case and would not shut the appellants out from bringing the claim on this ground. There is no appeal against that finding.

33. As to the second ground, DDJ Payne referred at paragraph 6 to *Henderson v Henderson* [1843] 3 Hare 100 and set out a passage of commentary about it. Although he does not identify it, the commentary comes from the then current edition of the White Book. He focussed on the application to reamend before DJ Stewart and found that the rule in *Henderson v Henderson*, as explained in the commentary, applied. He noted that the litigation had already been going on for three years and that the costs and court resources had already exceeded what an action should have involved to get no further than a CCMC. Although there is no further analysis, the clear inference from this and paragraph 7 is that the appellants were to blame for this situation.

34. DDJ Payne said at paragraph 8:

> "8. He narrowly, and I accept this, granted the application on the basis, I am quite sure, that these amended particulars of claim constituted the Claimants' whole claim. If he had known that an entirely new claim was about to be issued almost immediately after granting that position and essentially relating back to the same incident, it is all this incident, I have not got the date and, as I have already remarked, it does not matter what the date was, we all know

> what it was, it was this incident that had occurred when all the parties were at the property and an altercation occurred, and both this, the [trespass] claim and the new claim, all relate to that incident. I am quite sure that, had Judge Stewart known that that was going to be the subject of a further claim, albeit a different relief being claimed, I have no doubt he would not have granted the amendment that he did. At best, he would have allowed the Claimant one last opportunity to amend his particulars of claim to include, not only all the claim for damage and clarifying that, but also the issue of malicious prosecution that had been alive by that time for many, many, many, many months, and that information should have been made available to Judge Stewart at that hearing."

He reiterated at paragraphs 9 and 10 the need to ensure that litigation does not drag on forever and that, where possible, the whole case should be advanced at one time. He went on to say at paragraphs 11 and 12:

> "11. I have not gone into the detail of the case there, and again it does not really matter, it is the principle. Of course the claim could not have originally been pleaded as one of malicious prosecution but what should have happened here was, back in August of last year or even earlier actually, the Claimant could have said to the court, look, since I issued this claim, I have been acquitted of the criminal proceedings which the Defendants' evidence led me to having to face, and I want to proceed and think I can succeed in a claim for malicious prosecution. Can I amend my particulars of claim please to include those? I think the Court would have said yes to that at that stage because it is right that you should include all the claims you can bring in one proceeding to avoid multiplicity of claims. But that did not happen, and I think that is the fatal error here of the Claimant. So where *Barrow v Bankside* says could not have been dealt with on the first occasion, i.e. the trial of the matter, well, it clearly could have been.
>
> 12. What we will have here, if I allow this claim to go ahead, is a trial on one matter and then a trial dealing with essentially the same facts on another trial, and that, in my view, has to be avoided. The Claimant has carriage of this matter and it has had a lamentably slow progress and that slow progress is largely attributable to the Claimant. As I say, I find that the failure to raise these issues before District Judge Stewart this day last year is unacceptable and to put it down to a misunderstanding is completely unsatisfactory."

35. For these reasons, he said at paragraph 13 that a situation had been created which the "case law strives to prevent", and he struck out the malicious prosecution claim. He made no reference to, and apparently took no account of, the first appellant's witness statement which explained why the two claims were being kept separate (paragraph 19 above).

4.2 HHJ Berkley: 15 September 2022

36. The appellants appealed. The appeal was not heard for over a year. Although HHJ Berkley's judgment is long, it seems to me that the critical paragraphs are these:

(a) At [23], having set out paragraphs 8-10 from the judgment of DDJ Payne that I have cited above, he said - I think correctly - that those paragraphs "were at the heart of DDJ Payne's reasoning".

(b) Having set out the numerous grounds of appeal and the parties' submissions, the judge's analysis section, starting at [54], upheld DDJ Payne's conclusion.

