Applications to amend

Is it possible to resist an application to amend on the grounds that the new case could and should have been advanced earlier in the same proceedings? Martin Hutchings QC reviews the basic principles in the context of a recent case

There is no mention in CPR part 17 ('Amendments to Statements of Case') of the relationship between the court's wide discretionary power to allow amendments, and the abuse of process rule of law embodied in *Henderson v Henderson* [1843]. Nor does the White Book address the point. The leading textbook on *Res Judicata* also makes no mention of whether *Henderson* abuse can apply within the same set of proceedings. How, if at all, do they interrelate?

The point of principle was considered recently in *Kensell v Khoury* [2020]. Before explaining the conclusions of Zacaroli J in that case, it is worth remembering the basic principles.

Martin Hutchings QC is a barrister at Wilberforce Chambers and represented the successful respondents in Kensell v Khoury

Henderson v Henderson

In *Henderson,* Wigram VC famously laid down the rule that:

> The plea of *res judicata* applies, except in special cases, not only to points 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 the litigation, and which the parties, exercising reasonable diligence, might have brought forward.

Henderson was a case in which all relevant matters in a new (English) action had been previously litigated in Canada. That case and almost all subsequent cases relying on the 'extended' *res judicata* doctrine exemplified in it, are cases in which the issue was whether a new set of proceedings was an abuse of process in light of a determination in earlier proceedings.

The mischief to which the *Henderson* rule is therefore primarily directed is the bringing of a second action, not the making of an application to amend the first. Thus in *Greenhalgh v Mallard* [1947], the Court of Appeal characterised the *Henderson* rule as applying to:

> ... issues or facts which... clearly could have been raised [such] that it would be an abuse of the process to allow... new proceedings to be started.

The mischief to which the Henderson *rule is therefore primarily directed is the bringing of a second action, not the making of an application to amend the first.*

The most recent authoritative case on the *Henderson* rule *(Johnson v Gore Wood & Co (no 1)* [2002]) was also concerned with the question whether the claim or defence 'should have been raised in the earlier proceedings if it was to be raised at all'. Lord Bingham's statements of principle in that case, including that:

> ... there will rarely be a finding of abuse unless the later proceedings involves what the Court regards as unjust harassment of a party.

seem also to confine the rule to circumstances where a second set of proceedings has been issued following the determination of the first. This is also apparent from Bingham MR's earlier statement of principle in *Barrow v Bankside Members Agency Ltd* [1996] (emphasis added):

> The [*Henderson*] rule is... a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a *defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed*.'

One could therefore be forgiven for concluding that the danger that the rule in *Henderson* is designed to meet is the re-litigation of matters in fresh litigation, rather than attempts to amend statements of case to bring forward matters which might have been pleaded earlier in the same proceedings.

***Ruttle Plant Hire Ltd v The Secretary of State for the Environment, Food and Rural Affairs* [2007]**

In the only High Court case before Khoury to deal 'head-on' with the relationship between the CPR's amendment principles and *Henderson* abuse, Rupert Jackson J (later, Jackson LJ of CPR reforms fame) found that the *Henderson* rule did not, as a matter of principle, apply to applications to amend statements of case to plead new causes of action, even after there had

been a preliminary issue trial. In *Ruttle Plant Hire Ltd v The Secretary of State for the Environment, Food and Rural Affairs* [2007], the question before the judge was 'whether the rule in [*Henderson*] can be invoked as a ground for opposing amendments in existing litigation'.

In *Ruttle*, there had been a lengthy trial of preliminary issues and a considerable amount of the court's, and the parties' time and resources, had already been consumed. Over five months

One could be forgiven for concluding that the danger that the rule in Henderson *is designed to meet is the re-litigation of matters in fresh litigation, rather than... to bring forward matters which might have been pleaded earlier in the same proceedings.*

after the determination of those issues by Jackson J, the partially unsuccessful claimant applied to amend its particulars of claim (a third amendment) to plead new matters.

