IN THE DISTRICT COURT
AT MORRINSVILLE

CIV-2015-039-000060
[2015] NZDC 24512

	BETWEEN	IAN CHARLES SCHULER Plaintiff
	AND	INDEPENDENT LIVESTOCK AGENTS LIMITED (IN LIQUIDATION) Defendant

Hearing: 10 December 2015

Appearances: D Hayes for Applicant
B J Norling and A Cherkashina for Respondent

Judgment: 14 December 2015 at 4.00 pm

RESERVED JUDGMENT OF JUDGE D M WILSON QC
[Amended pursuant to Rule 11.10 District Court Rules 2014]

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[1] **Introduction**[1]

1.1 Mr Schuler seeks to strike out the statement of claim filed by Independent Livestock Agents Limited (in Liquidation) ("ILAL") and subsequently to dismiss this proceeding ("this proceeding").[2]

1.2 ILAL opposes this application. In particular, ILAL contends that:

a. This proceeding is not an abuse of process; and

b. This proceeding does not attempt to circumvent the rules of res judicata.

1.3 In the alternative, in the event that the application for dismissal is unsuccessful, Mr Schuler seeks security for costs against ILAL.

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[1] Paragraphs 1 & 2 are adapted from the submissions of the Respondent

[2] The proceedings against the second and third defendants have been discontinued. The First Defendant's application to transfer the proceedings to the High Court was withdrawn.[2]

1.4 ILAL similarly opposes this application. In particular, ILAL contends that:

a. No security for costs should be ordered in the circumstances; or alternatively

b. In the event that security for costs is ordered, adequate security can be given in the form of a guarantee and indemnity from the Liquidators to pay any future award of costs in this proceeding.

[2] Glossary of Terms

ILAL	Independent Livestock Agents Limited (in Liquidation)
ABOA	The Applicant's bundle of authorities
ABOD	The Applicant's bundle of documents
Mr Schuler	Ian Charles Schuler
RBOA	The Respondent's bundle of authorities
RBOD	The Respondent's bundle of documents
The Liquidators	Damien Grant and Steven Khov as liquidators of ILAL

[3] The Law[3]

8.1 The District Court has the inherent power to prevent abuse of its processes. *Watson v Clarke*[4]:

> Since *Mills v Cooper* [1967] 2 QB 459 it has been accepted by the highest authority throughout the Commonwealth that inferior courts such as the District Court have the inherent power to prevent abuse of its own processes.

8.2 Commencing a new proceeding is an abuse of process where the plaintiff seeks to rely on issues or facts which could and ought to have been raised in a previous proceeding.[5]

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[3] The law is adapted from paragraphs 13 to 26 of Mr Schuler's submissions. The reservations expressed in the paragraph 4.2 of the respondents' submissions have been considered.

[4] (1990) 1 NZLR 715

[5] *Beattie v Premier Events Group[2014] NZCA184 at [45]*

8.3 Abuse of process arises where proceedings are being advanced unfairly or where there are multiple proceedings likely to cause improper vexation. *Waterhouse v Contractors Bonding:*[6]

> [31] ..... conduct that would attract the intervention of the court on abuse of process grounds: (a)Proceedings that involve the deception of the court, or those which are fictitious or a sham;(b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way; (c) proceedings which are manifestly groundless or without foundation or which serve no useful; purpose; (d)multiple or successive proceedings which cause or a likely to cause improper vexation or oppression.

8.4 The principles to be applied in an abuse of process claim include:[7]

- whether manifest unfairness or injustice would result to a party; and,
- Whether the administration of justice will be brought into disrepute.

8.5 Relevant factors are:[8]

- consideration of the identity of the issues;
- the context of the two sets of proceedings;
- Whether there is a right of appeal.
- whether the proceedings were initiated by a party seeking a ruling inconsistent with an earlier judgment or whether the issue is raised in defence; and
- The facts of each individual case will determine the outcome.

8.6 **The Res Judicata point**

Where an issue has already been determined in a case a party is precluded from raising the issue in a new proceeding: *Beattie v Premier Events Group:*[9]

> [41] ....The public policy objectives of fairness to litigants and the need to bring an end to litigation are achieved by the rules of res judicata. Those rules prevent a party to a final judgment challenging in a subsequent

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[6] [2013] NZSC 89

[7] Huijsduijen v Woodley [2012] NZHC 2685 at [71]

[8] At [72]

[9] [2014] NZCA 184

proceeding matters that have already been determined..... He should not be vexed twice for the same cause.