(c) [55] is worth setting out in full because it is of some importance. HHJ Berkley said:

> "Whilst I accept that the *Henderson v Henderson* rule is normally applied to sequential proceedings, as the White Book and the authorities there cited make clear, this is not universal, and in an appropriate case, the issue of a new claim during the currency of the claim in which it is said the new claims should have been raised, can clearly amount to an abuse of process. In my judgment, DDJ Payne was entitled to conclude that the issue of the Malicious Prosecution claim in October 2020 was an abuse of process, and indeed that he was correct in doing so."

(d) Thereafter, the remainder of the judgment elaborates on that conclusion. This includes, at [58], his view that what was required on the application was "a broad merits-based approach" including a consideration of the overriding objective.

37. Throughout the judgment of HHJ Berkley, there are repeated references to the woeful progress of the litigation, responsibility for which he appears to lay entirely at the appellants' door. The whole thrust of his judgment is that what happened on 12 August 2020 was merely a part of a wider tactic on the part of the appellants to delay and disrupt these proceedings. That echoed paragraphs 6 and 7 of DDJ Payne's judgment, but made the point rather more forcefully and suggested, for the first time, that this may have been deliberate on the part of the appellants.

38. That is not the only way in which HHJ Berkley went well beyond the conclusions of DDJ Payne. First, he said at [59] that the appellants had obtained permission from DJ Stewart to reamend in respect of Version 5 "by way, if not of deception, of a clear misleading of the court. And it was not a misleading of the court by omission: Mr Orji repeatedly and positively led the court to believe, and all but promised, that this was the final version of the claim arising out of the events of 25 and 26 March 2018". That finding of dishonesty, which was relied on heavily by Mr Croskell in the appeal before us, had not been made by DDJ Payne.

39. Secondly, there is the consideration of what would have happened if DJ Stewart had been asked to consider an amendment which included the claim for malicious prosecution. As noted in paragraph 34 above, paragraphs 8 and 11 of the judgment of DDJ Payne makes it quite clear that he considered that such an application would have been permitted ("I think the Court would have said yes to that at that stage"). But HHJ Berkley, at [61], said that such an application would have been refused. The basis for that conclusion is unclear; neither does he explain how and why he differs, in a potentially important respect, from DDJ Payne.

40. On 23 January 2023, Warby LJ granted permission to bring a second appeal, pointing out, amongst other things, that the malicious prosecution claim had been held to be tenable on its face and that, at the time that the claim was struck out, the limitation period was still running.

5 THE ISSUES ON APPEAL

41. I consider that there are, broadly, two issues in this appeal. The first is whether the rule in *Henderson v Henderson* is generally applicable to a case like this, where there has been no prior determination of any substantive issue by the court. That was a point on which Mr Granville Stafford, for the appellants, laid great emphasis.

42. Secondly, there is the separate question which, so it seems to me, arises even if both judges below were wrong, and the rule in *Henderson v Henderson* does not apply to this case. That turns on whether what was said to DJ Stewart, and its consequences, amounted to an abuse of process such that, regardless of *Henderson v Henderson*, there were sufficient grounds to strike out the malicious prosecution claim under r.3.4(2)(b). Whilst I agree that what is necessary is, as HHJ Berkley put it at [58], "a broad merits-based approach…to include consideration of the overriding objective", it remains necessary for the court to approach an application to strike out a legitimate claim on a principled basis.

43. For the reasons that I set out in greater detail below, I consider that each of these two issues falls to be decided against the respondents and in favour of the appellants. That means that, if my Lords agree, the appeal will be allowed.

6 IS THE RULE IN *HENDERSON V HENDERSON* APPLICABLE HERE?

6.1 The Law

44. *Henderson v Henderson* is, in the words of Sir James Wigram V-C, authority for the proposition that:

> "…where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit that same parties to open the same subject of litigation in respect of matters 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 upon which the court was actually required by the parties from 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."

45. The modern statement of this principle can be found in the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2 AC 1 30H-31F, where he said:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This

> public interest is reinforced by the public interest in the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings, may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question 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."