The matters could have been pleaded at the outset. The application was opposed, partly on the basis that:

> 16. [...] a party cannot return to Court and advance arguments, claims or defences which that party could have put forward for decision on the first occasion but failed to raise.

Could the *Henderson* rule be applied to amendments?

Amendments are allowed as a matter of principle because of the courts' willingness to ensure that all relevant arguments/claims are before the court at one time during one set of proceedings.

The application of the *Henderson* rule to amendments, by barring a party from bringing forward in one claim all relevant matters, even late in the day, might be said to call into question the justification for the rule's original application, while also being inconsistent with the court's wide discretionary power to allow amendments under CPR part 17.

Furthermore, the *Henderson* rule is a rule of law. There is no discretion for a judge to exercise once s/he has decided that *Henderson* abuse will occur. Thus once it is determined, applying a 'broad merits-based judgment' (as explained by Lord Bingham in *Johnson*), that the rule in *Henderson* is engaged, the claim/issue must be struck out. This fact might be said strongly to militate against a requirement that applications to amend statements of case must also be shown not to offend the *Henderson* abuse rule. The court's powers to allow amendment at any stage of proceedings – even after judgment – should not be trammelled by the additional need to also consider whether the *Henderson* rule is engaged.

Continues below

Jackson J found that *Henderson* did not apply, and he gave four reasons why this was the case:

> 36. Having considered the competing submissions of counsel, I have come to the conclusion that the rule in [*Henderson*] cannot be invoked in order to prevent a party from pleading at a late stage in litigation issues which might have been pleaded earlier. I reach this conclusion for four reasons.
>
> 1. The rule in [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.
>
> 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*] 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.

Could the *Henderson* rule be applied to amendments? *(continued)*

Indeed, the idea that *Henderson* can apply to applications to amend a first set of proceedings could be argued to run contrary to a well-established practice in strike-out applications, where it argued that a statement of case discloses no arguable claim or defence. In such instances, if the court is of the view that such an application is likely to succeed, the respondent would be given an opportunity to file a draft amended statement of case to attempt to cure the defects.

The White Book affirms the principle in note 3.4.2 which states:

> … where a statement of case is found to be defective, the Court should consider whether that defect might be cured by amendment and, if it might be, the Court should refrain from striking it out without first giving the party concerned an opportunity to amend [*Soo Kim v Young*].

So, if it were right that it could be a *Henderson* abuse of process to apply to amend defective pleadings at the point of strike out, it might be said that the general practice exemplified in *Soo Kim v Young* [2011] on strike out/summary judgment applications, should not exist.

On the other hand, that practice can be said to be entirely consistent with the *Henderson* rule, in that it encourages parties to bring forward all of their potential claims and arguments in one set of proceedings, rather than dragging matters out and wasting court time by the hearing of abuse applications in a second set of proceedings.

> 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.

While rejecting the application of Henderson *on the facts, at least two of the CA judges expressly accepted the* possibility *that the* Henderson *rule might apply in the same set of proceedings to separate stages of those proceedings.*

However, in *Kensell*, Zacaroli J reached the opposite conclusion, finding that, as a matter of principle at least, the *Henderson* rule *could* be engaged on an application to amend a first set of proceedings.

In *Kensell*, Zacaroli J felt able to depart from Jackson J's conclusions in *Ruttle* because (he reasoned) that an earlier Court of Appeal decision, *Tannu v Moosajee* [2003], had not been cited in *Ruttle* (nor had Jackson J apparently found *Tannu* from his own, no doubt diligent, researches).

Tannu v Moosajee and the post-*Ruttle* cases

In *Tannu*, two of the three Court of Appeal judges had tentatively accepted that, at least as a matter of principle, it was possible that the *Henderson* rule could apply in relation to 'separate stages' of the same litigation, although on the facts of the particular case, it was found to be inapplicable.

