Abusing the system

Elaina Bailes assesses recent case law on abuse of process

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It is well established that there are two categories of abuse of process under English law (as set out in the leading case of *Johnson v Gore Wood & Co* [2000]):

- *res judicata*, or cause of action estoppel or issue estoppel, where a cause of action or issue has been raised in earlier proceedings and had been decided by the court; and

- *Henderson* abuse (*Henderson v Henderson* [1843]), where the court is satisfied that a cause of action in later proceedings *should have* been raised in earlier proceedings.

This article focuses on *Henderson* abuse, which is the less straightforward of the two categories.

The case law is clear on the approach a judge must take in deciding whether a claim 'should' have been raised in a previous action, namely a (para 31, *Johnson*):

> ... broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of 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.

However, in complex multi-party litigation, where there are many possible claims and parties, making that broad judgment can be a difficult task in the face of evidence from the parties as to when they became aware of potential further claims and/or other parties. Faced with this situation, in *Aldi Stores Ltd v WSP Group plc* [2007] the Court of Appeal set out mandatory case management rules for complex commercial multi-party litigation, in order to attempt to ensure such issues are raised to, and dealt with by, the court seised. This avoids a situation where a second action is brought and, unsurprisingly, becomes the subject of a strike-out application.

This article considers two recent cases where the courts had to deal with failures to meet the *Aldi* requirement and discusses what, in practice, this means for commercial litigators advising clients in complex litigation – can a party avoid falling foul of this rule without losing any tactical advantage?

'It is a difficult message to give to a client that where it is not in the client's best interest to add parties or claims into the current proceedings, the matter will nevertheless have to be referred to the court if they wish to avoid running the risk of breaching the *Aldi* requirement.'

What is the *Aldi* requirement?

The *Aldi* requirement is a procedural rule laid down in the 2007 Court of Appeal judgment in *Aldi*. The case concerned damage sustained to a retail store site near Luton. Aldi had originally brought proceedings against the building contractors for breach of warranty and negligence. B&Q, who also had a store on the site, brought a separate set of proceedings. Various other parties, including the WSP companies and Aspinwall, were joined to both sets of proceedings. Aldi won its case on certain parts of liability against the building contractors, but they went into liquidation and after protracted correspondence with the insurers, it became clear to Aldi that it would never recover the monies. In the meantime, the B&Q action settled. When Aldi then brought a second set of proceedings against WSP and Aspinwall, they argued it was an abuse of process since Aldi should have pursued the claims in the first proceedings.

At first instance, Aldi's claim against the respondents was struck out by Jackson J on the basis it fell foul of the principles of abuse of process set out in *Johnson*, as the claim *could* and *should* have been brought in the original proceedings. He accepted the

respondents' arguments, in particular that the resources of the court would be wasted by adjudicating on the same allegations and facts for a second time.

The Court of Appeal ruled that the first instance decision was impermissible as the judge had taken into account factors he should not have and not considered factors which he should have. In particular, Thomas LJ held that 'the mere fact that this action may require a trial and hence take up judicial time' did not make the action impermissible. Thomas LJ had sympathy with Aldi as, due to the lack of clarity as to the position with the insurers, it did not think it needed to pursue other parties until late in the day and thought that it had acted reasonably in all the circumstances. The court had regard to the private interests of the respondents, but noted that they were made aware by Aldi that it had a claim against them that might be pursued, and they themselves could have applied to the court to have that resolved in the extant proceedings.

Thomas LJ pointed to the (para 25):

> ... real public interest in allowing parties a measure of freedom to choose whom they sue in a complex commercial matter and not to give encouragement to bringing a single set of proceedings against a wide range of defendants or to complicate proceedings by cross-claims against parties to the proceedings. That freedom can and should be restricted by appropriate case management.

With that aim in mind, he laid down the requirement that where similar issues arise in complex multi-party litigation in the future, those issues must be referred to the court seised of the proceedings, in order that court resources be used efficiently, stating that '[t]here can be no excuse for failure to do so in the future'.