46. There can be no doubt, therefore, that both *Henderson v Henderson* and *Johnson v Gore-Wood* are primarily concerned with a party seeking to raise in subsequent proceedings an issue which had either already been decided in earlier proceedings, or which could and should have been raised in those earlier proceedings. However, it is not necessary for there to be two different sets of proceedings for the rule to apply. If a single set of proceedings involved a binding determination at an earlier stage, then the rule in *Henderson v Henderson* may apply to subsequent stages of the same litigation. Thus, in *Seele Austria GmBH v Tokio Marine Insurance Ltd* [2009] EWHC 2505 (TCC), the judge refused to allow the claimant to amend its pleadings to allege that the defective windows were a matter of design, in circumstances where, at an earlier stage of the litigation, Field J had concluded that the defects were a matter of workmanship, and the same point had been determined by the Court of Appeal. Accordingly, the claimant could not raise a contradictory case by way of a subsequent amendment.

47. It follows that the rule in *Henderson v Henderson* can apply, not only to one set of proceedings, but to earlier interlocutory decisions in those proceedings: see *Seele*, and *Koza Ltd v Koza Altin Isletmeri AS* [2020] EWCA Civ 1018, [2022] 1170 at [41] – [42] per Popplewell LJ. But it is crucial to remember that, whenever it arises, the rule in *Henderson v Henderson* requires a previous determination by the court. As Lord Hobhouse put it in *In Re Norris* [2001] UKHL 34 at paragraph 26: "It will be a rare case where the litigation of an issue which has not *previously been decided* between the same parties or their privies will amount to an abuse of process" (emphasis supplied). More recently, Nugee LJ reiterated in *Wilson and Another v McNamara and Others* [2022] EWHC 243 (Ch) at [57], by reference to *Henderson v Henderson* itself, that "the principle does not arise if there has not been a previous adjudication" by the court.

6.2 Analysis

48. I am in no doubt that the rule in *Henderson v Henderson* has no application to the facts of the present case. That is because there was no relevant determination by DJ Stewart which could legitimately prevent the appellants' subsequent pursuit of the malicious prosecution claim.

49. At the time of the hearing before DDJ Payne, there was a trespass claim which had not got beyond the pleading stage, and a later malicious prosecution claim, arising out of the same incident (but with many different features), which had also not got beyond the pleading stage. There had been no determination by the court of any substantive issue. The appellants could not be accused of trying to go behind some earlier determination of the court, because there had not been one. The only determination that DJ Stewart made was allowing the appellants permission to reamend the trespass claim. On the face of it, that had nothing to do with the existence or otherwise of the separate malicious prosecution claim, which had not even been commenced.

50. On that basis, therefore, it is impossible to see how the rule in *Henderson v Henderson* could have any general applicability to this case. It might be different if the trespass claim had been fought through to a trial and been determined by the court by August 2020. In those circumstances, the commencement of the malicious prosecution claim in October 2020 may well have fallen foul of the rule, because it could and should have been raised before the trespass trial. But that was all a long way off in August 2020, when the trespass claim had not got beyond the pleading stage, and the only determination was the permission to make some reamendments.

51. In addition, I consider that the respondents' reliance on the rule faces an insurmountable causation hurdle. As I have explained, the rule in *Henderson v Henderson* is designed to ensure that an innocent party - in this case, the respondents - is not vexed twice with the same matter. But, on the findings of DDJ Payne, the respondents have not been (and could not have been) vexed twice. He found at [8] of his judgment that, if DJ Stewart had known that the malicious prosecution claim was going to be added to the trespass proceedings, "he would have allowed [the appellants] one last opportunity to amend their particulars of claim to include, not only all the claims for damages and clarifying that, but also the issue of malicious prosecution". And DDJ Payne went on to confirm that in paragraph 11, when he found expressly that, if the appellants had referred to the malicious prosecution claim when they were in front of DJ Stewart, he would have allowed them to amend to add that claim – "the Court would have said yes" - "because it is right that you should include all the claims you could being in one proceeding to avoid multiplicity of claims."