In *Tannu*, a Queen's Bench claim had been brought for the repayment of an alleged loan of £110,000. The defendant denied there was a relationship of creditor/debtor, claiming there was a partnership. The judge found there was no loan, declaring that there was a partnership at will. He ordered the taking of an account in the Chancery Division. In the account proceedings, the claimant claimed that the £110,000 was a capital contribution to the partnership. One question for the Court of Appeal was whether the *Henderson* principle could apply to prevent the claimant advancing its capital contribution case in the account phase of the trial, on the basis that this ought to have been raised at the Queen's Bench trial. While rejecting the application of *Henderson* on the facts, at least two of the CA judges expressly accepted the *possibility* that the *Henderson* rule might apply in the same set of proceedings to separate stages of those proceedings; although one of the two, Arden LJ, went no further than saying that it was 'not conceptually impossible' for *Henderson* to apply to those different stages.

A few more recent first instance cases, including a Commercial Court case (*Tobias Gruber v AIG Management France SA* [2019]) appeared to accept that *Henderson* might apply to applications for amendments to pleadings in existing claims, but each of those cases were ones in which there had been a trial of a preliminary issue and the unsuccessful party sought to amend at the next stage of the proceedings. Furthermore in none of those cases had the courts apparently grappled,

as a matter of principle, with whether and how *Henderson* could apply to a first set of proceedings. In none of those cases was *Ruttle* apparently cited. The obiter remarks in *Tannu* seemed a slender basis on which to find that the *Henderson* rule could be extended so as to apply within the same proceedings. It is also to be borne in mind that, in *Tannu*, the status of the £110,000 payment had been determined in the first trial, before the account was taken

It is as yet unclear to what extent the Henderson *rule can be used successfully to oppose an application to amend.*

in the second – so there was arguably a much stronger rationale on the facts for applying the *Henderson* doctrine in those circumstances, as compared to the subsequent cases that had referred to *Tannu*.

The decision in *Kensell*

In *Kensell*, the claimants (the Khourys) alleged *inter alia* breaches of restrictive covenants by their neighbour, relying on a building scheme. Mrs Kensell secured summary judgment against the Khourys on the basis that there was no arguable case for the existence of a building scheme. The claim was not struck out altogether, however, because the Khourys also advanced a separate common law claim in nuisance. After instructing new counsel, the Khourys sought to amend their particulars of claim to advance a case to enforce the covenants based on s56(1) of the Law of Property Act 1925. Mrs Kensell objected, including on the basis that the amendments would amount to a *Henderson* abuse. Mrs Kensell complained that she had already seen off the covenant claim by her successful summary judgment application and should not be vexed with it again.

The Khourys argued that:

> Jackson J in *Ruttle* was correct to find as a matter of principle, that *Henderson* could not apply to amendments to pleadings in existing proceedings.

On any basis the *Henderson* principle could not apply to a new case advanced after a successful summary judgment application (as opposed to a trial of a preliminary issue – where the court had in effect decided to conduct the proceedings in distinct stages).

Alternatively to points 1 and 2, it would be wrong, on the facts, to apply *Henderson*, because when applying the merits-based test, no abuse of process was shown and, as a matter of discretion under CPR 17, it was right to allow the amendments – particularly as no trial date was imperilled.

Zacaroli J (on appeal from the County Court judge) rejected points 1 and 2 above, and found in the Khourys' favour only on point 3.

In relation to points 1 and 2, Zacaroli J found that the authority of *Ruttle* was diminished because *Tannu* had not been considered. He felt free, therefore, to decide as a matter of principle whether Jackson J's conclusion had been correct in light of *Tannu* and the post-*Ruttle* first

instance decisions; noting, however, that *Henderson* had never been considered in the context of a case where an amendment was sought in existing proceedings, following a successful summary judgment application. Disagreeing with Jackson J, the judge found that there was no reason to preclude the application of the *Henderson* principle in the context of amendments; nor even as a matter of principle, where the earlier judgment had been obtained on a summary basis:

> ... 51. If the bringing of the new claim would constitute unjust harassment [...] then it is difficult to see why the fact that the earlier summary judgment did not dispose of the whole action should make any difference.

He did, however, hold that while the *Henderson* principle was capable of being engaged on an application to amend after strike-out of the original claim in the same proceedings:

> ... 63. It is likely to be appropriate to apply it in more limited circumstances than if the earlier judgment was given after a trial (for example on a preliminary issue) at an earlier stage in the same proceedings.

