Neutral Citation Number: [2020] EWHC 567 (Ch)

Case No: CH-2019-000275

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
On appeal from HHJ Gerald sitting at the County Court at Central London on 24 May 2019

7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 13 March 2020

Before:

MR JUSTICE ZACAROLI

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Between:

TINA LORRAINE KENSELL	**Appellant**
- and -	
(1) GEORGE ALEXANDER KHOURY	**Respondents**
(2) SUSAN HILARY KHOURY	

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- -

Brie Stevens-Hoare QC & Lina Mattsson (instructed by **Leslie Trevor & Co Solicitors**) for the **Appellant**
Martin Hutchings QC (instructed by **William Graham Law LTD**) for the **Respondents**

Hearing dates: 19 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. This is an appeal against an order of HHJ Gerald sitting at the County Court at Central London. The order was drawn up on 7 October 2019 but reflects two separate decisions. In the first decision, made on 24 May 2019, the judge permitted the claimants in the action, the respondents to this appeal, (the "Claimants") to make amendments to the particulars of claim. In the second decision, dated 8 August 2019, while the Claimants were ordered to pay the costs of the amendments in any event, the judge awarded the Claimants their costs of the amendment application. The defendant in the action, the appellant to this appeal (the "Defendant"), appeals both decisions.

2. The Claimants and the Defendant are neighbours. They purchased their respective properties (in the case of the Claimants, an oasthouse and in the case of the Defendant, a barn), both of which were on land adjacent to Upper Tollhurst Farm in East Sussex, within a month of each other in the autumn of 1996. For some years prior to that the Farm and adjacent land (including both the barn and the oasthouse) had been in the ownership of members of the Mulleneux family.

3. The transfer of the barn to the Defendant contained various covenants. By clause 4.2.4, the Defendant covenanted with the seller to "…comply at all times with all planning conditions and requirements of the Local Planning Authority or any other statutory or competent authority relating to the Property" (the "Planning Covenant"). By clause 4.2.1, the Defendant covenanted with the seller "[n]ot to use the Property or allow it to be used in a way which would cause nuisance or damage to the Adjoining Owner or any occupier of the Retained Land" (the "Nuisance Covenant"). Similar covenants were contained in the transfer of the oasthouse to the Claimants and in the transfer of the farmhouse to another purchaser around the same time.

4. In 2004 the Defendant obtained planning permission to convert the barn into a four-bedroom house. The Claimants contend that the conversion works were carried out in breach of that planning permission.

5. In 2006 the local council issued enforcement notices requiring the Defendant to alter the works in certain respects so as to comply with the planning permission. It appears that the enforcement proceedings, including various appeals, lasted for several years, but ultimately no enforcement action was taken.

6. On 31 March 2012 the Claimants issued the claim form in this action, seeking a declaration that the Defendant was in breach of the Planning Covenant and an order that she pull down the offending parts of her property. In the particulars of claim, the sole basis upon which the Claimants (who were not the seller of the barn) claimed to be entitled to enforce the Planning Covenant was that the sale of the barn and the oasthouse formed part of a building scheme.

7. The Claimants did not actively pursue the claim, however, until 2015 when they applied to amend the particulars of claim to include a common law claim in damages for nuisance arising from the manner in which the building works had been carried out.

8. On 10 June 2016 directions were given for trial, including for disclosure, witness statements and expert evidence.

9. Throughout 2016 the Defendant's solicitors pressed the Claimants' solicitors for particulars of, and the evidence relied on to support, the claim based on a building scheme. On receiving confirmation that the Claimants had produced all the evidence on which they relied, the Defendant issued an application for summary judgment on the claim based on breach of covenant, the sole basis of which remained the contention that there was a building scheme.

10. On 23 March 2017 HHJ Simpkiss sitting in the County Court at Brighton gave judgment in favour of the Defendant and struck out the claims based on breach of covenant. The only extant claim, therefore, was the common law claim in damages for nuisance.

11. The Claimants appealed that decision. The appeal came on for hearing before me on 16 January 2018. The Claimants had in the meantime instructed new counsel. Shortly before the hearing of that appeal, the Claimants' solicitors emailed draft amended grounds of appeal and draft amended particulars of claim to the Defendant's solicitors, asserting a different basis for enforcing the covenants (including the Nuisance Covenant), namely section 56 of the Law of Property Act 1925 ("Section 56"). According to a witness statement subsequently filed by the Claimants' solicitor, the newly instructed counsel had "…taken a different view on the merits and the prospect of success in respect of the argument under Section 56 …".

12. At the hearing of that first appeal, I refused to entertain an application to amend the grounds of appeal, largely because the new claim potentially raised new issues of fact and the Defendant had been given insufficient time to consider the amended grounds prior to the hearing.