52. I respectfully agree that that, or something like it, is what should and probably would have happened. If DJ Stewart had been made expressly aware that the reamendments with which he was concerned dealt only with the trespass claim, and that the malicious prosecution claim was also going to be advanced, then he would have adjourned the reamendment hearing, given the appellants the opportunity either to plead a case involving both causes of action or to issue the separate claim and have the two cases managed together[3], and come back before the court for directions leading to trial. DDJ Payne was clear that that would have been permitted. In one way or another, everything would have been dealt with together. On that basis, the failure expressly to refer to the malicious prosecution claim at the hearing of 12 August 2020 did not mean that the respondents were vexed twice with the same claim: it meant

[3] I note that the court order of 17 May 2021 required the court to consider consolidation, which was overtaken by events when DDJ Payne struck out the malicious prosecution claim in August.

only that (two months later) the malicious prosecution claim had to be consolidated or managed with the trespass claim.

53. Taken at its highest, it seems to me that both judges below were saying that, because the appellants could and should have raised the existence of the malicious prosecution claim at the hearing before DJ Stewart, they were barred by operation of law from ever raising it subsequently. I disagree with that for two reasons. The first is the causation argument: for the reasons I have explained, in the overall context of this case, it made no, or very little, difference whether the malicious prosecution claim was promulgated in August or October. The second is that it would be an unusual extension of the rule in *Henderson v Henderson* if, in a single set of proceedings in which there had been no determination of any point of substance, it was concluded that, as a matter of law, solely because X could and should have done something earlier in the proceedings, he or she could not do it later. Of course, there may be costs implications in allowing something to be done late; there may indeed be good reasons (such as irredeemable prejudice or proximity to a trial) which militate against allowing X to do it at all. But it would be an unusual case where, merely because X could or should have taken a step earlier, X would be automatically shut out from doing so at a later date because of the rule in *Henderson v Henderson*. Of course, delays may lead to the striking out of a claim for different reasons and by reference to other rules: I address those in paragraphs 59 and 74 below.

54. Accordingly, I am satisfied that this is not a situation in which the rule in *Henderson v Henderson* applies. There was no relevant determination which justified striking out the malicious prosecution claim. If the appellants had been legally represented on 12 August 2020, they would have suggested doing precisely what DDJ Payne envisaged, and the appellants would have had a final opportunity to advance both claims together. That is what should have happened once the malicious prosecution claim was issued in October. I would therefore allow ground 1 of the appeal. However, the matter does not end there. If this Court concluded that there had been an abuse of process on 12 August 2020, regardless of the rule in *Henderson v Henderson*, striking out may still have been justified.

7 WAS WHAT HAPPENED BEFORE DJ STEWART AN ABUSE OF PROCESS JUSTIFYING THE STRIKE OUT OF THE CLAIM?

7.1 The Law

55. The power to strike out a statement of case is set out in r.3.4(2) in the following terms:

> "**3.4**—(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court—
>
> (a)that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b)that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

> (c)that there has been a failure to comply with a rule, practice direction or court order."

It is common ground that this appeal is concerned with the power at r.3.4(2)(b). Even if what happened before DJ Stewart did not involve an application of the rule in *Henderson v Henderson*, it was open to the respondents to argue that it nonetheless made the subsequent issue of the malicious prosecution claim an abuse of process. It is important to emphasise that the categories of abuse are not closed and that a flexible approach to r.3.4(2)(b) must always be adopted.

56. A party seeking to obtain a finding that there has been an abuse of process faces a high hurdle. Abuse of process has been defined as the use of the court process "for a purpose or in a way significantly different from its ordinary and proper use": *Attorney General v Barker* [2000] 1 F.L.R. 759, DC, Lord Bingham of Cornhill. It needs to be shown that the conduct of the party in question is so objectionable that they should forfeit their right to take part in a trial, such as where that party is determined to pursue proceedings with the object of preventing a fair trial (through the use of forgeries and perjured evidence): *Arrow Nominees Inc v Blackledge* [2000] B.C.L.C. 167, CA.

