Neutral Citation Number: 2024 EWHC 3444 (KB)

Case No: KB-2023-001406

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2024

Before :

Master Armstrong

- -

Between :

ANDREW CHARLES BATTENBURG	**Claimant**
- and -	
BRUCE KEITH PHILLIPS	**First Defendant**
-and-	
ROBYN RUTH PRICE	**Second Defendant**

- -
- -

Mr Richard Dew (instructed by **Trowers and Hamlin LLP**) for the **Claimant**
Mr Edward Knight (instructed by **Payne Hicks Beach LLP**) for the **Defendants**

Hearing dates: 8th December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9th February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER ARMSTRONG

Master Armstrong:

1. The Claimant has brought proceedings against the First and Second Defendants in their capacity as the executors of the estate of Blanche Condon. I have received helpful skeleton arguments and heard submissions from Mr Dew, Counsel for the Claimant, and Mr Knight, Counsel for the Defendants.

2. The claim form was issued on 21 March 2023. Time for service of the claim form ran from the date of issue, i.e., the date of sealing, which is to say 21 March 2023. The claim form, particulars of claim, and response pack therefore needed to be served by 20 September 2023. Although two orders regarding time for service were granted, these did not take the time for service beyond the 20 September 2023.

3. The First Defendant was personally served with the claim form, the application to serve out of the jurisdiction, and permission order, on 7 June 2023. The First Defendant has not been served with either the particulars of claim or the response pack.

4. The Second Defendant was served with particulars of claim and a response pack on 22 June 2023, but she was not served with the claim form, the application to serve out of jurisdiction, or the permission order.

5. The matter relates to the estate of the late Blanche Condon ("the deceased") who died on 13 December 2016 in New South Wales, Australia. The Claimant seeks to enforce a contract purportedly made between the deceased and the late Ailsa Lee, the Claimant's mother, in 2006. The deceased is said to have contracted with Ailsa to apportion to the Claimant a share in her estate under the terms of her will. The Claimant seeks to enforce terms of the agreement pursuant to the Contracts (Rights of Third Parties) Act 1999. The Defendants are the Australian executors of the deceased's estate. The issues arising from this case have been the subject of two sets of prior litigation. The first claim was brought in New South Wales ("the NSW claim"). The second claim was brought in the High Court in England and Wales under case number BL- 2018- 000586 ("the first UK claim").

6. The NSW claim sought, amongst other things;

> "an order that the defendants, or such other person or persons appointed the deceased's legal representatives, pay a sum equal to 18.75% of the net distributable estate to the plaintiff … an order that the defendants or such other person or persons appointed the deceased's legal representatives deliver to the plaintiff or at his direction the items of personalty listed and referred to in the Schedule hereto."

7. Within the first UK claim, as described in the amended claim form, the claimant sought, amongst other things;

> "a declaration that he is entitled, under the terms of an oral agreement between Blanche Minnie Condon (deceased) and Ailsa Margaret Lee, of 24 August 2006, recorded in a written contract

signed by Blanche Condon on 14 September 2006 and by Elsa Lee on 27 September 2006 to the following:

> i. a distribution from Blanche Condon's estate equal to 18.75% of the value of the estate.
>
> ii. delivery up of various household items to which he has a right to possession under the contract"

8. The NSW claim, to the extent that it pertains to anything arising within these proceedings, recorded an agreement which led to the court, by consent, on the 10 December 2018, dismissing the Claimant's Statement of Claim and hearing only the 'balance of proceedings'. The terms of that Order incorporate the following provisions:

> "1. NOTE that the plaintiff abandons all claims in this court, in the High Court of Justice of England and Wales, and elsewhere, in any jurisdiction, against the estate of the late Blanche Condon ("the deceased"), including, but not limited to the following:
>
> a any rights to which the plaintiff might be entitled arising out of the document referred to in paragraph 2 of the Statement of Claim filed on 26 July 2017 in these proceedings;
>
> b any rights to which the plaintiff might be entitled arising out of the putative agreement referred to in paragraph 9 of the Amended Particulars of Claim filed on or about 12 November 2018 in the High Court of justice, claim number BL- 2018- 000586, including annexures "A" and "B" to those Amended Particulars;
>
> c any rights to which the plaintiff might be entitled arising out of the acts asserted in the documents referred to in subparagraphs (a) and (b); and
>
> d any rights which the plaintiff might have in his personal capacity against the estate of the deceased and (whether in their capacity as executors and trustees of the will of the deceased or in their personal capacities) the Defendants
>
> 2. ORDER that the plaintiff, no later than 31 December 2018, make application in proceedings numbered BL- 2018- 000586 in the High Court of Justice of England and Wales for dismissal of those proceedings, without cost to the Defendants in those proceedings, and to prosecute that application so as to bring about determination of those proceedings without cost to the Defendant."

