Neutral Citation Number: [2024] EWHC 454 (KB)

Case No: KB-2023-000159

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st March 2024

Before :

Deputy Master Skinner KC

- -

Between :

MAIA LUXURY LIMITED **Claimant**

- and –

(1) LUXIERGE LIMITED
(2) PARESH JITENDRAKUMAR LALJI THANKY

Defendants

Mr Richard Wilson KC and Ms Rachel Coyle (instructed by **CGS Legal**) for the **Claimant**
Mr Simon Arnold (instructed by **Brandsmiths LLP**) for the **Defendants**

Hearing dates: 6 and 14 February 2024

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JUDGMENT

Deputy Master Skinner KC:

Introduction

1. By this claim issued on 12 January 2023 the Claimant has brought proceedings against the Defendants for breach of a supplier agreement and/or order; breach of the Sale of Goods Act 1979; misrepresentation, unjust enrichment and mistake as to identity. By way of remedy, it seeks repayment or restitution of the balance of sum paid, loss of earnings, punitive/exemplary damages to be assessed, interest and any other remedy as the Court sees fit. The claim is valued in excess of £220,000.

2. The Defendants acknowledged service of the Claim Form and Particulars of Claim on 3 February 2023.

3. By an Application Notice issued on 5 April 2023, the Defendants sought to strike out the Claimant's claim pursuant to CPR 3.4(2)(b) and/or (c) on the basis: (1) that the claim is an

attempt (contrary to *Henderson* principles) to litigate issues which ought to have been raised in a previous claim (QB-2022-000288); (2) that the instant claim is an attempt to bring the same claim again without permission pursuant to CPR 38.7 or otherwise; and (3) that the claim has been issued in the wrong court as it is beneath the value threshold.

4. By the time the Application was heard before me (having been listed twice previously, on 2 October and then 8 December 2003), the issues had crystallised and developed somewhat. Both the second and third issues had, in effect, fallen away. In respect of the second, it was accepted by the Defendants that, because the previous claim was discontinued prior to service of a defence, there was no requirement, whether under CPR 38.7 or otherwise, to seek the permission of the Court prior to issuing this claim. The point about value was not pursued.

5. The principal argument, therefore, was in relation to the first issue, and in particular whether the instant proceedings are an abuse of process. In relation to that, it was accepted by the Claimant that this claim was, in essence, if not in every particular, identical to the previous claim and arose from the same factual matrix.

6. As a result, the focus of the argument before me was on the circumstances in which the previous proceedings were compromised. The Defendants contended that it was clear that the parties intended to and did, by the terms of the settlement of the previous proceedings, compromise the claim in its entirety. It was therefore plainly abusive for the Claimant to commence this claim. By contrast, the Claimant contended that the compromise was limited to the previous proceedings alone. There was nothing about the circumstances of the settlement to suggest that it was intended to bind it in respect of any further claim, and much to suggest the opposite was the case. Before turning to consider those arguments in more detail, it is necessary to set out the history in a little more detail.

The First Claim

7. The Claimant issued the First Claim on 28 January 2022. That claim was issued against the First and Second Defendants to these proceedings as, respectively, the First and Third Defendants. Another individual, "Ivan Franki" was named as the Second Defendant.

8. By its Particulars of Claim, the Claimant stated that it was a reseller of authentic Hermes bags and accessories ("bags"), and that the First Defendant supplies such bags. The Claimant stated that the Mr Franki represented the First Defendant and was understood to have been acting as agent for it in February 2019. By paragraph 5, the Claimant stated that "*it has since transpired*" that Mr Franki is actually the Second Defendant, Mr Thanky, and that *"[i]t is understood that*" Mr Franki is not the actual name of the person with whom the Claimant was dealing. The circumstances in which the Claimant came to contend that Mr Franki and the Second Defendant were one and the same person were set out at paragraphs 10 and following, concluding at paragraph 14 that "*In the circumstances, the Claimant understands that [the Second Defendant] is [Mr Franki] and that [the Second Defendant] is agent and/or supplier of [the First Defendant]*".