57. In the context of more than one set of proceedings, *Dexter Ltd v Vlieland-Boddy* [2003] EWCA Civ 14 at [49] is authority for the proposition that a later action will usually only amount to abuse of process if it involves unjust harassment or oppression. *Aldi Stores Ltd v WSP Group PLC & Ors* [2000] EWCA Civ 1260 at [21] and [39] gives guidance to the effect that a party who learns of a second intended action and considers that it may be oppressive (and therefore an abuse) should say so promptly rather than waiting and then applying to strike out under this ground.

58. Striking out a claim is a draconian remedy. Even in a case where abuse may be made out, it does not necessarily follow that the claim should be struck out: *Biguzzi v Rank Leisure PLC* [1999] 1 WLR 1926 and *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607. The remedy of striking out must be proportionate in all the circumstances. There are obviously numerous alternative remedies, so the striking out of a valid claim should always be the last option.

59. As noted above, the judges below (and in particular, HHJ Berkley) referred extensively to delay. Rule 3.4(2)(b) can be applicable to cases of delay, although it is usually necessary for there to be some additional factor to justify striking out, such as the delays arising from a claimant acting in wholesale disregard of the norms of conducting serious litigation, and doing so with a full awareness of the consequences, as in *Habib Bank Ltd v Jaffer* [2000] C.P.L.R. 438, CA. A long delay *by itself* will not usually be categorised as an abuse without that kind of additional factor: *Icebird Ltd v Winegardener* [2009] UKPC 24 and *Adelson v Anderson* [2011] EWHC 2497 (QB).

7.2 *The Possible Elements of Abuse*

60. In the present case, there are three possible elements of abuse on which the respondents have sought to rely. The first is the suggestion that the first appellant lied to DJ Stewart on 12 August 2020 in order to hide the existence of the malicious prosecution claim. The second is the argument that the issue of the separate malicious prosecution claim in October 2020 amounted to oppressive conduct. The third is the

argument that the appellants have been responsible for the unacceptable delays in this litigation and that, when factored into everything else, justified the striking out. I deal with each in turn.

7.3 Dishonesty/Deception

61. HHJ Berkley said in terms that, if DJ Stewart had understood the real position in August, he would not have allowed the reamendments, and that the reamendments were obtained by the deliberate misleading of the court. The inference is that the appellants were knowingly untruthful when they said to DJ Stewart that the reamendments represented their final case.

62. On behalf of the respondents, Mr Croskell properly acknowledges the seriousness of that finding. But, as he accepted, dishonesty forms the basis of his underlying submission: if the appellants had been dishonest with the court by effectively keeping quiet about the malicious prosecution claim, then that was an abuse of process and should result in that claim being struck out. He fairly conceded that he needed to put his case that high in order to meet the high hurdle on an application strike out: as he put it, "the mischief comes from the dishonesty".

63. I do not consider that there is any proper evidence of dishonesty on the part of the appellants. I note that DDJ Payne did not make such a finding. It is quite plain that, at the hearing before DJ Stewart, the appellants had in mind their trespass claim, for the reasons that the first appellant explained in his witness statement. The affirmative answer to the question, "Is this the last word?", was accurate because, in relation to the trespass claim, that is what it was. The first appellant was never asked directly about the malicious prosecution claim, which – as demonstrated by his letter before action - he was treating separately, at least in his own mind. Thus his answer was not, and not intended to be, misleading.

64. I also think that, at times, Mr Croskell read far more into the note of the hearing of 12 August 2020 than the words will bear. By way of example, he submitted to this Court that the first appellant "expressly excluded further causes of action", and that the first appellant "made an election not to pursue additional claims". In my view, no part of the note can be read as indicating any such exclusion or any such election.