13. In a judgment delivered on 9 February 2018 ([2018] EWHC 217 (Ch)) I dismissed the appeal. At [8] of that judgment, having referred to the reasons why I refused to entertain the amendment application, I noted that "[t]he Claimants are free … to apply to the County Court for permission to amend the claim (and the Defendant remains free to advance such objections as she may have to that application)".

14. After some further delay, on 10 April 2018 the Claimants sought the Defendant's consent to their proposed amendment. The Defendant declined to consent, and an application to amend was issued on 3 May 2018. For reasons which do not matter for the purposes of this appeal, but which include the matter being transferred to the County Court at Central London, the application did not come on for hearing for a further year. It was heard by HHJ Gerald on 23 May 2019.

15. The Defendant opposed the amendment on three grounds: (1) the new case was without any merit; (2) the new case was an abuse of process on the basis of the principle in *Henderson v Henderson* (1843) 3 Hare 100; and (3) the court should not exercise its discretion to allow the amendment.

The First Judgment

16. In the judge's first judgment, dated 24 May 2019, he granted the Claimants permission to amend.

17. As to the merits of the new claim, he held that the Claimants had a real prospect of success in establishing an entitlement to enforce the covenants pursuant to Section 56. There is no appeal against that conclusion.

18. As to the argument based on *Henderson v Henderson*, the only authority cited to the judge was the *Henderson* case itself. At [33] of the first judgment the judge cited the well-known passage from the judgment of Sir James Wigram V-C:

> "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 cases, not only to points on 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."

19. The judge noted that he was dealing with an amendment application made in the same action in which the previous judgment had been given, as opposed to a separate action. He then noted that the Defendant had been unable to cite any authority which supported the proposition that the *Henderson* principle applies "within the four corners of existing proceedings even where there has been summary judgment on the key issue." He thought it would be surprising if the principle did apply in such circumstances. While it would have been better if the Section 56 claim had been pleaded earlier, the fact that it had not been was "not sufficient for this rule to be engaged."

20. The judge then went on to conclude that the *Henderson* principle was in any event not engaged for the separate reason that the case concerned the "general enforceability of the covenants contained in the transfer which are of a prospective nature and are valuable and plainly on one reading part and parcel of and intended to benefit all three of the lots which were sold at auction."

21. He noted that it was not clear, on the Defendant's case, how far the *Henderson* principle would preclude further action in relation to matters factually unrelated to what was now in dispute. He considered that it was difficult to see how the principle could sensibly be said to preclude the Claimants relying upon Section 56 in order to enforce the covenants, for example, "if for whatever reasons the defendant failed to pay their contribution towards maintenance of the shared driveways". For this reason, he concluded that the *Henderson* principle was not engaged at all.

22. That left the exercise of discretion as to whether to allow the amendment. At [38] of his judgment he noted "some strong submissions" from the Defendant to the effect that the Defendant had been on the receiving end of the litigation for many years, that it was impacting upon her health, and that if permission were granted the case would more or less be starting again, with some further (albeit limited) disclosure, exchange of witness statements and expert evidence.

23. At [39]-[40], however, he took into account that since (on the view he had taken that the *Henderson* principle was not engaged at all) the Claimants would be free to start a new action in any event, there was little doubt that the Claimants would issue new proceedings, which would take even longer and cause even more trouble to the Defendant than if he allowed the new claim in by amendment. He built on this reasoning at [41], noting that the cost of new proceedings would be greater than the cost of the claim being pursued by amendment in the same proceedings. Moreover, there was to some extent overlap between the claim based on breach of the Nuisance Covenant and the common law claim for damages in nuisance and it was better that those claims were pursued in the same proceedings.

<u>The Grounds of Appeal</u>

24. The Defendant obtained permission to appeal from Marcus Smith J on 7 October 2019. So far as the first decision of HHJ Gerald is concerned, there are two grounds of appeal:

    i) The judge was wrong to grant permission because the new case, based on the claim for breach of covenant that had been struck out by HHJ Simpkiss, is an abuse of process;

    ii) The judge wrongly exercised his discretion because he failed to have proper regard to: (a) the prejudice to the Defendant by the failure to raise the new case at an earlier date; (b) the effect of the delay on the Defendant and the administration of justice; (c) the denial of the finality the Defendant had secured; and (d) the prejudice to the Defendant of the prolonged and reoccurring unjustified claim for an injunction "to demolish their home."

25. I will address each ground in turn.

Abuse of Process

26. As I have noted above, the judge concluded that the *Henderson* principle was not engaged for two reasons: first, because the application before him was to introduce the new claim into an existing action by way of amendment and, second, because the question was the enforcement of covenants which were prospective in nature.

