[2012] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 9/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**HON GORDON STEWART OJ**	**1ST APPELLANT**
AND	**CHRISTOPHER ZACCA**	**2ND APPELLANT**
AND	**AIR JAMAICA REQUISITION GROUP LIMITED**	**3RD APPELLANT**
AND	**INDEPENDENT RADIO COMPANY LIMITED**	**1ST RESPONDENT**
AND	**WILMOT PERKINS**	**2ND RESPONDENT**

Donald Scharschmidt QC and Jerome Spencer instructed by Patterson, Mair, Hamilton for the appellants

Michael Hylton QC and Miss Carlene Larmond instructed by Michael Hylton and Associates for the respondents

22 and 23 June 2011 and 17 February 2012

HARRIS JA

[1] I have read in draft the judgment of my brother Hibbert JA (Ag). I agree with his reasoning and conclusion and have nothing further to add.

MCINTOSH JA

[2] I too have read the judgment of Hibbert JA (Ag) and agree with his reasoning and conclusion.

HIBBERT JA (Ag)

[3] The appellants in 2009 filed a claim in the Supreme Court against the respondents and in the amended claim form filed on 24 August 2010, claimed damages for defamation "arising from a number of publications maliciously and falsely made by Wilmot Perkins on the programme Perkins-On-Line broadcast by Independent Radio Company Limited on the radio station Power 106 FM over an extended period, particularly from the year 2004 to 2008 which were defamatory of the claimants personally and in the way of their business".

[4] Paragraph 43(a) of the amended particulars of claim stated:

> "The 1st Defendant's station broadcast the contents of a parliamentary speech made by a member of the House of Representatives Mr. Andrew Gallimore on the 28th June 2005. This presentation assailed the 3rd Claimant's management team in an unjustifiable manner. This had occurred while there was a pending case in Miami between Mr. Andrew Gallimore's brother, Miguel Gallimore against Air Jamaica arising from an incident, which occurred when the 3rd Claimant was in control of Air Jamaica's management and in which Andrew Gallimore had abused his parliamentary privilege. The 1st Defendant's station has been energetic and highly motivated in promoting the contents and sentiments of the speech and promotion of its accusations against the Claimants by repeating them outside of Parliament."

[5] On 13 July 2010 the appellants again sued the respondents, claiming among other reliefs the following:

> "1. Damages for libel in respect of the republication of a speech, and or parts thereof, presented in the Houses of Parliament by Andrew Gallimore, M.P. on June 28, 2005."

[6] Paragraph 20 of the particulars of claim stated:

> "On July 29, 2005, the 2nd Defendant, while hosting his radio programme "Perkins On Line' on Power 106, which was aired on the internet as well, falsely and maliciously republished a speech, or parts thereof, presented in the Houses of Parliament on June 28, 2005 by the current State Minister in the Ministry of Labour and Social Security, Andrew Gallimore, M.P. which was defamatory of the Claimants. At the time of the speech, Minister Gallimore was the M.P. for West Rural St. Andrew, the Jamaica Labour Party's parliamentary whip and shadow cabinet secretary."

[7] On 8 October 2010 the respondents filed an application seeking an order:

> "1. That the Claim Form and Particulars of Claim dated July 12, 2010 be struck out."

The grounds upon which the application was based were:

> "(a) Rule 26.3(1) (b) of the Civil Procedure Rules, 2002 provides that the court may strike out a statement of case if the statement of case is an abuse of the process of the court.
>
> (b) The Claimants in these proceedings are advancing the same claim and seeking the same relief that they

advanced and sought against the Defendants in Claim No 2009 HCV 02971 filed on June 9, 2009.

(c) The claim is therefore an abuse of the court's process."

[8] On 13 January 2011 when the application to strike out the claim dated 12 July 2010 and filed on 13 July 2010 came up for hearing before Miss Paulette Williams, J, the appellants took a preliminary objection to the hearing of the respondents' application. The appellants argued that in keeping with the provisions of Part 74 of the Civil Procedure Rules (CPR) the matter must first be referred to mediation. The learned judge rejected the preliminary objection and proceeded to hear the application. At the conclusion of the hearing the learned judge made the following orders:

"1. The Claim Form and Particulars of Claim dated July 12, 2010 be struck out.