65. To my mind, the important thing, which both judges below appear to have missed, is that the appellants never hid or even equivocated about the existence of the malicious prosecution claim: on the contrary, their intention to pursue it was always plain. Thus, in January 2020, they had provided Version 4 which ran the two claims together, and they had sent the letter of 17 May 2020 which made it quite clear that they were pursuing the malicious prosecution claim, albeit as a separate claim. This was not a case in which the malicious prosecution claim, when made, came out of the blue: on the contrary, it had been identified, and the intention to pursue it had been advertised in the clearest terms. Indeed, taking that point to its logical conclusion, it could be argued that it was the respondents who were at fault for not following the guidance in *Aldi*, and failing to notify DJ Stewart about the potential for oppression if the second claim for malicious prosecution was commenced.

66. It is also instructive to look at this question of deception and dishonesty by endeavouring to identify the advantage which the appellants may have been seeking

by hiding the existence of the malicious prosecution claim. What benefit could they hope to obtain from such conduct? Since the malicious prosecution claim was, on paper, worth 3 or 4 times the trespass claim, what was the incentive to keep quiet about that larger claim in order to obtain some reamendments – many of which were trivial - to the lesser claim? No obvious incentive occurred to me. When the question was put to Mr Croskell, he fairly agreed that he could not think of one. In my view, there was none. I consider that the absence of a motive lessens still further the likelihood of dishonesty.

67. In my judgment, the highest that it might be put is that, at the hearing on 12 August 2020, the appellants deliberately chose to focus on the trespass claim, and avoided any express reference to the malicious prosecution claim. But the respondents did exactly the same thing. That is the shadowboxing to which I have already referred at paragraph 29 above. So if any conduct could be labelled as less than straightforward, it occurred on both sides. The court cannot allow one side to be penalised, and the other to be rewarded when, on this premise, both have behaved in precisely the same manner.

68. Moreover, I consider that Mr Croskell was wrong to say that the respondents did not know where they stood in August 2020: on the contrary, the letter before action on 17 May had told them precisely. If they were truly unsure of the status of the intended malicious prosecution claim, they only had to raise it in unambiguous terms at the hearing before DJ Stewart. They did not do so but, if they had done, I am in no doubt that the first appellant would not have said the malicious prosecution claim had been abandoned. That would be contrary to all the evidence, including his unchallenged witness statement.

69. I accept that, if a litigant deliberately misleads a court to obtain some clearly advantageous order, and then subsequently seeks to do something which is contrary to what that litigant told the court, then that may qualify as an abuse of process. So if DJ Stewart had raised in the clearest terms the possibility of a future malicious prosecution claim, and if the first appellant had said in equally clear terms that he would abandon that claim in order to obtain his reamendments to the trespass claim, and DJ Stewart had said expressly in his order that the only reason that he was allowing the reamendments was on the condition that the malicious prosecution claim had been abandoned, then an abuse of the process may well be made out (although whether that would justify a strike out is a different question). But for the reasons that I have given, that is a long way from this case: if anything, the note of 12 August 2020 indicates the opposite, because it suggests that there may be consolidation in the future (see paragraphs 27 and 28 above).

7.4 Oppression

70. The second potential element of abuse is oppression. Mr Croskell submitted that it was oppressive when, in October 2020, the malicious prosecution claim was issued, after the first appellant had promised that Version 5 was the last word. But that turns on the assumption that the first appellant was referring to both claims when he was answering DJ Stewart's questions and, as I have explained, he was not. There was nothing oppressive about the making of the malicious prosecution claim itself; the relevant cause of action had accrued less than a year before.

71. Moreover, if the malicious prosecution claim had been identified in August 2020 and dealt with at that time in the way envisaged by DDJ Payne, it would not have been oppressive: as he said, the claim would have been allowed by way of an all-in set of amendments. If it was not oppressive in August 2020, it could not have become so by October. The only thing that was lost was that delay of two months, at a time when the trespass claim was still not beyond the pleading stage. In the context of this case, I simply do not accept that that amounted to oppression.