9. The essence of that claim (and indeed of the present claim) may be summarised as follows.

a. The Claimant contended (as it still does) that it in or around February 2019 it had, pursuant to a contract with the First and Second Defendant (the latter using the pseudonym "Mr Franki") entered into an agreement over WhatsApp for the sale and purchase of a 25cm Birkin bag with diamonds ("the Bag") for the sum of £170,000. That sum was duly transferred to the Second Defendant. The Claimant never received the Bag, which was not in an unused condition and was damaged.

b. Then known to the Claimant as "Mr Franki", the Second Defendant informed the Claimant that he had paid the £170,000 over to the owner of the Bag, and that he had brought proceedings against her in Hong Kong seeking recovery of the sums paid.

c. Between around 6 May 2019 and 1 August 2019, Mr Franki refunded sums totalling £13,500. The balance, however, remained unpaid.

10. The Claim Form and Particulars of Claim in the First Claim were served by post but not responded to. Judgment in default was entered for the Claimant on 25 July 2002. On 2 August 2022, the Claimant obtained a freezing injunction against the Defendants to the First Claim. Up to this point, there had been no communication from the Defendants at all.

11. It subsequently transpired that, due to an error by the Claimant's then solicitors, two characters of the Defendants' postcode had been transposed. Accordingly, there was no evidence that the proceedings had ever been served. For their part, the Defendants contended that they only became aware of them as a result of the freezing of one of the Second Defendant's bank accounts on 3 August 2022.

12. The relevant communications between the parties thereafter are as follows:

a. On 16 August 2022 at 11.27, the Claimant's then solicitor emailed the Defendants' solicitor, stating:

> "In light of the issues raised in relation to service, and in order to save any further costs being incurred, we consent to having judgment set aside and if this is agreed, we shall provide you with a Consent Order to that effect."

b. On 17 August 2022 at 09.50 the Claimant's solicitor emailed again:

> "…our client's position is that they shall consent to having default judgment set aside and either in the same consent order or thereafter, they shall discontinue the matters against the Defendants. Therefore, <u>your</u> clients need not carry out any further work in respect of this matter."

c. At 16.24 the Claimant's solicitor sent a further email:

> "We make an open offer on the same terms as we have previously, which you have understood in your reply email, namely

- Judgment is set aside;
- [O]ur client's claim is discontinued;
- Quantum hearing vacated;
- We are to pay … [y]our client's costs relating [to] the set aside and discontinuance and this order in the sim of £1,000 +VAT

If your client chooses to make an application to set aside or the like, we shall produce this correspondence on the issues of costs since [by] any such application you will simply be achieving what has already been offered.

In order to close matters, we would be prepared to make the payment of £1200 within 7 days…"

13. Thereafter, and pursuant to the above, Mr Justice Eyre made an Order on 18 August 2022 that judgment in default be set aside, and that the Claimant should pay the costs of and occasioned by the set aside and discontinuance in the agreed sum of £1,200. A recital to the Order recorded that the Claimant had agreed by email dated 17 August 2022 (a) that the judgment in default be set aside, it having been obtained on the basis of alleged lack of response to the claim form and pleadings that were in fact not served on the Defendants, and (b) that it will in those circumstances give Notice of Discontinuance of the Claim on the setting aside of judgment in default.

14. The Claimant has since paid to the Defendants the sum of £15,000 pursuant to the cross-undertaking in damages given in order to obtain the freezing injunction.

The Second Claim

15. As already noted above, these proceedings were issued on 12 January 2023. There is no dispute that they are, in substance, identical to the First Claim. Some further detail is added, but the legal bases of the claim, the remedies sought, and the underlying factual matrix are the same. There are now only two Defendants, Luxierge Limited, and Mr Thanky, the latter having acknowledged that he and "Ivan Franki" are one and the same.

The Law

16. CPR 3.4(2) materially provides that the Court may strike out a statement of case if it appears to the Court: (b) that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of proceedings; or (c) that there has been a failure to comply with a rule, practice direction or court order.