2. Costs to the Defendants on the claim to be taxed if not agreed.

3. Leave to appeal granted in respect of all orders made."

[9] It is from these decisions that the appellants have appealed. They have relied on the following grounds of appeal:

"(1) The Learned Judge erred in relying on the overriding objective in circumstances when the situation was dealt with by the clear and unambiguous language of Rule 74.4 of the CPR.

(2) The Learned Judge erroneously concluded that she had the power to dispense with mediation without

following the provisions of Rule 74.4 and Rule 26.1 (8) of the CPR.

(3) In determining that the overriding objective was applicable, the Learned Judge fell into error in deciding that hearing the application to strike out the claim rather than allowing the matter to proceed to automatic mediation was more in keeping with the overriding objective.

(4) The Learned Judge wrongly found that Claim No. 2009HCV39721 included a claim for defamation against these Respondents arising out of the republication or repetition of the speech made by Minister Gallimore and therefore the pursuit of the claim below was an abuse of process."

[10] Before this court Mr Spencer submitted that, although rule 1.2 of the CPR provides that, "The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under the rules", this cannot be used to defeat the clear and unambiguous provisions of the CPR.

[11] He further submitted that the provisions of rules 74.3(3) which mandate automatic referral to mediation and 74.4 which deals with the circumstances under which mediation may be dispensed with are in clear and unambiguous terms and therefore cannot be defeated by the use of the overriding objective. Consequently, he argued, the learned judge was bound to refer the matter to mediation and could not then embark on the hearing of the application by the respondents to strike out the appellants' statement of case. He finally submitted that the effect of the automatic referral to mediation is to impose a partial stay on court proceedings until and unless

mediation had been dispensed with, had not occurred or had failed to broker a settlement.

[12] In support of those submissions, Mr Spencer relied on the judgments in **Goodwin v Swindon Borough Council** [2001] 4 All ER 64, and **Vinos v Marks and Spencer** [2001] 3 All ER 784.

[13] In reply, Mr Hylton QC submitted that, although the provisions of rule 74.3(3) is couched in mandatory language, an examination of other provisions in rule 74 merely provides for a sequence for all matters to follow to avoid matters "falling between the cracks". He also submitted that the provisions contained in rule 74 are general provisions and, where applicable, the court may depart from the sequence in circumstances that warrant it. He further submitted that it could never have been the intention of the framers of the rules to oust the jurisdiction of the court to jealously guard its process from abuse. Indeed, he submitted, such allegation of abuse ought to be brought to the attention of the court as early as possible so that the court may deal with it expeditiously. He further submitted that rule 26.3(1) which empowers the court to strike out a statement of case, if it is found to be an abuse of the process of the court, contains no restrictions on, or pre-conditions to, the exercise of the court's power under that rule. Accordingly, he submitted, the learned judge was correct in applying the overriding objective and dealing with the application before the mediation process.

Analysis

[14] Rule 74.1 of the CPR states:

> "This part establishes automatic referral to mediation in the civil jurisdiction of the court for the following purposes:
>
> a) improving the pace of litigation;
>
> b) promoting early and fair resolution of disputes;
>
> c) reducing the cost of litigation to the parties and the court system;
>
> d) improving access to justice;
>
> e) improving user satisfaction with dispute resolution in the justice system; and
> f) maintaining the quality of litigation outcomes.
>
> through a mediation referral agency appointed to carry out the objects of this part."

In furtherance of the stated objective in rule 74.1, rule 74.3(3) states:

> "In any proceedings in which a case management conference has not been fixed before September 18, 2006, the matter shall be automatically referred to mediation."

Rule 74.4 empowers the court to postpone or dispense with mediation if it is satisfied that certain stated circumstances exist.

[15] It is quite clear from rule 74.3(3) that the automatic referral to mediation does not require an order from a judge and in fact is done administratively by the registrar of the court. A judge only becomes involved in the referral process if an application is made under rule 74.4. Before Williams J, there was no application to postpone or

dispense with mediation, neither was there an order made by her postponing or dispensing with mediation. Was Williams J therefore precluded from entertaining the application when she did?