72. I have not forgotten that one of Mr Croskell's points was that, in addition to the five versions of the trespass particulars of claim in the papers, there were as many as four others, and that the respondents felt oppressed by the constant regurgitation of the same or similar allegations in these different versions of the pleadings. I acknowledge the difficulty and disruption that such conduct may cause. But the answer for a disgruntled defendant is to ensure that the litigation is closely case-managed by the court, so as to bring about a trial sooner rather than later. The solution is not to make the numerous interlocutory applications that the respondents chose to make, each of which have failed either in whole or in part, and each of which have caused delay, extra costs and additional stress. That brings me onto the third possible element of abuse, namely delay.

7.5 Delay

73. It was assumed by both judges below that the appellants were responsible for the unacceptable delays that had occurred in the trespass claim, and that this was relevant to the striking out. Indeed that assumption seems to have been the springboard for the conclusion that, since no further delays could be countenanced in this case, the second malicious prosecution claim had to be struck out.

74. The first point to make is that, as explained in paragraph 59 above, although delays alone can sometimes justify striking out, it is usually necessary for there to be some form of additional factor. But that does not mean that a court is powerless in the face of delay. Far from it. The use of 'final' and 'unless' orders will achieve, by active case management, either the efficient progress of the litigation, or its early demise. Furthermore, the rigorous policing of the relief from sanctions regime under CPR rule 3.9, following the decision of this court in *Denton v TH White* [2014] EWCA Civ 906; [2014] 1 WLR 3296, makes it most unlikely that a serial offender who delays proceedings unduly will ever get his or her case to court. But none of that arises in this case, nor was the application to strike out put on that basis.

75. Secondly, I consider that both judges were wrong to blame the appellants for the delay, particularly since neither embarked on any sort of analysis to justify the assumption that they had made. I accept that the appellants were responsible for some minor delays. But I consider that the respondents were responsible for a much greater share of the delay overall: there was the first application to strike out (which was only successful in part and ultimately reversed by later decisions of the court) which took up 5 months in 2019; their ultimately futile application to enter judgment on the counterclaim which wasted time and costs for almost a year from September 2019 to August 2020; and the 5 months they waited (from October 2020 to March 2021) before seeking to strike out the malicious prosecution claim on a basis that was known to them from the outset.

76. So if we freeze time when DDJ Payne reached his decision in August 2021, it is easy to say that the delays were unacceptable. But those delays were, on any view, the responsibility of both parties, and primarily the fault of the respondents, for the reasons that I have explained. August 2021 was the time for the court to get these claims by the scruff of the neck, manage them together, and make clear directions leading to a prompt trial. It was not the appellants' fault that a further two years were then lost down another procedural rabbit hole of the respondents' making.

7.6 Summary

77. For these reasons, I consider that the three elements of possible abuse alleged here – deception, oppression and delay – have not been made out. So if the rule in *Henderson v Henderson* did not apply, there was no freestanding abuse of process. Moreover, even if a less generous view is taken of the appellants' conduct than that which I have set out above, I am in no doubt that this case has not come close to surmounting the high hurdle demonstrated by the authorities on striking out, which I have summarised at paragraphs 56 to 59 above. This is not on any view a case of abuse of process that could justify the striking out of an arguable, in-time claim.

8 CONCLUSIONS

78. If my Lords agree then, for the reasons that I have given, this appeal will be allowed. The claim for malicious prosecution is reinstated. If the parties are unable to resolve their differences by way of mediation, then these claims must be listed for case management directions as soon as possible.

LORD JUSTICE STUART-SMITH

79. I agree with both judgments so completely that it would be superfluous for me to add anything further.

LORD JUSTICE NUGEE

80. I am very grateful to Coulson LJ for his clear and compelling judgment with which I entirely agree. I add just a few words on the scope of the *Henderson v Henderson* principle.