However, on the facts, Zacaroli J declined to find that the application to amend to plead s56(1) was an abuse of process, and he further found, although for somewhat different reasons, that the judge below had been correct to exercise his discretion under CPR 17 to allow the amendment.

Is *Kensell* right?

So, we know that *Henderson* can apply to the same set of proceedings. Statements such as those in *Ruttle* that:

> The mischief against which the [*Henderson*] rule is directed is the bringing of a second action, when the first action should have sufficed.

now require qualification. But this extension to the *Henderson* rule can be questioned.

First, it is unclear why the courts should need to apply *Henderson* in this context when it has ample discretionary powers to refuse amendments, as explained in the well-developed jurisprudence under CPR part 17. Secondly, as was pointed out in *Ruttle*, the jurisprudence is different, and designed to deal with 'different juridical problem(s)'. It could also be said to be inappropriate to confuse or elide the discretion under CPR 17 with the *Henderson* principle, which is a rule of law, not a discretion. With *Henderson*, once abuse is found, there is no discretion not to strike out/refuse the amendment application.

Should judges therefore first consider the broad, merits-based test applied in the *Henderson* rule and only then (assuming the *Henderson* challenge fails) go on to consider how the CPR part 17 discretion should be exercised? This could be a recipe for confusion. For example, we are told that the merits-based test for the purposes of *Henderson* abuse should invariably

not include any assessment of the merits of the new claim that is being challenged (as per Lloyd LJ in *Stuart v Goldberg* [2008]). Yet when considering whether to allow amendments under CPR part 17, the position is more flexible: in certain circumstances, a court *is* entitled to take at least some note of the underlying merits of proposed amendments. The court's different treatment (in relation to questions of delay and a failure to use reasonable diligence) where abuse of process is alleged, as compared to when it is considering late applications to amend, is also worth noting. One might conclude that some applications to amend are now likely to become more complicated and time-consuming.

Lessons from *Kensell*

Despite the clear reasoning in *Ruttle*, it would seem that courts nowadays will be prepared to consider whether an application to amend following a strike out of part of a claim, or summary judgment, amounts to an abuse of process engaging the *Henderson* rule.

It is as yet unclear to what extent the *Henderson* rule can be used successfully to oppose an application to amend. Clearly, the abuse allegation will have more weight if the application to amend follows a preliminary issue trial rather than an 'interlocutory' order to strike out, or for summary judgment. But more than ever, it now behoves a party to ensure that all of its potential claims and every possible way of advancing those claims are set out at the outset, because parties seeking to amend are now more likely to be met with *Henderson* abuse arguments. Those arguments can be expected to be deployed tactically by those seeking to oppose amendments. The other point that emerges from the above cases, including *Kensell*, is the importance of the party who is seeking to amend (and avoid an abuse finding) making every effort to inform the other side as soon as possible that it intends to raise the new claim or issue.

Whether this might also impact the practice on strike out applications exemplified in *Soo Kim*, or even the amendment of other documents such as grounds of appeal, remains to be seen. ■

Reference point

Spencer Bower and Handley: Res Judicata, Kenneth R. Handley and George Spencer Bower (2019, LexisNexis Butterworths, 5th edn)

Barrow v Bankside Members Agency Ltd
[1996] 1 WLR 257

Greenhalgh v Mallard
[1947] 2 All ER 255

Henderson v Henderson
[1843] 67 ER 313

Johnson v Gore Wood & Co (no 1)
[2002] 2 AC 1

Kensell v Khoury
[2020] EWHC 567 (Ch)

Ruttle Plant Hire Ltd v The Secretary of State for the Environment, Food and Rural Affairs
[2007] EWHC 1773

Soo Kim v Young
[2011] EWHC 1781 (QB)

Stuart v Goldberg
[2008] EWCA Civ 2

Tannu v Moosajee
[2003] EWCA Civ 815

Tobias Gruber v AIG Management France SA
[2019] EWHC 1676 (Comm)