THE ENEMY OF MY ENEMY IS MY FRIEND: *RES JUDICATA* AND COMMON INTEREST PRIVILEGE IN MULTI-PARTY LITIGATION[1]

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The complexity of modern construction projects often means that a raft of specialist sub-contractors, managers, administrators and certifiers are engaged, each bringing their own expertise to bear on the works. However, when things go awry, the result is often a similarly complex and fragmentary multi-party dispute. Several such disputes have found their way to the Technology and Construction Court in recent years – for example, the litigation between Amey LG Ltd, Amey Birmingham Highways Ltd and Birmingham City Council, which Mr Justice Fraser characterised as "*tortuous*".[2]

In circumstances where the same defendant is being sued by a number of different claimants in respect of the same or related matters, but in separate sets of proceedings, the following two questions commonly arise:

(1) To what extent is that defendant bound by determinations, both factual and legal, made in other proceedings against different claimants? This question really concerns issue estoppel – a species of '*res judicata*' (i.e. matters adjudicated upon) which Lord Sumption has described as "*the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties*".[3] We are not here concerned with cause of action estoppel or the principle in *Henderson v Henderson*,[4] which are separate but related doctrines.

(2) Will communications with the defendant(s) in those other proceedings be privileged? This question concerns common interest privilege – the idea that where a communication is produced by one party for the purpose of obtaining legal advice or to assist in the conduct of litigation, then a second party who has a common interest in the subject matter of the communication or in the litigation can assert a right of privilege over that communication as against a third party.[5]

To illustrate these questions, let us imagine that a main contractor, 'B', having been sued by its employer, 'A', is now suing one of its sub-contractors, 'C', in respect of the same project. Despite the causes of action being different, there are issues common to both sets of proceedings. Expressing question (1) in those terms, to what extent will determinations of factual or legal issues in the litigation against A be binding upon B when it comes to the litigation against C? Expressing question (2) in the same terms, will B's communications with its co-defendants in the litigation against A be subject to legal professional privilege in the litigation against C?

Issue estoppel and common interest privilege are now principles of some antiquity and have been well ventilated in the senior courts. As a result, large bodies of relevant case law have accumulated. In order to be of maximum utility, this article does not quote from authority at length, but rather attempts to summarise the emergent principles as succinctly as possible. Full citation is provided in the footnotes to allow the reader to investigate pertinent aspects of the discussion in greater detail.

Answering question (1) – Issue Estoppel and Privity of Interest

The answer to the first question depends on two preliminary questions: (a) were the determinations in the previous proceedings *in personam* or *in rem*?; and (b) if they were *in personam*, can the claimant in the instant proceedings, who was not a party to the former proceedings, nonetheless be considered 'privy' to those former proceedings?

Determinations *in personam* or *in rem*?

Determinations *in rem* will bind non-parties. In order for a judgment to have *in rem* effect, the determination must be a determination regarding the status or disposition of property which is to be valid as against the whole world. Examples include a declaration on the ownership of shares,[6] or the revocation of a patent.[7] The mere fact that a judicial determination relates to property rights between parties does not make it a decision in *rem*.[8] However, it should be noted that an order may operate partly *in personam*, partly *in rem*.

> *"Someone who is not a party cannot take advantage of a decision made in proceedings when they were not there."*

Determinations *in personam* can usually only bind the parties to that litigation and their 'privies'. It is unquestionably not a rule of law that a judgment obtained by A against B is conclusive in an action between B and C; on the contrary, a judgment *inter partes* is conclusive only between the parties and those claiming under them.[9] Similarly, where B has lost against A on an issue in one case, it is irrelevant to B's legal obligations and rights in relation to A if C subsequently defeats A on the very same issue.[10] This is the doctrine of 'mutuality': someone who is not a party cannot take advantage of a decision made in proceedings when they were not there.[11] However, there is an important exception to this rule in circumstances of 'privity' between parties A and C.

Was the claimant 'privy' to the other proceedings?

Mindful of the reasoning above, let us suppose that an unfavourable determination *in personam* has been made against B in litigation with A – a finding that a contractual termination notice was invalid, for example. C then seeks to hold B to this finding in subsequent litigation. Can C rely on the court's determination in A v B? The answer is: only if there is sufficient privity between C and A.

Before a person can be privy to another, there must be a community or privity of interest between them.[12] This is a necessary but not a sufficient condition, since a privy must also claim under, through or on behalf of the party bound.[13] The bar here is high. Privity is not established by mere curiosity or concern (commercial or otherwise) about the litigation – there must be a sufficient degree of identification between the two parties to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is a party.[14] The requirements of privity may be stricter in the context