[16] The principle relevant to this case which may be extracted from the decisions in **Goodwin v Swindon Borough Council**, **Vinos v Marks and Spencer** and **Millicent Forbes v The Attorney General of Jamaica** SCCA No 29/05 delivered 20 December 2006 may be found in the judgment of Lord May at page 789 of the decision in **Vinos v Marks and Spencer**. He said:

> "Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored."

The passage was cited with approval by Harris JA in **Millicent Forbes v The Attorney General of Jamaica.**

[17] Rule 26.3(1) under which Williams J acted states as follows:

> "In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -
>
> (a) …
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (c) …

(d) …"

It is quite clear that this rule contains no restrictions or pre-conditions to the exercise of the court's power. In my view, there is nothing contained in this rule that would prevent the hearing of an application under it, even while the matter is awaiting mediation. Rule 26.3(1), in my view, does not in any way impact directly on the operation of rule 74.3(3). It may, however, impact indirectly if a statement of case is struck out as there would be nothing to be referred to mediation.

[18] The question to be resolved is: Did Williams J, in interpreting rules 74.3(3) and 26.3(1), in order to give effect to the overriding objective ascribe an incorrect meaning to provisions which are quite plain or ignored the plain meaning of these provisions?

[19] An answer could be given in the affirmative only if the court accepts the submission of Mr Spencer that rule 74.3(3) imposes a partial stay on proceedings before the court. I do not believe that this position is sustainable. In my opinion the word "automatic", as used in this rule, could only mean that the referral is to be made without the need for an application to be made to the court or for an order from the court, as was the case prior to the introduction of rule 74.3(3). Automatic certainly does not mean immediate. In my view, rule 74.3(3) contains no words, plain or otherwise, which imposes a stay on proceedings until the mediation process is completed. If this was so, how then could there be an application to postpone or dispense with mediation? It would be remarkable indeed if a clear case of an abuse of

the process of the court is disclosed and the court is bound to allow this to continue until after mediation.

[20] I am of the view that Williams J did not err in entertaining the application to strike out the statement of case of the appellants and therefore find no merit in grounds 1, 2 and 3 of this appeal.

[21] The arguments on behalf of the appellant, relative to ground 4, were presented by Mr Scharschmidt QC. He first submitted that striking out of a claim as an abuse of the process of the court should be the last option. For this he relied on a passage at paragraph 33.12 of Blackstone's Civil Practice 2008.

[22] He further submitted that it is incorrect to assert that the second claim was a repetition of the first. Relying on an extract from paragraph 59 of Halsbury's Laws of England, Fourth Edition, and the judgments in the **Duke of Brunswick and Luneberg v Harmer** (1849) 14 QBD 18 and **Berezovsky v Michaels and others**; **Glouchkov v Michaels and others** [2000] 2 All ER 986, he submitted that each publication was a separate tort. Consequently, he argued, the difference in the dates averred in the statements of claim show that separate claims were being made.

[23] Mr Hylton QC, in reply, submitted that there was a clear abuse of process, as the claimants in the second claim, who are all claimants in the first claim, have sought the very same relief against the same defendants on one of the bases advanced in the first claim. He further submitted that the contentions stated in paragraph 20 of the

particulars of claim of the second claim were no different from those contained in paragraph 43(a) of the first claim.

[24] In the alternative, he submitted, even if the first submission was wrong, the court could still find that there was an abuse of process. Accepting that res judicata and issue estoppel would not apply to the present case, he submitted that an abuse of process could still be found. He cited **OJSC Oil Co Yugraneft v Abramovich** [2008] EWHC 2613 in support of this proposition and submitted that a third category, **Henderson v Henderson** abuse of process, would apply. An example of this category of abuse of process, he said, is to be found in the decision of the Judicial Committee of the Privy Council in **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] 2 WLR 690 and was recognized in the decision in **Johnson v Gore Wood & Co (a firm)** [2001] 1 All ER 481. He also submitted that, based on these authorities, even if, as the appellants argued, the second claim raised a different issue, it could and should have been raised in the first claim and consequently was properly struck out.

[25] Mr Hylton also submitted that an examination of the particulars of claim of the first and second claim revealed no significant differences. Furthermore, the appellants by paragraph 59 of the particulars of claim in the first claim reserved the right to refer to other publications concerning them or any of them which may come to their attention. Hence, there was no need to bring a second claim as the court would not be deprived of the benefit of the full context of Minister Gallimore's speech. He further

submitted that any procedural flaw which might have existed in the first claim could be remedied by amending the particulars of claim.