9. The first UK claim ended when the Claimant filed a notice of discontinuance dated 18 December 2018.

10. The Defendants have not filed a defence to the present action but have instead filed an application seeking a declaration that the court has no jurisdiction, will not exercise its jurisdiction pursuant to CPR parts 6 and 11, and that the order dated 3 April 2023, as amended on 20 April 2023, giving the Claimant permission to serve the claim on Defendants out of the jurisdiction, be set aside and all subsequent proceedings in this claim be stayed, or that the claim be dismissed as an abuse of process. The declaration is sought on the basis that the claim form has not been served within the time permitted, the Claimant has no grounds for service of the claim out of the jurisdiction (in other words that the jurisdictional gateways have not been met), the claim is an abuse of process, that the Claimant has no cause of action, the claim is time-barred, and that England is not the convenient forum for the determination of the claim. These are not necessarily the order upon which matters were presented at the hearing, but rather the order in which they are presented in the application dated 28 July 2023.

11. I will deal with the issues in the order they were presented at the hearing with that first issue being that the claim is an abuse of process and the Claimant estopped from pursuing this action. It was dealt with first by Mr Knight because it is identified by the Defendants as the most significant issue and the one they considered the most egregious.

12. As has been identified these are the third set of proceedings between these parties raising the issues upon which the Claimant seeks to litigate. The opening position of the Defendants at the hearing of this application is that the claim is an abuse of process, or in the alternative, that the principle of res judicata applies and the Claimant is estopped from pursuing these proceedings.

13. The Defendants' position is simply that the Claimant is attempting to re-litigate claims that have already been dismissed by a court of competent jurisdiction in New South Wales, that this is an abuse of process or subject to cause of action/issue estoppel. They say there is little or no distinction between the previous claims and the current one, and in any event all such claims could and should have been brought within the earlier actions and fall within the rule of *Henderson v Henderson [1842-60] All E.R.Rep. 378*. The Defendants argue that although the NSW claim was dealt with by way of consent order, that consent order ought to operate in exactly the same way as dismissal following determination by a judge. In respect of the first UK claim, although discontinuance took place before a defence was filed, the Defendant maintain that given the terms of the consent order in the NSW claim, it is an abuse of process to relitigate the claim and there is an issue estoppel. The Defendants maintain they are the victims of continual litigation, from the same person, in relation to the same matters, despite having previously agreed final terms for the conclusion of all litigation.

14. The Claimant of course has reminded the court that discontinuance of a claim does not as of right prevent a party from starting fresh proceedings to pursue the same cause of action, provided the discontinuance is filed before the issues are determined by the court. The permission of the court to issue such a claim in these circumstances is not required. The Claimant's contention is essentially that the claim he seeks to bring has not yet been heard by any court or determined by a Judge either here or in Australia.

15. When considering the present application I accept there is no strict definition of what amounts to an abuse of the court process, and I keep in mind that the striking out of a claim as an abuse must be supportive of the overriding objective. This case does not require me to consider anything new or novel in exercising the court's power to strike out proceedings to give effect to the principles relating to res judicata. Neither am I required to extend the rules arising from *Henderson*, which already serve good purpose and which in effect extend the res judicata principle to include matters which were not put before a court in earlier proceedings, but which could and should have been so put. Litigation must not be allowed to drag on indefinitely and it is in the interest of the public and the parties themselves that final conclusions to litigation are reached. I appreciate that the mere fact that the matter could have been raised and dealt with in earlier proceedings does not automatically make the second set of proceedings abusive. The question as to whether the litigation is an abuse will depend on all the circumstances of the case. A balance needs to be struck between finality of litigation and access to justice. I ought, following *Johnson v Gore Wood [2002] AC 1*, to adopt a broad merits-based approach to these issues. The court must have regard to all of the surrounding issues and factors.

16. In my judgment, although the precise wording of the statement of claim in the NSW claim is different, there can be little doubt that it was an attempt to enforce terms of the agreement reached between the deceased and Ailsa. It references the same agreement in the same terms, specifically that the Claimant was to receive 18.75% of the deceased's net distributable estate as settled upon her personal representatives. Similarly, the first UK claim sought a declaration that the Claimant is entitled to 18.75% of the value of the deceased's estate, based on both the oral agreement and written agreement relative to the NSW proceedings and this claim. If I am wrong on that then to the extent that those cases differ from the present matter I conclude the rule in *Henderson* must be applied and the Claimant ought to have brought the whole case before the court within the previous cases so that all aspects of it could be determined once and for all. Absent special circumstances the Claimant ought not be returning to the court to advance arguments or claims which he should have put forward for decision on the first occasion but failed to do so.

