

**IN THE HIGH COURT OF JUSTICE**

**Claim No CH 97 S 4688**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**

**CHANCERY DIVISION**

**ORDER OF MASTER MONCASTER DATED 21 DECEMBER 2009**

Royal Courts of Justice

Strand, London WC2A 2LL

Date: 27 July 2011

**Between:**

**MOHAMMED SARWAR**

**Claimant**

**and**

**THE ROYAL BANK OF SCOTLAND PLC**

**Defendant**

**Before**

**Mr Robin Knowles CBE, QC**

**(Sitting as a Deputy Judge of the Chancery Division)**

**Mr Andrew Lenon QC, instructed by Goddard Smith, for the Claimant**

**Mr Luke Harris, instructed by DLA Piper, for the Defendant**

**Approved JUDGMENT**

**(Hearing date: 9 June 2011)**

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.

**Introduction**

1. This is the hearing of an appeal against an Order of Master Moncaster made on 21 December 2009. The appeal is brought with the permission of Henderson J.

## **The circumstances**

2. The appeal arises in these circumstances:

- (1) The Claimant (“the Customer”) was a customer of the Defendant (“the Bank”).
- (2) The Customer became a debtor of the Bank and the indebtedness grew. The Bank demanded repayment of an asserted debit balance of £166,753.34 on 8 August 1997.
- (3) When repayment was not forthcoming, the Bank appointed receivers on 21 August 1997 under security it held over the Customer’s property.
- (4) The Customer sued the Bank seeking, among other things, declarations, damages and an account in respect of their relationship as banker and customer. The pleaded issues included an issue in respect of the amount of interest the Bank had charged between 24 September 1991 and 23 March 1994, and an issue as to the validity of the appointment of the receivers.
- (5) The matter came to trial before Blackburne J in July 2000. The Customer appeared in person but with the assistance of a McKenzie friend. The Bank was represented by Leading Counsel.
- (6) In the course of the trial Blackburne J asked Leading Counsel for the Bank about the interest rate that was applied to the overdraft on the Customer’s account with the Bank. The question was at least in part prompted by a question as to the Bank’s entitlement to charge default interest at a rate of 25% per annum. The question did not arise distinctly on the pleadings or statements of case, but it was apparent enough for Blackburne J to ask about it.
- (7) The question was not answered immediately, and the topic continued to feature as the trial continued, just as it had in materials and documents before the trial and in preparation for the trial.
- (8) However having made enquiries of the Bank, and having been provided with certain documents by the Bank, towards the end of the trial Leading Counsel for the Bank informed Blackburne J that an interest rate of 25% had not been charged by the Bank, and that the rate charged on default had instead never been more than base rate plus 4%. On the basis of this information Leading Counsel went on to characterise default interest as “a complete red herring”.

- (9) In fact it is now clear that the Bank had been charging 25% interest, and specifically in the period 30 September 1994 to 30 September 1995. The information given at trial to Blackburne J, and to the Customer, by the Bank through its Leading Counsel was false.
- (10) However at the time of the trial, and understandably, Blackburne J relied on the information the Bank had provided. When the Customer referred to a 25% default interest rate Blackburne J pointed out that “that has not in fact been charged according to this calculation”. The Customer too seems, again understandably, to have felt that he had to take the Bank at its word.
- (11) Consistently, in his judgment at the conclusion of the trial, on the issue of interest Blackburne J treated the “only question” as being whether the Bank was entitled to increase the rate of interest in steps from 1.5% above base rate to 4% above base rate over the period November 1993 to March 1994. On that, he found in favour of the Bank. From there he went on to say this:
- “There is no challenge to the bank’s computation of the interest charged, arrived at by making these increases in the rate of charge. In my judgment, Mr Sarwar had no basis for complaining that too much was charged.”
- (12) Blackburne J dismissed the Customer’s claim, and awarded costs against the Customer and in favour of the Bank. The costs were to be assessed. Blackburne J also made clear that it was to be open to the Customer to seek to challenge any of “the costs and expenses” debited to his account.
- (13) The Customer sought permission to appeal to the Court of Appeal but this was refused by the Court of Appeal on 8 February 2001. At this point Blackburne J, the Customer (who was represented on the hearing, by Leading Counsel), and the Court of Appeal, were all still unaware that the Bank had charged interest at 25% contrary to its statement to Blackburne J that it had not. I have no doubt that Leading Counsel for the Bank too was still unaware of the true position.
- (14) For reasons that are not clear, because the Bank has not explained them, for many years the Bank did not proceed to an assessment of its costs of the proceedings that had led to the trial. What is clear is that it did not forego those costs, because it continued to treat those costs (and other sums) as secured against property of the Customer.
- (15) On 22 May 2007 the Customer issued an application seeking “an account of all sums charged against my account”. On 3 July 2007 Master Moncaster ordered the Bank to commence a detailed assessment of the costs that the Bank claimed it was entitled to charge the Customer.