He concluded by submitting that the bringing of the second claim involved an unjust harassment of the respondents.

Analysis

[26] The **Henderson v Henderson** form of abuse of process was pronounced by Wigram, V C in **Henderson v Henderson** [1843-60] All ER Rep 378 at 381-382 as follows:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of the 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 the same parties to open the same subject of litigation in respect of matter 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 case, not only to points upon 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 litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

[27] The Vice-Chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in **Greenhalgh v Mallard** [1947] 2 All ER 255 by Somerwell LJ who at page 257 stated:

> "… res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

[28] An examination and application of the **Henderson v Henderson** abuse of process was carried out in the **Yat Tung** case . In that case the first respondent (the bank) sold to the appellant property which it had acquired when the original owners defaulted on mortgage payments. The bank assigned the property, pursuant to the sale, to the appellant and the appellant borrowed money from the bank on the security of a mortgage of the property. The appellant defaulted on the payment of interest under the mortgage and the bank exercised its right of sale thereunder and sold the property to the second respondent. The appellant brought an action against the bank claiming that the sale of the property to it was a sham: that the property had been conveyed to it as trustee for the bank and the mortgage was accordingly a nullity. The bank denied that the sale was a sham and counterclaimed for the loss suffered on the re-sale of the property to the second respondent. The court dismissed the appellant's claim and upheld the bank's counterclaim. One month after that judgment the appellant brought an action against the bank and the second respondent, claiming that the sale by the bank to the second respondent was void or voidable as fraudulent, in that, the bank and the second respondent "were in fact essentially one certain interest and/or alternatively acting in concert with a common design calculated to obtain the … property at a low price and to extinguish the plaintiff's interest therein". The bank and

the second respondent applied for an order that the statement of claim be struck out as (inter alia) being vexatious, frivolous and/or otherwise an abuse of the process of the court. The judge held that the allegation of fraud and the voidability of the sale by the bank to the second respondent were matters which were available for litigation in the first action and ordered that the statement of claim be struck out. That order was affirmed by the Full Court.

[29] On appeal to the Judicial Committee of the Privy Council, the Board, applying **Henderson v Henderson** and **Greenhalgh v Mallard** held, dismissing the appeal, that there was no reason why a defence impugning the bonafides of the sale by the bank to the second respondent could not have been pleaded as a counterclaim to the counterclaim in the first action; that, accordingly, the doctrine of res judicata in its wider sense applied and it would be an abuse of the process of the court to raise, in subsequent proceedings, matters which could and should have been litigated in the earlier proceedings.

[30] In delivering the judgment of their Lordships, Lord Kilbrandon at page 590 stated:

> "The shutting out of a "subject of litigation" - a power which no court should exercise but after a scrupulous examination of all the circumstances–is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule."

At page 588 Lord Kilbrandon also stated:

> "The tendency, today, in all jurisdictions, is so far as possible to simplify the technical rules of pleading. Rules have to exist for the orderly conduct of litigation and especially for the prevention of surprise, which is injustice. But pleading and the rules of pleading are servants, not masters."

[31] The case of **Johnson v Gore Wood & Co** provides a helpful analysis of **Henderson v Henderson** abuse of process. The facts as extracted from the head note are that the claimant J carried on a property development business through a company which for all practical purposes was his corporate embodiment. In 1988, J, acting on behalf of the company, instructed the defendant firm of solicitors which from time to time had acted for him personally, to serve a notice exercising the company's option to purchase certain land. Because of the solicitors' faulty handling of the matter, the company suffered substantial loss. In 1991 the company brought proceedings for professional negligence against the solicitors and the latter were informed that J intended to bring a personal claim against them. In 1992 the company's proceedings against the solicitors were settled. In the settlement agreement J gave an undertaking that he would limit to a specified sum the amount of any claim made by him personally against the solicitors by reason of losses suffered through loss of income, dividends or capital in respect of his position as a shareholder of the company. It was expressly stated that that undertaking did not limit any other of J's rights against the solicitors. In 1993, J brought an action against the solicitors for breach of duty. Over the next four and a half years the parties pleaded and repleaded their respective cases. In December 1997, shortly after the trial date had been set, the solicitors indicated that they intended to apply to strike out the action as an abuse of the process of the court,