New claim in an existing action

27. In the skeleton arguments for this appeal, one (but only one) authority was cited in which the *Henderson* principle had been considered in the context of a new claim sought to be introduced into an existing action by way of amendment: Mr Hutchings QC on behalf of the Defendants referred to *Ruttle Plant Hire Limited v The Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 1773 (TCC). That case supported the conclusion of HHJ Gerald. There had been a trial of 15 preliminary issues, upon which Jackson J had given judgment. The claimant then sought to amend its statement of case. The defendant objected, first on the basis that the amendments sought to introduce claims that offended against the *Henderson* principle and, second, on the basis that the proposed amendments would be incompatible with the overriding objective. Jackson J found, first, that the amendments were all parasitic upon the judgment in the preliminary issues trial. He then considered the defendant's objection based on *Henderson v Henderson*. He identified the crucial issue as being whether the principle can be invoked to preclude a party from pleading, at a late stage in litigation, issues which might have been pleaded earlier. He noted that neither counsel had identified any previous decision in which this question had been considered. He concluded that the principle could not be invoked in these circumstances, for four reasons:

    i) The principle, both as originally formulated and as recast by other judges was focused upon re-litigation;

    ii) The mischief against which the principle is directed is the bringing of a second action, when the first should have sufficed;

    iii) In all of the cases cited by counsel or unearthed by his own researches, there had been at least two separate actions; it had never been invoked, so far as he could see, as a ground for opposing amendment in the original action;

    iv) There was no need to extend it to that situation, since the powers of the Court to allow or disallow amendments are clearly set out in the Civil Procedure Rules, and "there already exists an established body of judicial authority to guide first instance judges who are faced with applications to amend … it is inappropriate to transplant into this field the *Henderson* line of cases which are focused upon a different juridical problem."

28. In their skeleton argument, Ms Stevens-Hoare QC and Ms Mattsson, who appear for the Defendant, while acknowledging that none of the cases referred to by them applied the *Henderson* principle in the context of the same proceedings, relied on its underlying purpose and policy – as expressed by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. They submitted that this applied just as much in a case where a party sought to introduce the new claim into the same proceedings in which the first claim had been rejected.

29. In *Johnson v Gore Wood* (above), Lord Bingham, at p.31, identified the underlying policy of the *Henderson* principle as achieving finality in litigation: "a party should not be twice vexed in the same matter". He set out the modern approach to its application as follows:

> "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 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 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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. 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 then, if it is, to ask whether the abuse is excused or justified by special circumstances."

30. At the hearing of the appeal, the Defendant's position was bolstered by reference to a line of authorities which directly addressed the application of the *Henderson* principle to new claims sought to be introduced into existing proceedings.

31. In *Tannu v Moosajee* [2003] EWCA Civ 815, the claimant commenced an action in the Queen's Bench Division seeking repayment of an alleged loan of £110,000. The defendant denied that the relationship with the creditor was one of debtor/creditor. It was claimed that there was a partnership between them. After trial of the action, HHJ MacDuff QC dismissed the claim for repayment and declared that there had been a partnership at will between the claimant and the second defendant which was now dissolved. He ordered its winding-up and adjourned the taking of all necessary accounts to a Master of the Chancery Division.

32. In the account proceedings in the Chancery Division an issue arose as to the treatment of the £110,000. The Master read the judgment of HHJ MacDuff as having concluded that it had been a capital contribution by the claimant to the partnership. He accordingly struck out a claim by the second defendant that the sum had been paid to her by the claimant as the price for acquiring a half-share in the business.

33. On appeal, Lloyd J took a different view. He concluded that the claimant's claim that the £110,000 was a capital contribution to the partnership was a new claim which ought – on the *Henderson* principle – to have been pursued at the trial in the Queen's Bench Division and that it was not now open to the claimant to raise the point in the account proceedings in the Chancery Division.

34. The Court of Appeal took a third view. Mummery LJ concluded that there had been no decision by HHJ MacDuff on the proper treatment of the payment of the £110,000 in the taking of the partnership accounts. The claimant was precluded neither by his judgment nor the *Henderson* principle "from contending that the sum was not paid by her to the second defendant to do with as she pleased".

35. Dyson LJ added a few words to explain why the *Henderson* principle did not apply. He first noted that the principle has usually been applied where the claimant starts fresh proceedings raising a case which could and should have been brought in earlier proceedings which were pursued to judgment and said: "What is unusual about the present case is that the judge held that the principle applied in relation to separate stages of the same litigation." He did not suggest that the principle could *not* be applied in such a case. Instead, he went on to conclude that Lloyd J had applied the principle too rigidly, having failed to adopt the "broad merits-based judgment" to which Lord Bingham refers in *Johnson v Gore Wood*. He went on to conclude that there was no abuse in the case before him.

36. Arden LJ was more explicit on the point, saying at [40]: "While it may be unusual to apply the principle in *Henderson v Henderson* in relation to separate stages of the same litigation, it is not conceptually impossible."