8.7 The Plaintiffs in the High Court being the Liquidators personally and the Company in liquidation in this proceeding are different. That matters not because they are privies. *Chambelains v Lai.*[10] Parties and their privies are included: *Shiels v Blakely:*[11]

8.8 A decided matter of fact or law cannot be re-litigated[12].

8.9 It is not desirable to have two conflicting Court judgments on the same issues between the same parties.[13]

8.10 Issue estoppel is founded on facts fundamental to a decision without which it cannot stand.[14]

8.11 Issue estoppel need not be pleaded issue. [15]

8.12 If a claim properly belonged in prior litigation it cannot be raised later except where there are special circumstances.[16]

8.13 The important rule in *Henderson v Henderson*[17] is a case where an abuse of process was found.[18]

8.14 The Court of Appeal in *Commissioner of Inland Revenue v Bhanabhai* cited the following passage from *Johnson v Gore Wood & Co (a firm)*[19] in regard to the application of the rule in *Henderson v Henderson*:[20]

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[10] [2006] NZSC 70 AT [59]

[11] [1986] 2NZLR 262 at 266 line 24

[12] Shiels v Blakely [1986] 2NZLR 262 at 266 line 40

[13] Sim v Moncrief Pastoral CIV 2011-454-343 13 December 2011 HC Gendall AJ at [24].

[14] Talyancich v Index Developments Limited [1992] 3 NZLR 28 at 38.

[15] Kidd v Van Heeren [2015] NZHC 517

[16] Ma v Tay [2013] NZHC 573 at [47], [58]

[17] Henderson v Henderson (1843) 3 Hare 100

[18] I acknowledge that Mr Hawes cited Peterson v Lucas [2015] NZHC 721 in his discussion of the Henderson v Henderson, but that was a case where the earlier case had failed. That was not the case here.

[19] [2002] 2 AC1 (HL)

[20] *Commissioner of Inland Revenue v Bhanabhai* [2007] 2 NZLR 478 (CA), at [60]. **RBOA at 3.**

> Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them... 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. (Emphasis added)[21]

8.15 While "*abuse of process*" is not readily defined, in *Commerce Commission v Giltrap City Limited*, the Court of Appeal held that:[22]

> Primarily, an abuse of process, as spoken of in the rule, occurs when a litigant uses the processes of the Court for an ulterior or improper purpose.

8.16 The onus is on the party alleging abuse of process to show that this proceeding was brought for an improper purpose. It has been previously held that it is "*a heavy onus*" and one to be exercised only in exceptional circumstances.[23]

8.17 I have rejected impropriety so the case comes down to identifying the issues. The substance of the High Court proceeding was that Mr Schuler breached a director duty pursuant to s 131 of the Act and had to compensate ILAL for that breach. The present proceeding is concerned with a debt due from Mr Schuler to ILAL for advances which were not (wrongly) listed as salary in the Company accounts.

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[21] Cited in the respondents' submissions at 4.2

[22] *Commerce Commission v Giltrap City Limited* (1997) 11 PRNZ 573 (CA), at 579. **RBOA at 4.**

[23] *Air National Corporate Ltd v Aiveo Holdings Ltd* [2012] NZHC 602, at [32(c)]. **RBOA at 5.**

[4] **Chronology**[24]

- ILAL is a company which was incorporated on 9 August 2005.[25] Mr Schuler is and has been the director and shareholder of ILAL since its incorporation.[26]

- On 21 June 2010, ILAL was placed into liquidation by an order of the High Court at Hamilton. The Liquidators were appointed as joint and several liquidators of ILAL.[27]

- On 15 August 2011, the Liquidators commenced a proceeding against Mr Schuler at the High Court at Hamilton ("the High Court proceeding"). Amongst other causes of action (irrelevant for this proceeding), the Liquidators claimed that Mr Schuler failed to comply with his director duties pursuant to s 131 of the Companies Act 1993 ("the Act") by failing to act in good faith, in the best interests of ILAL, and with due care. In particular, the Liquidators claimed that:

    - ILAL received and held funds on behalf of its creditors.[28]

    - Despite numerous demands made by the creditors for payment of the funds, Mr Schuler failed to pay and deliberately misrepresented the reasons for non-payment to the creditors.[29]

    - Mr Schuler authorised ILAL to use these funds in the ongoing business of ILAL, including payments to other clients, business overheads, drawings and/or salaries.[30]

    - As a result, the creditors of ILAL were unpaid as at the date of the liquidation.[31]

- On 17 December 2012, the High Court proceeding was determined. The High Court held that Mr Schuler deliberately engaged in ongoing conduct that was designed to mislead and forestall the creditors of ILAL in pursuing the recovery of their debt. Such actions were found by the High Court to be detrimental to ILAL, which remained indebted to the creditors.[32] Accordingly, Mr Schuler was found to be in breach of s 131 of the Act and was ordered to repay and restore to ILAL the whole of the money owed to the creditors pursuant to s 301 of the Act, being $70,601.00 ("the Judgment").[33] In addition, Mr Schuler was ordered to pay interest, costs and disbursements totalling $103,903.00.

- On 10 July 2015, the Liquidators caused ILAL to commence this proceeding.[34] The substance of this proceeding is that Mr Schuler, while

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[24] I have adapted the chronology from the Liquidators submissions as more comprehensive. Further the Applicant's Submissions failed to include a chronology of the material facts as required by R 7.32(3) (b) of the District Courts Rules.
[25] Affidavit of Damien Mitchell Grant dated 21 October 2015, at exhibit 1. **RBOD at [013]**
[26] **RBOD at [014]**
[27] **RBOD at [013]**
[28] *Grant v Independent Livestock 2010 limited* [2012] NZHC 3458, at [2]. **ABOA at 11**
[29] At [158]
[30] At [107]
[31] Above
[32] At [159].
[33] At [200].
[34] Statement of claim dated 10 July 2015. **ABOD at [1]**.

being a director of ILAL, received various transfers of funds from ILAL. The Liquidators claim that these transfers were loans repayable on demand.

- On 20 August 2015, Mr Schuler filed an interlocutory application seeking to strike out ILAL's statement of claim and dismiss this proceeding.[35]
- On 17 September 2015, Mr Schuler filed an interlocutory application seeking security for costs against ILAL.[36]

[5] The applicant's case

4.1 Mr Hayes submitted that the application proceeded on:

> ...effectively abuse of process with various estoppels as backup. The respondent has already sued the applicant in the High Court and obtained a judgment for $70,601 plus interest and costs in all totalling $174,504.[37]

4.2 He went on: This application does not rely upon the strength of the proposed case and so as usual in a strike out application the pleadings can be taken as correct."[38]

4.3 Despite an oral attempt by Mr Hayes to argue that that rule applied only to applications to strike out where no cause of action was established, he ultimately reverted to the (correct) written version.

4.4 Mr Hayes[39] described the present proceeding as:

> A cunning and manipulatively timed attempt to double dip and this court should in my submission firmly strike the case out with costs against the Solicitor who filed this case being considered. The defendant is entitled to rely upon the case presented to the High Court by the liquidators which clearly accepted the money he took was a substantial shareholder salary.
>
> Even in the Court of Appeal the Liquidators continued to rely upon the alleged fact the money was gone into salary. ([32] of decision) Their Counsel specifically tabulated the salaries and drawings to show where the money had gone so to now come to this court and say that the money was not legally salary is ingenuous at the least and clearly misled the true position the Court of Appeal(sic).

4.5 Mr Hayes submitted[40] that:

- The "allegation in this case distils to Mr Schuler owing the company money because the company loaned him money. In either case the claims are

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[35] Interlocutory application dated 20 August 2015. **ABOD at [44]**.
[36] Interlocutory application dated 17 September 2015. **ABOD at [17]**.
[37] $150,838.96 of this was for costs, an amount Mr Hayes described in his written submissions as "obscene"
[38] Schuler submissions paragraphs 3 & 4.
[39] Schuler submissions at para 32,33
[40] Schuler submissions at para 7ff

substantially identical in that Mr Schuler owed the company money although the legal mechanism of recovery is different.