1 First published by Practical Law.
2 Amey LG Ltd v Amey Birmingham Highways Ltd [2019] EWHC 234 (TCC), at [3].
3 Per Lord Sumption in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46, at [17].
4 (1843) 3 Hare 100.
5 Per Aikens J in Winterthur Swiss Insurance Company & Anor v AG (Manchester) Ltd & Ors [2006] EWHC 839 (Comm), at [78].
6 E.g. Ali v Pattni [2007] 2 AC 85, PC.
7 E.g. Resolution Chemicals Ltd v H. Lundbeck A/S [2013] EWCA Civ 924.
8 Per Lord Mance in Ali v Pattni, at 98.
9 Per Mellish LJ in Gray v Lewis (1873) 8 Ch App 1035, at 1059-1060.
10 Per Lord Neuberger in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46, at [46]-[47].
11 Per Longmore LJ in Sun Life Assurance Company of Canada v The Lincoln National Life Insurance Co [2004] EWCA Civ 1660, at [77].
12 Per Lord Guest in Carl-Zeiss (No.2) [1967] 1 AC 853, HL, at 936.
13 *Spencer Bower and Handley on Res Judicata*, 4th Ed., §9.45.
14 Per Sir Robert Megarry V-C in Gleeson v J Wippell & Co [1977] 1 WLR 510 (Ch), at 515-6.

of issue estoppel than *Henderson v Henderson* abuse of process, where the courts take a broad merits-based approach.[15] Yet both approaches will often lead to the same conclusion.[16]

Issue estoppel may operate between defendants too, where: (i) there is a conflict of interest between the defendants; (ii) it is necessary to decide that conflict to determine the claimant's entitlement to the relief sought; and (iii) the question between the defendants has been judicially determined in other proceedings.[17] A defendant prejudiced by a judgment for or against a co-defendant on liability or quantum can appeal from it.[18] Any third party joined to the proceedings (e.g. under CPR Part 20) becomes a party to the proceedings between the prior parties and will be bound by issue estoppels created by a judgment or judgments between them.[19]

Finally, it should be noted that issue estoppel applies only to judicial determinations which are fundamental to the decision reached, rather than collateral to it.[20] As to legal issues, the issue determined must have been necessarily involved in the decision, as part of its legal foundation or justification; nothing but what is legally indispensable to the conclusion reached is thus finally precluded. As to factual issues, the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action.[21]

Answering question (2) – Common Interest Privilege

First, common interest privilege is not a freestanding form of privilege. It merely provides a means by which pre-existing privilege in a document or communication may be preserved in transmittal to a third party who has the requisite 'common interest'. Accordingly, the answer to whether privilege is lost by sending privileged information to another defendant will depend on whether that party has sufficient common interest in the information and/or in the litigation generally.

Older cases suggested that common interest privilege arose where the parties concerned could have instructed the same solicitor.[22] More recent authority, however, indicates a less restrictive approach which acknowledges that the relationship between parties with a common interest may not (and need not) always be harmonious.[23] The relationships where common interest privilege has been held to apply include: co-defendants;[24] insured and insurer;[25] reinsurer and reinsured;[26] companies in the same group, including parent companies and subsidiaries;[27] agent and principal;[28] and any parties who do or might use the same solicitor.

It has been suggested that common interest privilege can be used as a 'sword' (to obtain disclosure) as well as a 'shield' (to prevent disclosure).[29] However, this development may in fact be an outgrowth of joint interest privilege (requiring that the joint interest in the document existed at the time of its creation) rather than common interest privilege (which requires only that the parties have a common interest in the confidentiality of the document at the time of its disclosure).[30]

In practice, it may be prudent for parties to delineate the extent of their common interest before sharing privileged material, since for privilege to attach, disclosure must be given in recognition that the parties share a common interest.

15 Per Thomas LJ in Aldi Stores Limited v WSP Group Plc and others [2007] EWCA Civ 1260, at [10].
16 Per Floyd LJ in Resolution Chemicals v Lundbeck, at [33-35] and [50-52]. See also the learned judge's summary of the three-stage test to be applied by courts assessing privity, at [32].
17 Per Sir George Lowndes in Munni Bibi v Tirloki Nath (1931) 58 LR Ind App 158, PC, at 165-166. Board included Lord Tomlin.
18 Per Lord Carswell in Moy v Pettman Smith [2005] 1 WLR 581 HL, 602-604.
19 Per Scrutton LJ in Barclays Bank v Tom [1923] 1 KB 221 CA, 223-224.
20 Per Lord Holt CJ in Blackham's Case (1709) 1 Salk 290; per Mance LJ (as he then was) in Sun Life Assurance, at [41].
21 Per Dixon J in Blair v Curran (1939) 1 CLR 464, at 531-533 (an Australian case which was cited with approval by Mance LJ in Sun Life Assurance).
22 E.g. Buttes Gas and Oil Co v Hammer (No 3) [1981] QB 223.
23 E.g. Svenska Handelsbanken v Sun Alliance and London Insurance plc (No 1) [1995] 2 Lloyd's Rep 84.
24 Buttes Gas and Oil.
25 Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027.
26 Sun Alliance.
27 USP Strategies plc v London General Holdings Ltd [2004] EWHC 373 (Ch).
28 The World Era (No 2) [1993] 1 Lloyd's Rep 363.
29 Per Aikens J in Winterthur Swiss Insurance, at [78] *et seq*.
30 *Thanki on Privilege*, 3rd Ed., §6.21, 6.59.