37. In *Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [2009] EWHC 255 (TCC), the claimant had originally commenced proceedings in the Commercial Court against the defendant insurer in respect of losses incurred as a result of having to repair and replace defective window glazing. After a trial on liability, Field J dismissed the claim. He held that the indemnity in the policy relied on (in respect of intentional damage to enable a defect to be made good) depended upon the existence of accidental damage to the property. The Court of Appeal reversed that decision. The proceedings were then transferred to the Technology and Construction Court where the claimant sought to amend its claim to plead that the majority of the defects in the windows were due to bad design, rather than bad workmanship. This was important because the Court of Appeal had held that workmanship deficiencies to each window represented a separate event/occurrence (and would thus permit the defendant to apply a deductible to each repaired window) whereas defects due to design errors would constitute only one event (and therefore give rise to only one deductible).

38. The defendant contended, first, that the Court of Appeal had ruled that the cause of the defects was bad workmanship, and that ruling could not be re-opened. Alternatively, the defendant contended that the "design v workmanship" issue could and should have been raised for determination before either Field J or the Court of Appeal and it was too late to raise the matter now, on the basis of the *Henderson* principle.

39. In his judgment in the proceedings in the Technology and Construction Court, Coulson J held that Field J had determined that the defects in the windows were the result of workmanship. Accordingly, the claimant was precluded by issue estoppel from re-opening that question. He went on, nevertheless, to consider the *Henderson* principle on the assumption that his first conclusion was wrong.

40. At [27], Coulson J referred to *Tannu* as a decision of importance because:

> "…the Court of Appeal expressly recognised that *Henderson* abuse could apply to the later stages of the same litigation, although they expressed the view that such a situation was 'unusual'. It seems to me that there is no reason why *Henderson* abuse should not be applicable, just like issue estoppel, to the later stages of the same action. It is however no more than common sense to observe that it might be significantly easier for a party facing a *Henderson* abuse allegation to defeat it if the point arose for decision in the same proceedings, rather than in a subsequent action, for the reasons explained by the Court of Appeal in *Tannu*."

41. At [97] to [108] Coulson J then considered the various elements of the *Henderson* principle (in accordance with the approach adopted in *Johnson v Gore Wood*). There was no doubt that the issue *could* have been raised before Field J and the Court of Appeal. He found also that it *should* have been raised. The parties wanted to have one hearing on liability/policy matters. It was their clear intention to have a hearing on all issues of liability.

42. For completeness, at [106] to [107], Coulson J returned to the question whether the fact that the point arises in on-going proceedings as opposed to subsequent litigation should make any difference as to the outcome, and concluded that it should not:

> "Again, I accept that, where certain issues are dealt with by the court in advance of others, genuine mistakes may occur, where it would be unfair and unreasonable to prevent one party from raising an issue on the merits which, for whatever reason, has not been the subject of a clear determination before. *Tannu* and *Aldi Stores* are good recent examples of such a case. But at the same time, the court should be astute to prevent a claiming party from putting its case one way, thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again. The CPR are designed to avoid the litigation equivalent of death by a thousand cuts. I have no doubt that, on the basis of the facts as I have summarised them in Section D above, it would be wrong and unfair to allow the claimant in these proceedings to go back to square one and attempt to run a case which could and should have been raised years ago."

43. In *Tobias Gruber v AIG Management France, SA* [2019] EWHC 1676 (Comm), judgment was entered against the defendant after a final trial for damages to be assessed. In its statement of case in relation to the assessment of damages proceedings the defendant raised points which the claimant contended were an abuse of process, being matters which could and should have been raised at the main trial on liability.

44. Andrew Baker J, at [11], having been referred to a number of authorities, including *Seele Austria* and *Tannu*, distilled the principles to be derived from them into eight points for the purposes of the case before him, the last two of which are relevant to the issue raised on this appeal:

> "g. The doctrine is not restricted to cases where the alleged abuse comes in a separate, later action. It is possible to conclude that a claim or defence not initially raised ought properly, if it was to be raised at all, to have formed part of an earlier stage within a single action at which at least some matters were finally determined.
>
> h. It is a strong thing to shut out pursuit of a point not actually decided previously against the party raising it; and it may be an even stronger thing to do so in relation only to different stages within a single action. I would though add, as to the latter, that much may depend on the nature of the stages involved. Here, the parties had their final trial of all issues, not merely, for example, a decision on preliminary issues or a summary judgment decision on some particular claim or defence or a final determination of an individual point as part of dealing

> with some other interlocutory application. If the doctrine be available, as indeed it is, in the context of a single set of proceedings, the potential for it to apply on the facts where those are the circumstances plainly may arise more readily than during the interlocutory life of the process."

45. It is a curious feature of the above line of authorities that (1) the earlier decision of the Court of Appeal in *Tannu* was not cited in *Ruttle* and (2) *Ruttle* was not cited in any of the later cases I have referred to above.

