

Litigation estoppels and abuse of process—categorisation and scope (Baxendale-Walker v APL Management Ltd)

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Dispute Resolution analysis: Zoë Barton, barrister at Wilberforce Chambers, says the case of *Baxendale-Walker v APL Management Ltd* serves as an important reminder of the abuse of process principle and the different litigation estoppels.

Baxendale-Walker v APL Management Ltd; *APL Management Ltd v Baxendale-Walker* [\[2018\] EWHC 543 \(Ch\)](#), [\[2018\] All ER \(D\) 156 \(Mar\)](#)

What are the practical implications of this case?

This case confirms the categorisation and scope of different litigation estoppels and their relationship to claims liable to be struck out under the principle in *Henderson v Henderson* (1843) 3 Hare 100, or as an abuse of process as explained by Lord Sumption in *Virgin Atlantic v Zodiac Seats UK* [\[2014\] AC 160](#), [\[2013\] 4 All ER 715](#).

It serves as a reminder to lawyers of the importance of their clients bringing before the court for determination 'every point which properly belong[s] to the subject of the litigation and which the parties exercising reasonable diligence might [bring] forward at the time' (as per Lord Keith in *Arnold v National Westminster Bank plc* [\[1991\] 2 AC 93](#), [\[1991\] 3 All ER 41](#)). It applies to all points which were not brought forward, whether by reason of 'negligence, inadvertence or even accident'. Lawyers should therefore seek to understand the true scope of both the present and potential future disputes between their client and the opposing party so as not to fall foul of the principle in *Henderson*.

Further, lawyers should be realistic as to the benefit of running purely procedural defences to possession actions as these will likely fail unless prejudice can be shown to be caused to a defendant in the remedy of those—the court is concerned with exercising its powers in accordance with the overriding objective, and [CPR 3.10](#) should be exercised so as not to cause unfairness.

What was the background?

In 2017, APL Management (APL) brought a claim for possession of a residential property on the basis of the default of the borrower, Paul Baxendale-Walker (PBW), for repayment of a loan secured against the property (known as Burleigh House) in respect of which demand for repayment had been made, the loan having long expired. PBW commenced proceedings for declarations that two loans made by APL to him, which were secured over Burleigh House and Amberleigh House, were void or voidable.

APL, incorporated by Mr Levack on the tax advice of PBW, was the fiduciary agent of a Belizean company that was trustee of various offshore trusts he also set up. APL later made two loans to PBW, one secured on each of Amberleigh House and Burleigh House. In 2014, APL issued possession proceedings against PBW in respect of Amberleigh House and the loan made in 2011. PBW had unsuccessfully defended that claim.

In the 2017 proceedings, the parties brought cross-applications for summary judgment and/or strike-out.

What did the court decide?

The judge held that PBW was barred by cause of action estoppel, issue estoppel and abuse of process from attempting to avoid the loan secured on Amberleigh House, and that he was barred on the ground of abuse of process from attempting to avoid the loan secured on Burleigh House. Further, the court held that as the alleged defects in APL's claim for possession were procedural errors and their rectification would cause no injustice to PBW, they provided no defence to the claim.

The estoppel and abuse arguments succeeded because of the way in which the earlier Amberleigh House proceedings had been determined. They were defended on regulatory grounds (relating to regulation by the Financial Conduct Authority, consumer credit and consumer regulations) and as to the relevant documentation executed so as to bind PBW at common law (in particular, whether it was executed by him or with his authority). However, PBW later amended his defence to admit that he was so bound at common law and APL's charge on Amberleigh House was 'binding...and enforceable as security'. This gave rise to the litigation estoppels which were either absolute (cause of action estoppel) or applied as there was no special circumstance which would make it unjust to apply (issue estoppel).

Further, PBW's attempted re-litigation of that point was prevented by the principle in *Henderson* and an abuse of process. It was not open to PBW to assert that the agreements were void or voidable on the basis of new information (including that APL had made the loans not as a fiduciary agent for the trusts, but to make a profit on its own account), as the judge did not accept that it could not have been available with reasonable diligence on the part of PBW at the time.

The same reasoning applied to the loan secured on Burleigh House, even though it had not previously been litigated so no litigation estoppels arose. The remaining defence to possession of Burleigh House, which amounted to complaints as to the form of the proceedings consisting of procedural defects, was liable to be struck out as the error did not invalidate steps taken in the proceedings, [CPR 3.10](#).

Interviewed by Stephanie Boyer.

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