Application in recent cases

The *Aldi* requirement has been considered in two recent High Court cases.

Otkritie Capital International Ltd v Threadneedle Asset Management Ltd [2015] was a dispute regarding the purchase of Argentine government warrants for a multiple of their market value. In the first proceedings, the claimants had sued 19 defendants, including a Mr Gersamia, who allegedly assisted or attempted to assist fraudulent behaviour on the part of the claimants' employees. Judgment in those proceedings was in favour of the claimants, who then brought the second action against the first defendant, Mr Gersamia's employer, and the second defendant (together the 'Threadneedle defendants'), who they alleged exercised control of Mr Gersamia akin to employment.

When Aldi then brought a second set of proceedings against WSP and Aspinwall, they argued it was an abuse of process since Aldi should have pursued the claims in the first proceedings.

The claimants' stated principal reason for not suing the Threadneedle defendants in the first action was because their solicitors were unable to bring proceedings against the Threadneedle defendants due to a conflict. The claimants stated that their preference was to continue with their existing solicitors and then bring a second action using a different firm, rather than change their solicitors in the first action. There was no suggestion of dishonesty, but simply that their approach was 'focused on their interests'.

The judge (Knowles J) commented that it was 'obvious' that the claimants could have made the Threadneedle defendants parties to the first action, but had chosen to wait until they had the result of the trial in the first proceedings. He stated that where the *Aldi* requirement has been breached, the court should be ready to form a view of what the probabilities were of the court allowing the new parties to be joined or new claims to be brought in the existing case, had case management been undertaken, but without embarking on speculation.

However, the judge decided that the second proceedings were *not* an abuse, despite the *Aldi* requirement having been breached by the claimants. The factors he considered led him to conclude that had the claimants raised the issue with the court in the first proceedings, the court would have likely allowed them to conduct the two sets of proceedings. He pointed to the fact that addition of the two parties would have lengthened the first proceedings and required a change in solicitors, but also that the claims against the Threadneedle defendants did not follow straightforwardly from the findings in the first action against their employee, and the evidence of the Threadneedle defendants that they would have wished to bring contribution claims against companies in the claimants' group. He also did not accept evidence that the boards of the Threadneedle defendants would have consented to involvement in the first set of proceedings, had this been put to them at the time.

The judge made a point of recording publicly that the course taken on behalf of the claimants in this case fell well below the standards that the courts expect – it was not a 'responsible approach to complex commercial litigation' – and foreshadowed that he would likely award costs of the defendants' strike-out application against the claimants. He also commented on the 'major risk' that the claimants had run on a large claim in failing to meet the *Aldi* requirement, given that different facts could lead to a different consequence for those ignoring this requirement.

The other recent case that considered the *Aldi* requirement, *Clutterbuck v Cleghorn* [2015], was a second set of proceedings brought by husband and wife claimants against parties involved in a series of agreements regarding property developments. In the first set of proceedings (*Clutterbuck v Al Amoudi* [2014]), the claimants brought claims for fraudulent misrepresentation, deceit and breach of trust against Ms Al Amoudi arising out of various property dealings. These claims were dismissed by Asplin J in February 2014. Ms Al Amoudi had been introduced to them by a Mr Nichol, who died in 2009. In the *Cleghorn* case, the claimants brought an action against the judicial factor of Mr Nichol's estate

(which was being settled in Scotland) in relation to three claims in the *Al Amoudi* case.

In the second proceedings, the judge held that the *Aldi* guidelines applied due to the 'ample evidence' of the overlap of pleaded issues and evidence, which should have been clear to the claimants and their legal advisors, and thus they should have raised this with the court.