46. Mr Hutchings submitted that the authority of the decisions subsequent to *Ruttle* carry no weight because of the failure to cite *Ruttle* in them. He also submitted that, as a matter of principle, Jackson J was in any event correct in *Ruttle* to hold that there was no need to extend the *Henderson* principle to applications to amend in existing proceedings, given the width of the discretion available to the court.

47. So far as the authorities are concerned, the proposition that the *Henderson* principle can be invoked even at a later stage in the same proceedings is now clearly established by *Tannu* and the line of subsequent cases that have applied it. Contrary to Mr Hutchings' submission, the weight to be afforded to Jackson J's decision in *Ruttle* is itself diminished by the fact that the earlier Court of Appeal decision in *Tannu* was not cited to him.

48. So far as the point of principle is concerned, I do not see why the existence of a broad discretion in the context of an application to amend is a reason to preclude altogether the application of the *Henderson* principle within the same action. A finding that a new claim would amount to an abuse of process *must* lead to the claim being disallowed, as a rule of law and not merely an exercise of discretion. If a new claim would amount to an abuse, therefore, the mere fact that it is sought to be introduced in circumstances where the court has a broad discretion is not sufficient reason to preclude the application of the *Henderson* principle.

49. Mr Hutchings submitted, in the alternative, that even if the *Henderson* principle can be engaged in the context of a later stage in the same action, it cannot be engaged where the first stage is an application for summary judgment.

50. Neither counsel has been able to find a case where the principle has been held to be engaged in the context of an application to amend following an earlier summary judgment or strike out of a claim. It is true that in *Gruber v AIG Management* (above), Andrew Baker J, in referring to the possibility of the principle being applied following a prior interlocutory decision, gave as examples "a decision on preliminary issues or a summary judgment decision on some particular claim or defence". Neither the case before him, nor any of the cases to which he referred, however, involved an earlier summary judgment.

51. Nevertheless, as a matter of principle I do not see why the fact that the earlier judgment had been obtained on a summary basis would alone preclude the *Henderson* principle from applying. It is common ground that where an action had been *wholly* disposed of by summary judgment or strike out then the *Henderson* principle would be engaged if the claimant brought a second action. If the bringing of the new claim would constitute unjust harassment of the defendant, then it is difficult to see why the fact that the earlier summary judgment did not dispose of the whole action should make all the difference.

52. Nevertheless, as Andrew Baker J put it in *Gruber*, the potential for the principle to be applied during the interlocutory life of proceedings may arise far less readily than in the case of a wholly new action. That is especially so, in my view, where the original claim was disposed of on a summary basis. In such a case, much of the reasoning which has led one or other court on previous occasions to apply the principle at a later stage of the same proceedings either does not apply, or applies with less force.

53. For example, where judgment is awarded against a claimant following a trial (whether of liability, with quantum to follow, or of a preliminary issue) then the nature and quality of the "finality" which the defendant can expect to achieve is different. That is, in part, as Mr Hutchings submitted, because in such a case there has been either agreement between the parties, or a decision of the court, that it is appropriate for the issues to be litigated to their conclusion on that single occasion. That is not the case with a hostile summary judgment or strike-out application.

54. It is also a result of the greater opportunity afforded to a party to amend its claim in order to avoid the consequences of a decision that its original claim should be struck out.

55. Mr Hutchings, in this connection, submitted that it is commonplace for a party to seek to amend its claim (or defence) in order to avoid the consequences of a judgment striking out the existing claim (or defence): see *In Soo Kim v Youg Geun Park* [2011] EWHC 1781 (QB), at [40]:

> "…where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right."

56. Ms Stevens-Hoare accepted that this jurisdiction exists, but relied on *Stewart v Engel* [2000] 1 WLR 2268 for the proposition that it should only be exercised in exceptional circumstances if the court has already concluded that the claims should be struck out. In that case, the claimant sought permission to amend, after the judge had handed down his judgment but before it was sealed, to add a claim which the claimant's legal advisors had repeatedly said they would not be running. The judge gave permission to amend and the defendant appealed to the Court of Appeal who determined that, although a judge was entitled to reopen a judgment in the period between its delivery and it being sealed, and

thus had jurisdiction to entertain an application to amend a pleading in an action which he had determined should be dismissed:

> "…once judgment had been given on such an application the jurisdiction to reopen it was to be sparingly exercised and only where there were exceptional circumstances or strong reasons for doing so, since finality and the doing of justice required justice to all parties in the litigation."

57. That is no longer to be regarded as the correct approach, however. In *Macleod v Mears Ltd* [2014] EWHC 3140 (QB) Hamblen J noted that the majority's decision in *Stewart v Engel* was concerned with the question as to when a judge could re-open a decision, often referred to as the *Barrell* jurisdiction. He considered that the "powerful dissenting judgment of Clarke LJ provides good reason for not extending the ambit of the majority decision in *Stewart v Engel* further than is necessary."