17. I take note that, within the recorded agreement reached in the NSW proceedings, the Claimant consented to an order that the first UK proceedings should be dismissed. Such a dismissal would typically prevent the commencement of litigation based on the same matter in the future. Instead, the Claimant filed a notice of discontinuance, a technical approach he unilaterally adopted contrary to the terms of the NSW Consent Order. This is the only reason he is able to attempt to re-litigate the matter afresh without permission from the Court. Such discontinuance does not in my view represent what the Claimant agreed to do and does not then reflect the true purpose behind the NSW Consent Order. In addition, it must be noted that at the conclusion of the NSW proceedings the Australian court made an adverse costs order against the Claimant which the Claimant has yet to pay.

18. In my judgment the Claimant's abandonment of the NSW proceedings was intended to be absolute. The wording of the consent order is clear and unequivocal. It is a good example of an order such as described by Mummery LJ in *Ako v Rothschild Asset Management [2002] ICR 899* when he said:

> "An order dismissing an action by consent operates in the same way as dismissal by adjudication: the cause of action expires

> with dismissal and the fact of the order being made precludes fresh proceedings based on the same or substantially the same grounds."

19. There has been no suggestion that the New South Wales Court is not a court of competent jurisdiction and, whilst proceedings there may not have been determined by a judicial decision, the consent order agreed by the Claimant makes the intentions of all concerned clear. That intention was one of finality to all the issues arising from the alleged contract between the deceased and Ailsa, and finality of any asserted claim as between the Claimant and the Defendants arising from that contract. The substance of the present case was fundamentally the same as the NSW claim and the first UK claim, and there is no evidence of any special reason why the present case ought to be allowed to continue.

20. Further, the Defendants ought not to be victims of harassment by litigation or vexed a third time by a Claimant pursuing the same or similar matters. The Claimant has already had opportunity to litigate the issues in hand on two prior occasions. Instead of pursuing that litigation the Claimant has twice abandoned the claim. In my judgment the Claimant has been afforded ample opportunity to present his case in court and have access to a judicial outcome.

21. It would be inappropriate and manifestly unjust for me to ignore the terms of the NSW order, to ignore the fact that that order represented a comprehensive abandonment by the Claimant of any claims to which the Claimant might be entitled arising from the agreement, in any court including but not limited to the High Court of Justice of England and Wales, any claims which the Claimant might have in his personal capacity against the estate of the deceased and the Defendants, whether in the capacity as executors of the trustees of the will of the deceased or in a personal capacity. Neither can I overlook the fact that there is an outstanding costs order yet to be paid by the Claimant. The fact is, the Claimant has had two opportunities in which he could and should have presented his case to trial if his conviction to the claims were true. Instead, he wholeheartedly abandoned all potential claims arising from the agreement he seeks to rely upon within these proceedings. It seems probable that the Claimant has issued the present claim as a reaction to the Defendants having sought to enforce the costs order from the NSW proceedings and that the present claim is little more than an attempt by the Claimant to frustrate the Defendants and divert their attention from enforcing those costs they have already been awarded.

22. In the circumstances I am satisfied that the Claimant is estopped from bringing these claims and that this case amounts to an abuse of process. As such it ought to be dismissed.

23. Given this decision it is not strictly necessary for me to deal with the other matters raised. However, I do believe they are worth some brief attention.

24. The Defendants seek a declaration in respect of service of the claim, in particular that there has not been good service in compliance with the requirements of the CPR. The Defendants position is that the Second Defendant has not been served with the claim form and the First Defendant has not been served with the particulars of claim or response pack. Time for

service of these documents on those parties has now lapsed and so the Defendants submit the claim ought to be dismissed.

25. The Claimant has sought to persuade the court that since the Defendants are representatives of the estate of the deceased, and that they are jointly and severally liable in respect of that estate, then service upon them albeit separately of the entirety of the proceedings amounts to good service. It is argued by the Claimant that the Defendants have, between them, been served with all the documents they need to respond to the claim and the service argument has no merit whatsoever.

26. In the alternative, the Claimant has sought to persuade the court that there is an extant application dated 12 July 2023, included at page 63 of the bundle, to extend the time for service of the claim form and particulars of claim and that the Court should exercise its discretion and grant that application.