- So the question is why was this proceeding not part of the earlier High Court proceeding? There was no rational reason for the failure to include this claim in the first apart from a scheme to facilitate a double recovery and that in my submission is a clear abuse of process.
- The plaintiff's affidavit at paragraph 3.15 freely admits that a commercial decision was taken not to litigate every issue in one proceeding as it would increase costs.[41] There is no denial that the cause of action was not identified then and neither could there be as the liquidators had all the information they now have at the time."
- First, had this cause of action been raised in the first proceeding the court would never have entered judgment as it did because the now alleged debt would have meant the company was in fact not balance sheet insolvent and in fact had sufficient assets to pay its creditors.
- Secondly, the evidence accepted by the High Court from the liquidators was that the company was insolvent when it in fact based on what is now asserted it was not insolvent. The evidence of the liquidators in this case would therefore be that the company had sufficient assets which fact is contrary to that found by the judge in the earlier case.
- A third point is that the defendant could have used the current account debt as an affirmative defence to show he had provided for the debts of the company, but at the very least both matters needed to be heard together to do justice to the situation and avoid double recovery.
- To allow the court process to now be so manipulated in either of those ways to allow the liquidators to double dip would in my submission be an abuse of process and offend against res judicata, issue estoppel and the rule in Henderson v Henderson.

[6] The submissions were based upon the proposition that Potter J and the Court of Appeal both got it wrong in treating payments described as salary in the accounts

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[41] Affidavit of Damian Grant dated 21 October 2015 paragraph 3.15

as salary. Mr Hayes submitted (and Mr Norling agreed) that the payments were not 'salary' because no company resolution had so described them.

[7] Mr Hayes submitted that the liquidators would have known this given their background and experience. He finally conceded that the point had not occurred to him as a commercial law barrister, nor did any counsel make the point in either earlier Court hearing. Given there was no cross-examination of the Liquidators before me there is no reason to support they knew more than counsel.

[8] Mr Hayes' oral and written submissions made serious allegations of misconduct against the Liquidators, including misleading the High Court and the Court of Appeal. The Liquidators rightly resent the allegations. In my view the "commercial decision" made by the Liquidators does not give any hint of the cynical manipulation alleged by counsel. Misconduct is not apparent from the affidavit and Mr Hayes had not issued a notice requiring the deponent liquidator to appear for cross-examination on his affidavit. Given there is no evidence of any misconduct the submissions are mere allegations and should never have been put and I reject them.

[9] Decision on strike-out application

[10] The starting point is the Statement of Claim which lists the items particularised as advances taken for personal expenses. I accept that there is some overlap of dates with the earlier proceeding as Mr Hayes pointed out. He may be right that some of the present claim may include "salary". There is no apparent unfairness or impropriety. Mere submissions about possibilities with no evidential basis do not satisfy the heavy onus appropriate to an intervention by the court before trial. Mr Schuler has not demonstrated that this proceeding is an abuse of process and/or an attempt to circumvent the rules of res judicata

[11] There are no exceptional circumstances which would justify intervention.

[12] The application to strike out is dismissed. Costs will follow the event. The respondents will have costs on a 2B basis with disbursements to be fixed by the Registrar. If counsel cannot agree, I will settle the costs on memoranda. The

memorandum from ILAL's counsel is to be filed and served first and in any event no later than 4 p.m. on Wednesday 20 January 2016. Any reply is to be filed and served no later than 4 p.m. on Thursday the 28th January 2016.

[13] Security for costs

[14] I would now turn to the application for security for costs given that the application to strike out has failed.

[15] However it became clear that Mr Hayes[42] needed time to calculate likely future costs before quantifying the amount being sought. The figures in Mr Schuler's affidavit (even assuming they belong there) did not predict future costs and do not assist.

[16] For the benefit of the parties I advise a preliminary view that adequate security could be given in the form of a guarantee and indemnity from the Liquidators to pay any future award of costs in this proceeding.

[17] I invite counsel to confer. If they are unable to agree they can file memoranda. The memorandum from Mr Schuler's counsel would be filed and served first and in any event no later than 4 p.m. on Wednesday 20 January 2016. Any reply is to be filed and served no later than by 4 p.m. on Thursday the 28th January 2016.

[18] The file is to be referred to me on Friday 29th January 2016.

D M Wilson QC
District Court Judge

[42] Amended from Newsen to Hayes