81. As I referred to in *Wilson v McNamara* at [57], Lord Sumption considered the *Henderson v Henderson* principle in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 36, [2014] AC 160 at [17], where he treated it as one of a number of disparate principles which he grouped together under the portmanteau term *res judicata*. As this label ("a thing adjudicated on") indicates, the essence of the principle, like other aspects of *res judicata*, is that once a particular matter has been determined by a court, that may preclude a party from having a second go. Or to put it in colloquial terms a litigant is entitled to their day in court, but once they have had it, is not in general entitled to a second bite at the cherry.

82. Thus where a party has prosecuted a claim to judgment that may preclude them from bringing a second action raising the same cause of action, or re-litigating a particular decided issue (cause of action or issue estoppel); it may preclude further damages being claimed for the same cause of action; or cause a merger of the cause of action in

the judgment; or – and this is the distinctive feature of *Henderson v Henderson* abuse – it may render it abusive for a party not only to litigate an issue that has already been litigated but an issue that has not previously been litigated, if it could and should have been raised in earlier proceedings. The underlying justifications for all these principles is similar: once a claim has been determined, that (subject to appeal) should be that; and the other party should not be put to the trouble of having to defend themselves twice. The effect of the *Henderson v Henderson* principle is that this is capable of applying not only where a litigant seeks to run exactly the same point but also a different one, so long as the new point really ought to have been taken, if it was to be taken at all, first time round.

83. The cases show that the *Henderson v Henderson* principle is a very flexible one. In *Henderson v Henderson* itself the issue was whether a claim could be brought in England for items said to be due on an account where there had already been an account taken in previous proceedings in Newfoundland in which those items could have been raised but were not. In *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 a mortgagor sought unsuccessfully to avoid the exercise by a mortgagee of a power of sale in two successive actions, contending on the first occasion that the sale was a sham and that there was no real sale, and on the second that the sale was fraudulent. That was undoubtedly a different claim but if it was going to be taken at all it should have been taken in the first set of proceedings. The doctrine can apply even though the second claim is brought by a different party (as was the case in *Johnson v Gore Wood*), or against a different party (as in *Aldi Stores v WSP Group*), although in fact in each of those cases the second claim was not found to be abusive. Whether in any particular case the second claim is abusive depends on whether it not only could but should have been brought first time round, and that requires a broad merits-based judgment as explained by Lord Bingham in *Johnson v Gore Wood*.

84. But what all the cases have in common is that the second claim is an attempt to reopen something that has already been decided. That is where the abuse lies. That does not mean there must have been a trial of the first claim. The principle is capable of applying if the previous proceedings have been settled by agreement. A settlement by the parties is just as much a final resolution of a claim as a judgment by a court, and it can be just as abusive to seek to circumvent it by putting forward a second claim. The principle is also capable of applying where there has been an interlocutory decision in the very same proceedings, as illustrated by the case referred to by Coulson LJ in paragraph 46 above of *Seele v Tokio* (in fact a decision of his own although he modestly does not say so). But if there has not been any previous decision, there is nothing for the principle to bite on. It cannot be said that a litigant is being abusive in seeking to have a second bite at the cherry if they have not yet had their first.

85. In the present case, as Coulson LJ points out at paragraph 49 above, there had been no relevant decision in relation to the trespass claim, the only decision that DJ Stewart made being to permit reamendment of the claim. I agree with him that this is clearly not enough to attract the *Henderson v Henderson* principle. The Appellants by issuing their malicious prosecution claim were not in any sense seeking to reopen something that had already been decided.

86. I also agree with him on the other aspects of the appeal. There are many types of abuse of process, of which *Henderson v Henderson* abuse is only one example, and the Court's power (if not duty) to strike out proceedings that have been conducted abusively is an important and valuable one. But for the reasons so well expressed by Coulson LJ the facts here do not demonstrate that the issue of the malicious prosecution claim, a claim that has both been held to be arguable and is well within the limitation period, involved any abuse.

87. I agree that the appeal should be allowed.