17. There is no dispute that, on an application to strike out for abuse of process, the onus is on the party alleging the abuse – here the Defendants - to satisfy the Court of it.

18. The type of abuse with which this application is that which lawyers refer to as "the rule in *Henderson"*, following the judgment of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 at 115. The so-called "rule in *Henderson*" operates to preclude a party from raising in subsequent proceedings matters which were not but could and should have been raised in earlier ones.

19. As Lord Bingham observed in *Johnson v Gore Wood* [2002] 2 AC 1 at p30H-31A, Wigram V-C's ruling in *Henderson* itself was in fact addressing res judicata. As now understood, however, it is separate and distinct from cause of action estoppel and issue estoppel, it has much in common with them. His Lordship continued:

> 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 current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. …
> …
> I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. 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 all of the facts of the case, focussing 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 been raised before. As one cannot comprehensively list all possible forms of abuse, so that one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. …
> …
> While the result may often be the same it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and the, if it is, to ask whether the abuse is excused or justified in the circumstances.

20. In *Johnson*, the House of Lords held that there was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter; but that whether an action was an abuse of process as offending against the public interest should be judged broadly on the merits taking account of all the public and private interests involved and all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of the court.

21. During submissions, I was taken to other passages in *Johnson*, and my attention was drawn to a number of further cases. I refer below only to those cases that the parties place particular emphasis upon.

22. In *Aktas v Adepta* [2011] QB 894, the Court of Appeal held that a mere negligent failure to serve a claim form in time was not, without more, an abuse of process; that for a matter to be an abuse of process, something more than a single negligent oversight in timely service was required, such as inordinate and inexcusable delay, intentional and contumelious default, or at least wholesale disregard of the rules.

23. In *Spicer v Tuli* [2012] 1 WLR 3088 proceedings were compromised in circumstances where the claimants' solicitor had indicated to the defendants' solicitor that he would agree to a

consent order being drawn up withdrawing the proceedings on the understanding that such withdrawal did not preclude the possibility of further proceedings being brought pending further investigation by the claimants. The order that was drawn up stated that, by consent, the proceedings were "dismissed". The claimants subsequently issued a fresh claim covering the same subject matter as the previous claim but with additional allegations. The first defendant then issued an application to strike out the fresh claim on the basis that the first claim had been dismissed so that the later proceedings were barred by cause of action estoppel or were an abuse of the process of the court.

24. An appeal against the district judge's refusal to strike out the claim was dismissed. The Court of Appeal held that the conduct of a party in bringing an end to an earlier action was part of the court's broad merits-based approach to the question whether it amounted to an abuse of the process of the court for that party to bring fresh proceedings; that since the basis for the suggestion that the first claim be withdrawn was the claimants' statement that the action against the defendants would be pursued depending on the outcome of further investigation, and since the accident that the consent order had used the word "dismissed" instead of "discontinued" could not alter that merits-based approach, it would be unconscionable to allow the first defendant to take advantage of that technical error; and that accordingly, the bringing of the fresh proceedings did not amount to an abuse of the process of the court.

25. Giving a judgment with which the rest of the court agreed, at p3091G, Lewison LJ noted that under the CPR an action could not be withdrawn. It may be either discontinued or it may be dismissed. If discontinued under CPR 38 "*it is clear that a second action may be brought even if it arises out of the same facts as the discontinued action, although the permission of the court would be needed under CPR r38.7 if the action is discontinued after the defendant has served a defence*."

26. At p3097C, Lewison LJ stated as follows:

> "But where it is alleged that a person has waived his article 6 rights as a result of a friendly settlement, a thorough analysis is needed in order to determine whether a friendly settlement has indeed been reached, including an investigation into the surrounding circumstances. An investigation into the surrounding circumstances in this case makes it clear that there was no friendly settlement; rather the receivers made it clear that they would pursue their claim. In my judgment, it is clear from the surrounding circumstances in this case that the receivers did not intend to abandon their claim, and it is equally clear that Ms Tuli, through her solicitors, knew that."