58. In his dissenting judgment in *Stewart v Engel* Clarke LJ had said:

> "…. I respectfully differ from the suggestion that this court is bound by *In re Barrell Enterprises* [1973] 1 W.L.R. 19 to hold that permission to amend should only be granted in exceptional circumstances where the application is made after the order is announced orally but has not been drawn up and sealed. In deciding how to apply the overriding objective that factor is simply one consideration to be taken into account, albeit an important one. I am therefore unable to agree that we have to look to see whether in November 1999 there existed exceptional circumstances sufficient to justify the judge in exercising "the Barrell jurisdiction"."

59. In *Re L and B (Children)* [2013] UKSC 8, per Lady Hale at [27], the Supreme Court endorsed the approach of Clarke LJ over that of the majority of the Court of Appeal in *Stewart v Engel*:

> "Thus one can see the Court of Appeal [in later cases] struggling to reconcile the apparent statement of principle in *Barrell* [1973] 1 WLR 19, coupled with the very proper desire to discourage the parties from applying for the judge to reconsider, with the desire to do justice in the particular circumstances of the case. This court is not bound by *Barrell* or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in *Stewart v Engel* [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly."

60. Moreover, the finality to be expected from a summary judgment is affected by the greater likelihood, in practice, of an amendment being permitted even on an appeal from such an order. Mr Hutchings referred me to the White Book at para 52.17.3, for the principles to be applied on an application to introduce a new point by amendment on appeal. Broadly, a distinction is drawn between introducing on appeal a pure point of law, as opposed to one which was contingent on new facts or evidence: *Pittalis v Grant* [1989] QB 605, per Nourse LJ (in a passage more recently cited and applied by the Court of Appeal in *Glatt v Sinclair* [2013] 1 WLR 3602, at [24]). An amendment to include a new point which the opposing party could have adduced evidence to defeat will generally not be allowed. Where the point is a pure point of law, then the appellate court retains a discretion to exclude it but, where it can be confident that the other party has had opportunity enough to meet it, that he has not acted to his detriment on the faith of the earlier omission to raise it and that he can be adequately protected in costs, the usual practice was said to be to allow it to be taken, "[o]therwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

61. Where an application is made to advance a new point on appeal from a decision striking out a claim, then there is inherently more likelihood of overcoming the hurdles set out in *Pittalis*. That is because, by definition, there has been no determination of matters of fact. The judge will merely have determined whether, assuming the facts alleged were proved at trial, the claim nevertheless has no real prospect of success. It is enough, in order to avoid the claim being struck out (by the judge), to identify facts which, if proven, give rise to a cause of action with real prospects of success. It follows that where a defendant identifies a new claim on appeal against a strike-out judgment, the fact that it raises new issues of fact which would need to be resolved at trial is not necessarily an impediment to the amendment being allowed.

62. Finally, it is important to bear in mind the counter-balancing point, as expressed by Andrew Baker J in *Gruber*, that "it is a strong thing to shut out pursuit of a point not actually decided previously against the party raising it".

63. For these reasons, while I consider that the *Henderson* principle is capable of being engaged upon an application to amend made after the strike-out of the original claim in the same proceedings, 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.

Application of the principle in the present case

64. Ms Stevens-Hoare contended that the judge should have applied the *Henderson* principle on the facts of this case. She relies principally on the fact that if the amendment were allowed, the Defendant would be deprived of the finality which she legitimately believed she had obtained.

65. I accept that it ought to have been obvious to the Claimants that the Defendant's objective in bringing the application for summary judgment was to achieve finality in respect of the claims for breach of covenant, in particular the claim for breach of the Planning Covenant. Judgment in favour of the Defendant would have brought an end to that claim, and thus to the threat of the Defendant being required to pull down the offending parts of the barn, which had been hanging over the Defendant for more than four years already.

66. I also accept that the Defendant had given the Claimants numerous opportunities to clarify the evidential basis upon which they alleged the existence of a building scheme, and had shared her own counsel's opinion on the issue. In those circumstances, if there was an alternative legal basis for the Claimants' claim for breach of covenant, then there are good reasons why they ought to have relied on it, at the latest, in answer to the application for summary judgment.

67. Ms Stevens-Hoare pointed out that the effect of introducing the new claim based on Section 56 would be, in substance, to re-start the directions previously ordered by HHJ Simpkiss for witness statements and experts reports. She relied on the impact on the Defendant's health caused by the stress of the proceedings. I accept that these factors add weight to the importance of achieving finality.

68. Notwithstanding these forceful and well-made submissions, taking into account the points I have made above as to the circumstances in which the principle might be applied in the context of an earlier summary judgment, and taking the broad approach required by *Johnson v Gore Wood*, I do not think that the Claimant's attempt to introduce the Section 56 claim by amendment is to be characterised as an abuse of process.