27. Addressing service, I am unable to agree with the Claimant's submissions. The Defendants are separate individuals and separate parties to the proceedings. As such each must be served separately. There is no special rule for service just because they both represent the estate of the deceased. Service of a document on one of the Defendants does not mean the other Defendant has been served properly or at all.

28. I turn next to the application dated 12th of July 2023. The application does not assist the court or the Claimant. Firstly, it only seeks to extend the time for service to the 31 August 2023, a date which is already within the specified service period. Secondly, it does not appear to have been filed with the court. There is no record of the application on CE file, there is no correspondence chasing the listing of such application, and there is no Master's Appointment Form. There is an application from the Claimant dated 7 June 2023, and received by the court on 7 June 2023. That application seeks to extend time for service to 22 June 2023, a date which once again does not assist the Claimant. That application was dealt with and resulted in an Order as sought which required service by a date earlier than the 20th September 2023. The only document received by the court from the Claimant on 12 July 2023 is a certificate of service.

29. In the circumstances I am satisfied that there is no extant application to extend time for service of either claim form or particulars of claim. If I am wrong on this point and there were an extant application before me today I would not be minded to grant it. If I apply the test for relief from sanction the Claimant has failed to comply with the rules, has failed to pursue his application expeditiously, and failed to apply for relief from sanction promptly or at all. The failures are significant and serious. No reason whatsoever has been given for the failures and breaches. Assessing the overall circumstances of this case the only just outcome would be to dismiss any such application and the striking out of the claim.

30. Given the aforesaid, and given that the claim form has not been served on the Second Defendant, the claim against the Second Defendant must be dismissed since the time for service of the claim form has now lapsed.

31. Service of the claim form on the First Defendant was made in time, having been served personally on 7 June 2023. However, the particulars of claim have not been served in accordance with CPR 7.4 (2), that is to say no later than the latest time for serving of a claim form. Compliance with this rule is mandatory and where there is a failure to comply with that rule an application for relief from sanction ought to be made. The Claimant has made no such application. Neither is there an out of time application from the Claimant to extend the period of service for the particulars of claim. The claim against the First Defendant ought also be dismissed. For the same reasons identified above, were such an application before me it would be dismissed.

32. The final issue for me to consider relates to the jurisdictional gateway. I have been referred to CPR 6.36 and CPR 6 PDB (2)(a) which allows for service of a claim form out of the jurisdiction with the permission of the court under rule 6.36 where:

> "a claim is made in respect of the contract where the contract :
>
> was (i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction"

33. In this instance it is factually agreed that there was a conversation between the deceased and Ailsa by telephone whilst both were situated in New South Wales on 24 August 2006. The Defendants maintained this is when agreement was reached, relying upon the Claimant's pleadings which state agreement was reached on that occasion. The Claimant on the other hand argues that the contract was discussed on 24 August 2006, but was only formed later when Ailsa signed it on 27 September 2006 at which time she was in England.

34. The determination of this point is now largely immaterial given my findings above. However, for the avoidance of doubt I am satisfied that on the balance of probabilities the jurisdictional gateway was met. It seems more likely than not, based on the limited evidence available at this stage, that the telephone conversation on 24 August 2006 represented discussion between the parties whereas the written agreement on 4 September 2006 represents the actual date of contract when terms were finalised. Alternatively, the written document supersedes and replaces any earlier verbal agreement. This is of course subject to determination as to whether the written agreement is genuine or a forgery, a matter which is in dispute between the parties and which, if the matter were to proceed, would need to be determined at trial. However, subject to the legitimacy of the document I am satisfied, for the purposes of this application, that the claim is made in respect of a contract where that contract was made within the jurisdiction, or at least concluded by the acceptance of an offer, which was received within the jurisdiction. However, given the absence of evidence in respect of the applicable law of New South Wales I am unable to make determinations in respect of third-party rights or enforcement of third-party claims within that jurisdiction. Neither can I determine that the claim discloses no cause of action based upon assertions of the applicable law or descriptions of the applicable law.

35. In conclusion then this court is satisfied that the claim is an attempt to re-litigate claims that have already been dismissed by a court of competent jurisdiction in New South Wales, and this claim is subject to cause of action estoppel. To the extent this claim is any different to

the first UK claim or the NSW claim then it could and should ought properly to have been addressed and brought within those prior proceedings and this claim is subject to estoppel by operation of the rule from *Henderson*. I am persuaded that the claim represents an abuse of process, that the claim and particulars of claim have not been properly served on either the First or Second Defendant, and that in all the circumstances the claim should be dismissed.