(16) The Bank first disclosed its error to the Court and to the Customer on 2 November 2009, shortly before the hearing leading to the decision now under appeal. As Master Moncaster later noted “[t]he long delay and the way compound interest works has had a substantial effect on the amount which is now claimed by the Bank”.

3. Thus important information, sought by the Court itself and on which the Court was to rely, was provided to it by the Bank and was wrong. I make clear that there is no suggestion at all that Leading Counsel for the Bank had any belief other than that the information he was giving to Blackburne J was correct. Further there is no basis for any conclusion that the Bank intended to provide incorrect information.

### **The decision under appeal**

4. In the proceedings before Master Moncaster for an account the question arose “as to whether [the Customer] was bound by the starting figure and date” for the account which are to be found in the judgement of Blackburne J, £166,735.64 as at 8 August 1997. Within that figure it is now known that there is interest at 25%, but is it open to the Customer to re-open the figure?
5. Master Moncaster held that the figure could not be re-opened. He accepted the Bank’s submission that the matter was res judicata, and rejected the Customer’s submission that the Bank was estopped from debiting interest at a rate above 4% over base in respect of any period after 21 March 1994.

### **The appeal**

6. The permission to appeal granted by Henderson J from the Order of Master Moncaster was expressly limited to these points of res judicata and estoppel. The Customer had also raised an allegation of fraud but the grant of permission expressly does not permit that allegation to be pursued on this appeal.
7. On this appeal Mr Luke Harris appeared for the Bank. Mr Harris was not instructed as Counsel at the trial before Blackburne J. Although the Customer again appeared in person before Master Moncaster, with the assistance of a McKenzie friend, the Customer has had the advantage of representation on this appeal, by Mr Andrew Lenon QC.
8. Mr Lenon QC made clear on behalf of the Customer that, whatever happened on this appeal, there would be no attempt further to challenge the appointment of the receivers.

## The law

9. The authorities cited to me support the following propositions:

- (1) “[C]ause of action estoppel,’ is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which had been determined by a court of competent jurisdiction in previous litigation between the same parties”: Thoday v Thoday[1964] P 181 at 197-8 (per Diplock LJ). It “arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.”: Arnold and Others v National Westminster Bank plc [1991] 2AC 93 at 104 D-E (per Lord Keith).
- (2) A “cause of action” is “simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”: Letang v Cooper [1965] 1 QB 242 at 243 (per Diplock LJ); and note Republic of India v India Steamship Co Ltd, The Indian Endurance and The Indian Grace [1993] AC 410.
- (3) “[I]ssue estoppel,’ [arises] [i]f in litigation upon one ... cause of action any ... separate issue[] as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.”: Thoday at 198 (per Diplock LJ); and see Arnold at 105E-106A (per Lord Keith) and Spencer Bower and Handley on “Res Judicata” (4<sup>th</sup> edition) at 8.23.
- (4) “The determination by a court of competent jurisdiction of the existence or non-existence of a fact, the existence of which is not of itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before that court, but which is only relevant to proving the fulfilment of such a condition, does not estop at any rate per rem judicatam either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court.”: Thoday at 198 (per Diplock LJ); and see R v Hartington Middle Quarter Inhabitants (1855) 4 El & Bl 780 at 794-797.
- (5) “There may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct

determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings.”: Arnold at 109A-C (per Lord Keith) and 111C-G (per Lords Griffiths, Oliver, Jauncey and Lowry).

