Not for the first time this year I have been instructed to deal with an application to strike out a case owing to an abuse of process.

In March this year I dealt with a case that involved a claimant bringing the same cause of action twice. In that case (involving a road traffic accident), the claimant pleaded the defendant was negligent in that he reversed into her car. However, at trial, her evidence was the defendant was not in the car and it started to move of its own volition. The first action was dismissed as the claimant failed to prove her case. The claimant issued a second set of proceedings (the second action) but on that occasion alleged the car rolled backwards into her car with the defendant not being in occupation. The court found this second action was an abuse of process on the basis the claimant failed to plead her full case in the first action (per **Henderson v Henderson (1843) 3 Hare 100**).

The above circumstance is a common example of an abuse of process i.e. where the claimant has failed to prove their case in the first action and seeks a second bit of the cherry. Lasts week, I found myself dealing with a less common example of abuse of process in the county court in Birmingham.

In last weeks case, the first action was issued by 'A' in March 2018 for damages arising from a road traffic accident. The defendant to the first action 'B', failed to file a defence. Rather than immediately apply for judgment in default, the party's solicitors negotiated a settlement (in favour of A) but unfortunately, B's insurer failed to make payment on time and judgment in default was entered and payment made in full. One might think that was the end of the dispute but it was not to be.

6 months later, B issued a counterclaim against A claiming damages arising from the same road traffic accident.

The defendant's solicitors in the second action (A's solicitors) made an application to strike out on the basis of abuse of process. The claimant (B) opposed the application arguing that a) a default judgment does not amount to a finding of liability b) there is no settlement or adjudication c) taking account of the circumstances, there was a good reason for B not bringing a counterclaim in the first action (being that there was a bereavement in the family and she couldn't deal with the legal proceedings during this difficult time) and d) A will not be vexed twice by dealing with the same claim as this is the first time the claim (counterclaim by B) has been brought.

B relied upon the authority of **Johnson v Gore Wood & Co [2002] 2 AC 1** that states it is wrong to hold that just 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 and B sought to apply the broad merits-based approach, looking at B's conduct generally.

At the hearing of the application to strike out the claim, I represented the defendant (A). I referred the learned judge to the leading case of **Davies v Carillion Energy Services Ltd and Another [2017] EWHC 3206 (QB)** where Morris J provides helpful guidance on how parties should approach potential abuse of process claims. In particular he identified two potential categories of abuse of process, the first category of cases are ones where the first action was struck out for procedural irregularity and the second category are of the type identified in the leading case of **Henderson v Henderson** where a party failed to bring forward their entire case in the first action. There was no dispute this was a second category case. Accordingly, the general principal from **Henderson v Henderson** applies.

Turning to the specific points raised by B in their opposition to the application to strike out, these were dealt with as follows:

a) In respect of a judgment in default, this is an adjudication for the purposes of **Davies v Carillion Energy Services Ltd and Another [2017] EWHC 3206 (QB)**. **CPR12.4.4** states a judgment in default is '*conclusive of liability*'. Whilst arguments may be made in respect of quantum arising from a judgment in default, there can be no argument in respect of liability. Whilst counsel for B tried to argue against this, the learned judge was not with them on the point, the district judge was satisfied that once default judgment is entered, it is conclusive of liability in the circumstances that had arisen in this case.

b) Accordingly, it followed from the above that there was an adjudication in the matter. Further, the learned district judge took the view that whilst he didn't have all the papers in respect of the settlement between the parties, the evidence before the court from both parties' solicitors was that there was a settlement, terms had been agreed and A's insurer simply failed to make payment.

c) As to A's argument that she had not been able to file a defence with a counterclaim owing to a bereavement the judge was not satisfied that this was a reasonable excuse. I had submitted that there was little evidence from A in relation to this (no names or dates). Second, the time from the claim being issued to judgment in default being requested was 10 weeks, this would have been a reasonable period of time to file and serve a defence and counterclaim under the circumstances. In addition, I submitted the logical steps for A to take if she was struggling with the bereavement was to make an application for a stay of proceedings. The learned judge agreed with me on all points and took the view that having taken account of all the circumstances there was no good reason to allow the second action to proceed.

d) Finally, as to the suggestion that A would not be vexed twice by allowing the second action to proceed because it was the first time the claim (counterclaim) was being raised was not accepted. The learned judge agreed with my submission that the same accident circumstances were being raised a second time, A has already dealt with the issue of liability in respect of these circumstances, to allow the second action would result in A being vexed twice with the same circumstances.

The application to strike out the second action was successful. The learned judge commented that the main barrier to the claim proceeding was that a judgment in default existed, there was no application to set aside that judgment or appeal the same. Therefore, if the second action proceeded to trial and was successful there would potentially be two separate (quite regular) judgments but with contradictory outcomes i.e. both A and B could be 100% liable for the accident and this is not possible.

This case serves as a timely reminder that parties to proceedings must bring their entire case both in respect of their defence and counterclaim.

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