27. In *King v Kings Solutions Group* [2020] EWHC 2861 (Ch) Mr Leech QC, sitting as a Judge of the Chancery Division, acknowledged at [108] that *Johnson* remains the leading authority on *Henderson* abuse. The Judge further acknowledged at [112] that the power to strike out or stay was not dependent upon there being a cause of action or issue estoppel. At [113], he stated that it remains open to a party to rely on the rule in *Henderson* where the first claim has been discontinued as well as where it has resulted in a judgment or compromise.

The Arguments

28. The Defendants' argument on abuse was in summary as follows: (1) that the instant claim was in material substance identical to the first claim and the issues ought to have been litigated in that claim; (2) that there had been non-compliance with the rules because the first claim had not been served etc, and judgment in default and the freezing injunction were obtained on the premise that they had been; and (3) that the compromise of the first claim was a settlement of all claims arising from the same factual matrix.

29. The Claimant responded as follows: in relation to (1) it was accepted, as already noted above, that the instant claims was in material substance identical to the first claim, but that seeking to pursue that first claim would have been inherently problematic and it was more efficient and straightforward simply to start again; (2) that the reality was that there had been a single error – namely the transposition of two of the characters in the postcode; and (3) that, properly constructed, it was evident that the settlement of the first claim was limited to that claim and that claim only. The Defendants at all material times had solicitors on the record acting for them; that through their solicitors the Defendants ought to have been advised that discontinuance was not, without more, a bar to bringing fresh proceedings, and that the Defendants never sought to settle on the standard terms that the settlement was in full and final settlement of all claims arising. In addition, it was contended that the merits of the underlying claims were strong, that the Second Defendant had a demonstrable history of dishonesty (in maintaining in WhatsApp messages exchanged with the Claimant that Mr Ivan Franki was real, and a separate person from Mr Thanky when in reality they are one and the same); and further that a declaration made to companies house to similar effect was prima facie constituted the commission of a criminal offence by Mr Thanky contrary to s1112 of the Companies Act 2006.

Discussion

30. In order to strike out this claim for *Henderson* abuse the Defendants must satisfy me, on the balance of probabilities, that this claim is abusive in the sense summarised at paragraphs 16 to 27 above. I note, in particular, that there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. Here, the Defendants did not even become aware of the first claim until Mr Thanky's bank account was frozen pursuant to the freezing order. The Defendants' costs of the first proceedings have been paid by the Claimant and they have also been paid damages pursuant to the cross-undertaking. No defence was ever served and accordingly there is no procedural bar to the issue of new proceedings. Notable for its absence from the settlement of the first proceedings agreed between the parties is any reference to the terms agreed relating to any future proceedings in respect of the same subject matter.

Decision

31. In the circumstances I have little difficulty in concluding that the Defendants' case falls a very considerable way short of satisfying me that the present proceedings are abusive. Accordingly, I do not need to consider whether, and if so to what extent, I accept the Claimant's additional arguments about the overall merits or the Second Defendant's alleged dishonesty. If I am wrong about that, I assess, based on the Particulars of Claim and their Appendices, that the Claimant has a real prospect of success on its claims and is likely to establish that the Second Defendant was dishonest in representing that he and Mr Franki were separate persons.

32. The Defendants' application is dismissed. As indicated at the hearing, I will receive and respond to submissions on costs and any application for permission to appeal in writing. Time for any appeal will not begin to run until I have handed down judgment on costs and permission. I would be grateful for an agreed draft order reflecting this at the earliest opportunity and in any event by 2pm on Monday 26 February.

33. The parties' written submissions or an agreed draft order on consequential matters should be provided to the Court by no later than 4pm on Monday 26 February 2024. In case it assists the parties, my strong preliminary view is that the Defendants should pay the Claimant's costs of the application to be assessed if not agreed, together with a payment on account of such costs. Please ensure that any costs schedules relied on are provided together with submissions.