69. The burden of establishing abuse of process lies on the Defendant. While the Claimants clearly could have brought the Section 56 claim earlier, I am not satisfied that the failure to do so was caused by anything other than the failure of their former legal advisors to appreciate the merits of the argument. The action is continuing in any event (albeit only in respect of the common law claim in nuisance). The application to amend was at least raised prior to the hearing of the first appeal. It is true that it was made too late for it to be dealt with (as a matter of discretion) at the hearing of the first appeal. Had it been raised in sufficient time before the appeal hearing to give the Defendant the opportunity to deal with it, then I do not think that the Claimants would have been shut out from relying on it by reason of the *Henderson* principle. The fact that I exercised my discretion to preclude it being taken at the first appeal, thus requiring the Claimants to make a separate application to amend, does not in my view tip the balance sufficiently to merit characterising the conduct as unjust harassment or otherwise abusive.

70. For these reasons, while I consider that the judge was wrong (understandably so, given the lack of citation of any of the relevant authorities) to conclude that the *Henderson* principle was not capable of being engaged in the context of an application to amend proceedings following an earlier strike-out judgment, he was in any event correct to reject the Defendant's opposition to the application on the basis of the *Henderson* principle.

The prospective nature of the covenant

71. Ms Stevens-Hoare submitted that the judge was also wrong to conclude that the *Henderson* principle was not engaged because the central issue related to the enforceability of covenants which were prospective in nature.

72. She accepted that the Claimants would be free (without risk of committing an abuse of process) to bring a claim to enforce the covenants, based on Section 56, in respect of any future breach including (for example, as noted by the judge) if the Defendant failed to pay her contribution towards maintenance of the shared driveways.

73. She submitted that that was irrelevant, however, to the present case, where the Claimants sought to rely on Section 56 to pursue the very same claim for the very same relief as that which had been struck out: namely that the building works which had already been completed constituted a breach of the Planning Covenant and should be pulled down, and that the Defendant's past conduct constituted a breach of the Nuisance Covenant. In such a case, the *Henderson* principle was engaged because of the potential abuse in the Claimants seeking that same relief pursuant to a cause of action which could have been advanced before the initial claim was struck out. It was no different, she submitted, from a case where a claimant succeeded in proving breach of covenant, but the court had awarded damages instead of an injunction, and the claimant sought by a separate action to claim the same injunction but on a different legal basis.

74. Mr Hutchings was constrained to accept that this was correct. In my judgment he was right to do so, for the reasons advanced by Ms Stevens-Hoare. He contended, however, that the judge's conclusion had been consistent with Ms Stevens-Hoare's analysis, because he had concluded only that the Claimants would not be prevented from pursuing a claim based on Section 56 in relation to any future breaches of covenant. I disagree. It is clear from paragraphs 37 to 41 of his judgment that the judge considered that the *Henderson* principle would not be engaged at all in respect of the new claim which reintroduced the same matters and sought the same relief as that which had formerly been struck out.

75. Mr Hutchings relied on paragraph 6(2) of the Order of HHJ Gerald drawn up on 7 October 2019, which permitted further witness statements addressing "any alleged nuisance occurring after 16 June 2017". At most this envisaged the possibility that there may have been further acts of nuisance since the date the first claim was struck out. That was not, however, the thrust of the amended statement of case, which introduced no new allegations of breach, whether of the Planning Covenant or of the Nuisance Covenant. Even if the judge was correct to conclude that the *Henderson* principle was not engaged in

relation to a claim for further acts of alleged nuisance which post-dated the striking out of the first claim, his error in my judgment lay in not distinguishing between such acts and the conduct which had been relied upon in support of the first claim for breach of covenant (i.e. the already completed building work and the historic acts of alleged nuisance).

Second ground of appeal: the exercise of discretion

76. The error of law identified in paragraphs 71 to 75 above also infected the judge's exercise of discretion. That was because an important factor (if not the principal factor) in the exercise of his discretion was that the Claimants were free to commence a new action for breach of covenant based on Section 56. The importance of that factor to the exercise of his discretion is demonstrated by his reliance on the fact that new proceedings (which he had little doubt would be commenced) would take even longer, cause even more trouble to the Defendant and be more expensive than if he allowed the new claim in by amendment.

77. That was in turn based on his conclusion that the *Henderson* principle did not prevent the Claimants from commencing a new action, as it was not engaged at all due to the prospective nature of the covenants.

78. Since the exercise of discretion was based on an error of law, it falls to me to re-exercise the discretion. This involves a consideration of all the circumstances. These include, but go beyond, the factors relevant to the application of the *Henderson* principle, which I have considered above.

79. It is not disputed on this appeal that, as the judge found, the claim under Section 56 has a real prospect of success. While recognising the importance of compliance with the rules of court, it is a relevant factor that to refuse the amendment would be to deny the Claimants the ability to pursue a claim for breach of covenant on a legal basis that was seriously arguable. It is also relevant that it raises no substantive issue of fact. The new claim turns predominantly on a question of construction of the written transfer (and neither side relies on any disputed issue of fact so far as the relevant factual matrix is concerned). While it does involve one new assertion of fact, which is not admitted, as to the extent to which the Mulleneux children retained any land, Ms Stevens-Hoare accepted that this would add little, if anything, to the evidence to be called at trial.