- (6) Both species of estoppel, cause of action estoppel and issue estoppel, are species of estoppel per rem judicatam and based on public policy: Thoday at 197-8 (per Diplock LJ). The public policy is, as with *Henderson v Henderson* abuse of process, “that there should be finality in litigation and that a party should not be vexed twice in the same matter”: Johnson v Gore-Wood & Co (a firm) [2002] AC 1 at 31A per Lord Bingham, and at 59A per Lord Millett. “This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole”: Johnson at 31B (per Lord Bingham).
- (7) At the same time “[t]he rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve”: Johnson at 22C (per Lord Bingham). The citizen has a “right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953)”: Johnson at 59D (per Lord Millett).
- (8) In addition to cause of action estoppel and issue estoppel is the *Henderson v Henderson* rule on abuse of process. Properly applied, the *Henderson v Henderson* rule too has “a valuable part to play in protecting the interests of justice”: Johnson at 31F (per Lord Bingham).
- (9) “The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to [a *Henderson v Henderson*] abuse of process 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. [It is not necessary], before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty ...”: Johnson at 31B-C (per Lord Bingham). However it is “wrong” and “too dogmatic an approach” 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.”: Johnson at 31C-D (per Lord Bingham).
- (10) Today, *Henderson v Henderson* abuse of process should involve “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.”: Johnson at 31D (per Lord Bingham). “[I]t is 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.”: Johnson at 31F (per Lord Bingham), and see 59G-H (per Lord Millett). It “ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation”: Brisbane City Council v Attorney General for Queensland [1979] AC 411 at 425 per Lord Wilberforce.

### **Cause of action estoppel**

10. In my judgment there can be no cause of action estoppel.
11. The causes of action before Blackburne J included a cause of action for breach of contract by charging excessive interest between 24 September 1991 and 21 April 1994. In the present account the Customer seeks to challenge the charging of interest for later periods. This is not, as submitted by the Bank, “simply a particular of the same breach”. It is an allegation of further breaches, or a challenge to the Bank’s claim to be entitled to bring later amounts of interest into the account.
12. The prayer to the Amended Particulars of Claim on the trial before Blackburne J included a claim for an account. The Bank urged that all matters relating to interest were within the four corners of such a claim. But an account, in this sense, is best understood as a remedy, and not the cause of action. We are not here concerned with the more technical forms of action on an “account stated” or a “settled account”. And the factual situation the existence of which the Customer said entitled him to obtain from the court the remedy of an account against the Bank, did not depend on whether or not the Bank charged or was entitled to charge interest at a rate of 25%.
13. Even in relation to the claim for an account sought from and refused by Blackburne J, interest at 25% was not “within the four corners”. It did not in the event feature in the claim (because the Bank said that they had not charged interest at 25%). To my mind the situation is not so very different from the situation where there is a claim for an order that an account be taken save in respect of a specified item which is to be left to one side for the purposes of the account sought. This would not automatically prevent an order later that the item should then be dealt with. Indeed, to take an example from this very case, Blackburne J expressly left it open to the Customer to seek to challenge any of “the costs and expenses” debited to his account.

### **Issue estoppel**

14. In my judgment there can be no issue estoppel.

15. This is for these reasons:

- (1) It is clear that Blackburne J did not determine the issue of whether the Bank was or was not entitled to charge interest at 25%. He was (wrongly) told that they had not, and so proceeded on the basis that no such issue arose.
- (2) Mr Harris for the Bank submits that Blackburne J's finding of the balance of the account on 8 August 1997 was "a fundamental finding in a case where the balance of the account was in issue". Blackburne J did indeed state a figure for the balance of the account of £166,735.64. However for the purposes of the issues before him, including the validity of the appointment of the receivers, he needed only to conclude that an amount (no doubt a material amount) was due from the Customer to the Bank and unpaid, but not the precise amount. This was expressly submitted by the Bank itself in the course of argument before him. The order resulting from the trial did not state a figure.
- (3) If the fact that the issue of entitlement to charge interest at 25% for the period 30 September 1994 to 30 September 1995 was not distinctly pleaded is a fact that has materiality in the circumstances of this case (given that Blackburne J saw the issue as sufficiently material to warrant enquiry by him), then its materiality is further to confirm that the issue has not been decided.
- (4) Even had the conditions been otherwise present for an issue estoppel this is a case in which there is a special circumstance of a quality that invokes the exception to the estoppel. In response to a request from Blackburne J to the Bank, the Bank provided information that was wrong and that misled Blackburne J and the Customer. There has since become available to the Customer further material that shows the true position, and in the circumstances of the Bank's provision of (wrong) information to Blackburne J and the Customer the further material could not by reasonable diligence have been adduced in the proceedings before Blackburne J.