contending that the action could and should have been brought at the same time as the company's action. On the hearing of that application, the judge held that the solicitors were estopped by convention from contending that the action was an abuse. He also held, on the determination of preliminary issues, that the solicitors had owed J a duty of care and that the heads of damages claimed were not irrecoverable. On the solicitors' appeal, the Court of Appeal agreed with the judge's decision on duty of care and, with one exception, with his decision on the pleaded heads of damages. However, it reversed the judge's findings on estoppel by convention and concluded that the proceedings were an abuse of process, holding that J could have brought his action at the same time as the company's proceedings and that he should therefore have done so. Accordingly, the court struck out the proceedings and J appealed to the House of Lords.

[32] Their Lordships allowed the appeal holding that although the bringing of a claim or the raising of a defence in later proceedings might, without more, amount to abuse if the court was satisfied that the claim or defence should have been raised in earlier proceedings, it was wrong to hold that a matter should have been raised in such proceedings merely because it could have been. A conclusion to the contrary would involve the adoption of too dogmatic an approach to what should be a broad, merits based judgment which took account of the public and private interests involved and the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party was misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before. Their Lordships also held

that while the result might often be the same, it was preferable to ask whether in all the circumstances a party's conduct was an abuse and then, if it was, to ask whether the abuse was excused or justified by special circumstances. Their Lordships also found that the Court of Appeal had applied too mechanical an approach, giving little or no weight to the factors which had led J to act as he had done, and failing to weigh the overall balance of justice.

[33] In his judgment, Lord Bingham of Cornhill reviewed several cases in which the **Henderson v Henderson** abuse of process was applied or sought to be applied. One of the cases considered by Lord Bingham was **Ashmore v British Coal Corp** [1990] 2 All ER 981. In that case there was an attempt to reopen issues which had been decided adversely to the appellant's contentions in rulings which, although not formally binding on her, had been given in sample cases selected from a group claims of which hers had been one. The Court of Appeal held that it was not in the interest of justice to allow her to pursue her claim. Reliance was placed on **Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd, Ulster Marine Insurance Co Ltd v Oceanus Mutual Underwriting Association (Bermuda) Ltd** [1982] 2 Lloyd's Rep 132 at 137 in which Kerr LJ said:

> "To take the authorities first, it is clear that an attempt to relitigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same."

[34] In **Barrow v Bankside Members Agency Ltd** (1996] 1 All ER 981, another case also considered, the Court of Appeal, in considering the rule in **Henderson v Henderson**, through Sir Thomas Bingham MR at page 983 stated:

> "The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It 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 the defendant should not be oppressed by successive suits when one would do. This is the abuse at which the rule is directed."

[35] **Talbot v Berkshire CC** [1993] 4 All ER 9 was also considered by Lord Bingham. This case arose out of a motor vehicle accident in which both the driver and his passenger were severely injured. The passenger sued the driver. The driver's insurers, without notice to the driver, made a third party claim against Berkshire County Council, claiming contribution as between joint tortfeasors but including no claim for the driver's own injuries. Not until after the expiry of the limitation period for bringing a personal claim did the driver learn of the third party claim against the county council. At trial, the passenger succeeded in full, damages being apportioned between the driver and the county council. The driver then sued the county council to recover damages for his own injuries. On trial of the preliminary issues, the judge held that the driver was prima facie estopped from bringing the action but that there were special circumstances which enabled the court to permit the action to be pursued. The county council successfully challenged that conclusion on appeal. Stuart Smith LJ, at page 15 of the judgment said:

> "There can be no doubt that the plaintiff's personal injury claim could have been brought at the time of Miss Bishop's action. It could have been included in the original third party notice issued against the council …; it could have been started by a separate writ and consolidated with or ordered to be tried with the Bishop action … The third party proceedings could have been amended at any time before trial and perhaps even during the trial to include such claim, notwithstanding that it was statute barred, since it arose out of the same or substantially the same facts as the cause of action in respect of which relief was already claimed, namely contribution or indemnity in respect of Miss Bishop's claim … In my opinion if it was to be pursued, it should have been so brought."