80. As against these points, the most powerful factor against allowing the amendment is delay, with the consequence that the threat of the claim which has already been hanging over the Defendant for many years will continue to do so for some considerable time further. Added to that is the effect on the Defendant's health and that of her husband. The stress upon the Defendant is exacerbated in this case by the fact that the Claimants seek an order that would require the Defendant to pull down the offending part of the building.

81. While there has undoubtedly been delay, that is mitigated to some extent by the fact that the new claim was raised for the first time, not only while the proceedings were continuing and before a trial date had been set, but before the appeal against the summary judgment had been heard. It is true that this was a long time after the proceedings commenced but for much of that time the action was effectively stayed, first pending potential action by the Local Authority and latterly while the summary judgment application was made, and then appealed.

82. The overriding aim in exercising the discretion is to strike a balance between injustice to the Claimants if the amendment is not permitted and injustice to the Defendant if it is.

83. In my judgment, the most significant element of injustice to the Defendant arising from the delay is the continuing stress as a result of the threat of having to pull down those parts of the building found to constitute a breach of the Planning Covenant. The improbability of such an order actually being made at trial, in view of the delay in this case, was acknowledged before me by the Claimants. I would have thought that the prospects of the court actually granting such relief are close to nil in circumstances where the basis for the successful claim (if it succeeds at trial) was only identified by the Claimants many years after the building work was done, and 12 years after the Local Authority first issued an enforcement notice in respect of it.

84. Taking all the circumstances into account, I consider that the appropriate solution is to permit the amendments save for the reintroduction of the claim (based on Section 56) for a mandatory injunction that the offending parts of the building are pulled down.

85. That exclusion is justified in part because of the weakness of the claim for such relief and in part because it is that relief which gives rise to most injustice. I make it clear, however, that the exclusion bars only the relief by way of mandatory order to pull down the offending parts of the Defendant's property, but does not bar the claim to damages in lieu of an injunction.

The Second Judgment

86. The third ground of appeal is against the order granting the Claimants their costs of the amendment application.

87. The White Book (at 17.3.9) notes that applicants who obtain permission to amend are often ordered to pay the other parties' costs of and caused by the application (citing *Taylor v Burton* [2014] EWCA Civ 21). The costs "of and caused by" the application include the costs of preparing for and attending the application and the costs of consequential amendments: see CPR 44 PD 4.1. There is, however, an exception where parties fail to consent to amendments which they "could not reasonably oppose": see *La Chemise Lacoste SA v Sketchers USA Limited* [2006] EWHC 3642 (Ch).

88. The judge applied that test in making his costs order. He considered that the Defendant should have accepted that the amendment stood a real prospect of success (and not turned the hearing into a mini-trial). He also concluded (at [6] of his judgment dated 8 August 2019) that the suggestion that there was an abuse of process was without foundation "where disputed arguable proprietary rights of some longevity and future duration and enforceability are concerned…"

89. In my judgment, this latter conclusion reflected the same error of law I have identified above as to the non-applicability of the *Henderson* principle given the prospective nature of the covenants. Again, therefore, it falls to me to re-exercise the discretion, asking afresh whether the Defendant acted unreasonably in refusing to consent to the amendments. In my judgment, it was not unreasonable for the Defendant to oppose the amendments. Leaving aside the *Henderson* issue, the delay in raising this new claim until long after summary judgment had been given meant that it was reasonable for the Defendant to take the point that it was too late to raise a new claim. Added to that, however, the question whether the *Henderson* principle was capable of being engaged was far from straightforward (as the earlier parts of this judgment demonstrate), such that it cannot be said that the Defendant's arguments based on abuse of process were "without foundation".

90. Nevertheless, there is force in the judge's point that it was not reasonable to oppose the application on the basis that the new claim had no real prospect of success, thus treating the application as if it were a preliminary issue. As I have already noted, the Defendant did not pursue that argument on appeal. It would appear from the judgment itself that a substantial portion of the hearing was taken up with arguing the merits of the claim.

91. Taking a broad approach to estimating the extent of costs incurred on the different aspects of the application, but starting from the proposition that it was reasonable for the Defendant to oppose the amendment on the basis of delay alone, which would have necessitated the costs of a contested hearing, I consider it fair to apportion one-half of the costs incurred by the parties as being caused by adding the opposition based on the merits of the new claim. That would result in each side being entitled to one-half of their costs against the other, with the practical outcome that there is no order as to costs. Accordingly I set aside the order that the Defendant pay the Claimants' costs of the amendment application, and substitute it with an order for "no order as to costs".