Abuse of process issue estoppel applies equally within the same arbitral proceedings. No second bites!

Simon Rainey QC

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***Daewoo Shipbuilding & Marine Engineering v Songa Offshore Equinox Ltd* [2020] EWHC 2353 (TCC)**

Simon Rainey QC acted on behalf of Songa Offshore Equinox Ltd, instructed by David Leckie and Tom Roberts at Clyde & Co LLP.

A claimant seeks a preliminary issue on a question of construction. It states that it accepts that if the point is decided against it, then that will be the end of all claims by it in respect of the project in question. The other party on this basis agrees and the tribunal makes a consent order. The claimant loses the preliminary issue and leaves it too late for a s.69 appeal.

Can it then amend to run a different legal case on more or less exactly the same facts complained of, which it could have run in the alternative to its primary case, if wrong on its primary case on construction?

Can it resist reliance on *res judicata* on the basis that that principle cannot apply to amendments in the same set of proceedings as those in which the preliminary issue decision was made?

Or can the other party preclude the claimant from re-opening any claim on those matters, and, in addition, to defending its counterclaim by seeking to rely on the matters as defences?

Indeed can the other party contend that a binding agreement came into effect concerning the preliminary issue which meant that the claimant had contracted out of its rights (if any) to make any other claims if it lost on the issue?

These stark facts arose in ***Daewoo Shipbuilding & Marine Engineering (DSME) v Songa Offshore Equinox Ltd*** [2020] EWHC 2353 (TCC). The Court (Jefford J.), dismissing DSME's double-barrelled s.69 and s.68 Arbitration Act 1996 applications, held that DSME was estopped *per rem judicatam* from trying to relitigate matters which it could and should have raised before, that it made no difference that this all took place in the same set of proceedings rather than in two separate sets of proceedings and that this preclusion extended to relying on the same matters not only as claims in their own right but also as defences to the respondent Songa's counterclaims.

The judgment contains a detailed and valuable analysis of the circumstances in which it will be an abuse of process to seek to raise new arguments in the same proceedings.

The competing arguments

Songa's case was that the situation fell exactly into the situation described in ***Henderson v Henderson*** (1843) 3 Hare 100: "the court requires the parties to that litigation to bring forward their whole case … and will not 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". The result was that the determination of the preliminary issue and of DSME's responsibility for design (FEED) in respect of the project and delays and costs relating to issues with that design meant that the award decided against DSME all issues of liability arising out of the design and as to which party bore the delay and costs associated with design problems. DSME had put its case on one ground only, had sought a preliminary issue on the basis that if it lost that was the end of the case and could not now re-open the question under a different legal guise. If it had run the case which it now wished to run, there could and would have no possibility of a preliminary issue. It sought such an issue representing that there were no other issues which could make a preliminary issue inappropriate.

Songa submitted that for DSME to try to re-introduce the new alternative factual case was an example of abuse of process res judicata estoppel, analysed by the House of Lords in ***Johnson v Gore Wood*** [2002] 2 AC 1. Given the very wide restatement of ***Henderson v Henderson*** by the House of Lords (as Lord Bingham put it "one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard or fast rule to determine whether, on given facts, abuse is to be found or not": 31E), Songa submitted that it made no difference that the estoppel was invoked in one set of proceedings to stop an amendment in those proceedings rather than to stop a later separate claim in separate proceedings. The critical question was simply: "Whether in all the circumstances, a party is misusing or abusing the process of the court [or the arbitral tribunal] by seeking to raise before it the issue which could have been raised before".

DSME advanced various arguments before the Tribunal (Stewart Boyd QC, Sir David Steel, John Marrin QC). But its principal case was that ***Henderson v Henderson*** abuse of process estoppel had no place and could not apply to amendments in the same set of proceedings. That was dealt with on ordinary amendment principles which looked at costs and prejudice. Subject to such matters, it was always open to a party to amend, paying costs. In the present case given that this was an early preliminary issue, amending to run a new alternative case based on the legal findings in the preliminary issue award could hardly be said to be late, or to occasion prejudice.

The battle of the authorities

DSME relied on the decision of Jackson J. in ***Ruttle Plant Hire Ltd v Secretary of State for the Environment*** [2007] EWHC 1733 (TCC). He had stated "the rule in ***Henderson v Henderson*** cannot be invoked in order to prevent a party from pleading at a later stage in the litigation issues which might have been pleaded earlier" (at [36]). But no reasoning and analysis was given for that view.

In particular the Court in Ruttle did not appear to have been referred to an earlier decision of the Court of Appeal in ***Tannu v Moosajee*** [2003] EWCA Civ 815 in which the Court of Appeal had said "Whilst it might be unusual to apply the principle in ***Henderson v Henderson*** in relation to separate stages of the same litigation, it is not conceptually impossible" (per Arden LJ at [40]). ***Tannu*** was relied upon and followed in refusing amendments relating to liability after a "liability hearing" in ***Seele Austria GmbH v Tokio Marine Europe Insurance*** [2009] EWHC 255 (TCC)

Other cases, post ***Ruttle***, all at first instance had shown the clear application of ***Henderson v Henderson*** in the same litigation: ***BT Pension Scheme Trustees v BT plc*** [2011] EWHC 2071 (Ch), a case involving preliminary issues; ***Gruber v AIG Management France SA*** [2019] EWHC 1676 (Comm), in which Andrew Baker J. had made clear that it was a "strong thing" to shut someone out from running a point which had not actually been determined and "even stronger in relation to different stages of a single action" but that determinations within the action, e.g. by way of preliminary issues or a summary judgment on a particular claim could have just such an effect. See also ***Kensell v Khoury*** [2020] EWHC 567 (Ch).

The Judgment

Jefford J. concluded that there was no principled basis for the contention that ***Henderson v Henderson*** estoppel could not apply within the same proceedings or to different stages and determinations within a single set of proceedings [128].

Accordingly, the Tribunal was right to embark upon a "broad, merits based judgment" of the situation (in Lord Bingham's words in ***Johnson v Gore Wood***) and there was no error of law.

Interestingly, by a majority, the Tribunal had also held that DSME's conduct in representing repeatedly that the claim was over if it lost on the preliminary issue which it proposed, in order to induce Songa to agree to it amounted to a contractually binding arrangement under which DSME had given up any other claims, while recognising that a binding contract springing from a consent order was "less usual but not unknown". An attempt to argue that the majority had erred in law also failed [95].

Lessons for the future?

When proposing a preliminary issue, parties should have in mind that if it is portrayed as determinative if decided in one way, then that is likely to set the foundation for an argument that later attempts to amend to run a new case amounts to a ***Henderson v Henderson*** abuse, and that the party should have brought forward all of its arguments.

When on the receiving end of an application for a liability only hearing or the determination of preliminary issues, a party should consider carefully defining what the result of that will be for the claims and the proceedings generally and tying the applicant down to the dismissal of the claim etc in the event of a particular determination.

Simon Rainey QC

”Truly a super silk - devastatingly sharp and exceptional on his feet.” (Legal 500 UK, 2020)

Simon Rainey QC is one of the best known and most highly regarded practitioners at the Commercial Bar. He has a reputation which is second to none for his intellect and legal analysis (“fantastically intelligent and tactically astute”). He is acclaimed for his advocacy skills (“a stunning advocate”) and his cross-examination (“excruciatingly superb”). But he is equally well known to his clients as a cheerful team player, who rolls up his sleeves in long and complex trials and arbitrations and who prides himself on high standards of client care (“incredibly user friendly” and “lovely to work with”).

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