[36] Having examined and analysed the several cases, Lord Bingham stated at pages 498-499:

> "It may very well be, as has been convincingly argued (Watt "The danger and Deceit of the Rule in **Henderson v Henderson**: A new approach to successive civil actions arising from the same factual matter (2000) 19 CJQ 287), that what is now taken to be the rule in **Henderson v Henderson** has diverged from the ruling which Wigram VC made, which was addressed to res judicata. But **Henderson v Henderson** abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. 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. The 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. 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. 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 regard 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 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."

[37] Noticeably, in the **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd, Johnson v Gore Wood & Co** and all the cases considered in **Johnson v Gore Wood & Co**, the second action was brought after the conclusion of the first. Mr Hylton, however, also cited the decision of the English Court of Appeal in **Buckland v Palmer** [1984] 3 All ER 554. In that case the defendant's vehicle was involved in a collision with the plaintiff's vehicle which was seriously damaged. The costs of repairs was covered by the plaintiff's insurers save for the first £50 of the claim. The defendant admitted liability for the damage. The plaintiff issued proceedings against the defendant to recover the £50 which was the uninsured amount. The defendant disputed the claim but paid the amount into court and it was subsequently paid to the plaintiff. This operated as a stay of the plaintiff's claim. The plaintiff's insurers subsequently discovered that the defendant was uninsured and commenced proceedings in the county court in the plaintiff's name for the full amount of the repairs less the £50 already received by the plaintiff. The defendant applied for an order to

strike out the second action, on the ground that, it was an abuse of the process of the court to bring a second action based on the same cause of action as that in the proceedings which were stayed. The registrar refused to strike out the second action. The defendant's appeal to the judge was dismissed. On appeal by the defendant it was held that it was an abuse of the process of the court to bring two actions in respect of the same cause of action, but where there had been no judgment in the first action, that action could in appropriate circumstances be revived and amended to enable an adjudication to be made on the whole of the plaintiff's claim. As the insurers would suffer no injustice, an order striking out the second action would be made but without prejudice to an application to remove the stay on the first action and for leave to amend the particulars of claim in that action. In his judgment at pages 558-9, Sir John Donaldson MR said:

> "The public interest in avoiding any possibility of two court reaching inconsistent decisions on the same issue is undoubted and this alone would suggest that two actions based on the same cause of action should never be allowed. Equally clear is the public interest in there being finality in litigation and in protecting citizens from being 'vexed' more than once by what is really the same claim. Against this must be set the public interest in seeing that justice is done."

[38] The rule in **Henderson v Henderson** is described as an extension of the doctrine of res judicata. In the cases which were considered, and in which the rule was applied, it is to be noted that the second action was commenced after the first was disposed of. The doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause, to protect litigants from having

to face multiple suits arising from the same cause of action, and to protect the public interest that there should be finality in litigation and that justice be done between the parties. In **Buckland v Palmer** in which the rule in **Henderson v Henderson** was not applied, it was clearly shown that what was paramount was the public interest.

[39] In the case before this court, what was stated in the written submissions of the appellant was that the second suit was brought ostensibly to cure a perceived defect in the pleadings in the first suit. Although a defect in the pleadings in the original claim may have been cured by amendment, the consolidation with a second suit or the ordering of the two to be tried together as was envisaged in **Talbot v Berkshire CC** could also be adopted. This approach would put no additional burden on the court in its adjudication on the issues, nor would it cause any injustice to the defendants, bearing in mind paragraph 59 of the claimants' amended particulars of claim in the first suit which stated that:

> "The Claimants, to the extent desirable, will refer to other publications concerning them or any of them which may come to their attention and relevant to the Claimants."

[40] In light of the fact that no trial date had been set in the first claim and that the two claims could be easily consolidated and tried together, I am of the opinion that in the circumstances of this case the drastic steps of striking out the appellants' statement of case should not have been taken by the learned judge. If a trial court thinks it appropriate, I believe a penalty, by awarding costs, would be a more appropriate

remedy. Accordingly, I would allow the appeal with costs to the appellants to be taxed if not agreed.

HARRIS JA

ORDER:

Appeal allowed. Costs to the appellants to be taxed if not agreed.