### ***Henderson v Henderson* abuse of process**

16. In my judgment there is no sensible question of the Bank succeeding in characterising the present case as one of *Henderson v Henderson* abuse of process by the Customer. On this Master Moncaster found in favour of the Customer, and I agree with him.
17. How could the Court be satisfied that the question whether the Bank was entitled to charge interest at 25% should have been raised by the Customer in the earlier proceedings if it was to be raised at all? It was the Bank that, by putting wrong information before Blackburne J, caused him and the Customer to leave the question

to the side. 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, would not, in all the circumstances, fairly characterise the Customer as misusing or abusing the process of the court by seeking to raise before it this issue now. To the question whether in all the circumstances the Customer's conduct is an abuse the answer is firmly in the negative.

### **Some particular points**

18. Mr Harris for the Bank emphasised throughout his submissions that whatever could be said about what happened at trial, the Customer could not overcome the question why the point was not pursued on appeal. But the Customer could not pursue the point on appeal because he did not know the truth. And the point had not been part of the decision under appeal. For the same reason there is not a risk of inconsistent parallel judgments as the Bank urged.
19. Mr Harris also urged that it would be complex to deal with the point now, many years on, and that memories will have been lost. These difficulties are of the Bank's making. In any event, the Bank relies largely on documents. In addition, the Bank now having accepted that it did charge interest at 25%, the issue is primarily a question of law as to its entitlement to charge that interest.
20. Mr Lenon for the Customer submitted, referring to the overriding objective, that by reason of the fact that the Customer was acting in person and without access to the information held by the Bank there was "a heavy duty on the Bank to ensure that information supplied to the Court was accurate". Mr Harris for the Bank responded with the contention that for the purposes of examining whether there was an estoppel there was no difference between a litigant-in-person and a professionally represented party.
21. In response to this last submission and counter-submission I would say this. At least in the context of *Henderson* abuse of process, and perhaps also for the purpose of the question whether there is a special circumstance in the context of issue estoppel, I am not persuaded that the position is as clear-cut as Mr Harris submits. In Johnson Lord Bingham was not, for example, prepared to treat lack of funds as necessarily irrelevant in the context of *Henderson* abuse of process (see at 31E-F). The considerations in a case such as the present might properly include the particular impact on a litigant-in-person of specific information and assurances provided by the Bank through Leading Counsel in response to a question from the Judge, whatever else may be somewhere "in the papers". But in any event, I add that, litigant-in-person or no litigant-in-person, it was for the Bank to take all reasonable steps to ensure the accuracy of information supplied to the Court in response to a request from the Court, and to correct any inaccuracy promptly.

### **Estoppel of the Bank?**

22. The question whether the Bank is estopped, on the basis of its representation to the Court, from claiming an entitlement to charge more than 4% over base rate was within the appeal. However it was not strongly pressed. In circumstances where I have concluded that the issue of entitlement to charge interest is still live, with no estoppel binding the Customer, I do not conclude that the Bank for its part is bound by an estoppel.

### **Conclusion**

23. In these circumstances the appeal must be allowed. I view that result with satisfaction. Many might ask why the Bank's response to realising that it had provided incorrect information to Blackburne J and to the (its) Customer would not be to seek to put that right. It is obvious that had the Bank provided correct information Blackburne J would have ensured there was a means by which its entitlement to charge interest at that rate could be examined. Putting right what the Bank had done wrong would involve the Bank's supporting a course that would allow examination of its entitlement to charge interest at 25%, rather than seeking to take advantage its own error by arguing that the matter was closed.