The reasons given by the claimants for not referring the matter to the court were:

- the 'pressure of events' relating to the litigation;
- representations from solicitors acting for the claimants and the estate that the estate wished to settle its claims against them; and
- advice from their various solicitors over time that proceedings against Mr Nichol should be dealt with separately as a great many matters did not involve Ms Al Amoudi.

The judge was not persuaded by the claimants' excuses for that failure to refer. In determining the consequences of the failure, he concluded that while the inexcusable failure to comply with the *Aldi* guidelines did not automatically entail the success of the strike-out application, it was a 'heavyweight factor' in the overall broad merits-based judgement, given the costs and other resources involved, and led him to a conclusion that in this case, the new proceedings were an abuse of process. The judge also cited the importance of the fact that the new proceedings were a collateral attack on Asplin J's decision, as the difference in one of the new claims was solely the identity of the defendant and the evidence used in the new case would be the same as in the first.

Impact for litigators

In both *Otkritie* and *Clutterbuck*, the court had to grapple with excuses given by the parties for failing to meet the *Aldi* requirement where they had relied on the advice given to them by their solicitors at the relevant time that it was in their best interests to bring a claim separately. In both situations, it appears that this was a tactical, but honest, attempt in the circumstances to advise the client of their best interests, with the *Aldi* requirement being overlooked.

However, the requirement to notify the court of potential new parties and actions does raise the following practical dilemmas for a solicitor providing advice throughout the case:

Balancing the clients' interests with the duty to the court

Where solicitors are alive to the fact that the *Aldi* requirement is engaged, it is a difficult message to give to a client that where it is not in the client's best interest to add parties or claims into the current proceedings, the matter will nevertheless have to be referred to the court if they wish to avoid running the risk of breaching the *Aldi* requirement, and its potential cost consequences. This is especially true in a situation where some advantage can be gained from deferring a judgment on certain matters until other matters have (hopefully) been decided in the client's favour, as was the case in *Otkritie* and *Clutterbuck*. Solicitors should, of course, be able to resolve this tension if acting properly under the SRA code of conduct, as the duty to the court outweighs the obligations to the client. Further, in *Otkritie*, it was made abundantly clear by the judge that although the case was not struck out, the claimants would be on the hook for the costs of the strike-out application.

Excuses for failure to refer

In both cases, the court was unsympathetic to parties' excuses for having failed to meet the *Aldi* requirement where they were represented by competent solicitors. It was also said in *Otkritie* that declining to take advice on the question of referral to the court could not avoid the requirement. Solicitors must therefore make it clear to their client that it will be difficult to persuade the court that there are any good reasons for not referring a matter to the court, even if at the time this appears an unattractive option to the client.

Continued awareness of the *Aldi* requirement

When deciding whether the *Aldi* requirement has been breached, the court must take into account when the party became aware of potential further claims/parties. In complex multi-party litigation, it may be quite late in the day (for example, after disclosure, witness statements or pleading amendments) that the existence of other parties/claims becomes apparent. It is therefore incumbent on solicitors to recognise this and be constantly vigilant to the fact that the requirement to inform the court may arise at any time.

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Conflicts

The claimants' solicitors in *Otkritie* faced a conflict as had they referred the matter to the court, this could have resulted in a court ruling essentially forcing a change of solicitor due to the firm being unable to bring an action against the Threadneedle defendants. This illustrates the pitfalls for clients when instructing large multi-service firms with a broad client base, giving rise to many potential conflicts, and the advantage of instructing conflict-free litigation-only firms. ■

Aldi Stores Ltd v WSP Group plc & ors [2007] EWCA Civ 1260
Clutterbuck & anor v Al Amoudi [2014] EWHC 383 (Ch)
Clutterbuck & anor v Cleghorn [2015] EWHC 2558 (Ch)
Henderson v Henderson (1843) 3 Hare 100
Johnson v Gore Wood & Co [2000] UKHL 65
Otkritie Capital International Ltd & anor v Threadneedle Asset Management Ltd & anor [2015] EWHC 2329 (Comm)