Ho Kian Cheong v Ho Kian Guan and Others
[2004] SGHC 104

Case Number : Suit 713/2003, SIC 589/2004

Decision Date : 20 May 2004

Tribunal/Court : High Court

Coram : Vincent Leow AR

Counsel Name(s) : Lee Eng Beng with Low Poh Ling (Rajah and Tann) for plaintiff; Daniel Tan Choon Huat (Wee Swee Teow and Co) for third defendant

Parties : Ho Kian Cheong — Ho Kian Guan; Ho Kian Hock; Chan Chin Chin; Ho Yeow Khoon and Sons Pte Ltd

20 May 2004

Assistant Registrar Vincent Leow:

Introduction

1 The genesis of the present action lay in a simple, albeit voluminous application for further and better particulars by the plaintiff against the third defendant. It evolved into a rather different kettle of fish when Mr Tan, counsel for the third defendant raised preliminary objections against the application to the plaintiff's right to ask for further and better particulars. I dismissed the preliminary objections and felt that it would be useful to set out my grounds for having done so as it touched on a point that commonly occurs in practice.

Background

2 The facts of this application are not in dispute. On 17 October 2003, the plaintiff's solicitors wrote to the third defendant's solicitors to request for further and better particulars. Following the third defendant's failure to provide the particulars asked for, the plaintiff filed an application for further and better particulars on the morning of 10 December 2003 in Summons-in-Chambers 7579 of 2003 ("SIC 7579 of 2003"). Unknown to the plaintiffs, the third defendant had already prepared her reply. However, she only sent her reply on 11 December 2003 after the plaintiff's application was filed.

3 Two weeks later on 22 December 2004, SIC 7579 of 2003 came up for hearing before me ("the first hearing"). At that hearing, Ms Low, who appeared on behalf of the plaintiff, informed me of the crossing of the filing of their application and the third defendant's reply. She then asked for costs of the application to be fixed at $800. In reply, Mr Tan, who appeared for the third defendant, suggested that costs should be in the plaintiff's cause or alternatively that costs should be fixed at $150. I considered their arguments and fixed costs at $200. At this juncture, I should highlight that the parties had only argued on the issue of costs before me and I was silent on the substantive merits of the application.

4 Subsequently, solicitors for the plaintiff went through the particulars provided by the third defendant. As they were of the view that the particulars were deficient, they took out Summons-in-Chambers 589 of 2004 for further and better particulars which came before me on 12 February 2004 ("the second hearing"). At the second hearing, Mr Tan raised the preliminary objections which I dismissed. However, before I discuss why, I will first discuss in greater detail the point upon which Mr Tan's entire objection was predicated: the fact that the Court had made no ruling on the application at the first hearing.

Effect of judicial silence

5 There are three possible scenarios when an applicant will not get what he has prayed for. First, where the Court dismisses the application. Second, where the court makes an order of "no order". Third, where the court is silent. Confusion really only arises in relation to the third scenario.

6 The implications of the first scenario are clear. The Court has dismissed the application. The applicant has failed and costs would normally follow the event: see Order 59 Rule 3(2) of the Rules of Court.

7 As for the second scenario of an order of "no order", the applicant has also not succeeded in his application. In such a scenario, the Court has considered the matter and decided against granting the order. The difference between this and that of an order to dismiss turns only on the cost implications. Where an order of "no order" is made, costs need not normally be ordered against the applicant. The Court can thus use the order of "no order" to tailor its order to suit the justice of the case such as where, for whatever reason, the applicant does not deserve to succeed in his application, but the circumstances do not justify him being penalised in costs. An illustration would be where events subsequent to the application render the application nugatory, but where it would not be appropriate to penalise the applicant in costs.

8 I now turn to the third scenario: that is where the Court is silent. In the course of submissions, I had questioned Mr Lee, counsel for the plaintiff, whether there was any difference between this scenario and one where the Court made an order of "no order". His reply was

> It would be the same. I would be hard pressed to draw a distinction.

I was surprised at his answer. To my mind, the situation is not necessarily the same and the appropriate interpretation to be drawn from the Court's silence must depend on the factual matrix surrounding the Court's silence.

9 I envision three possibilities. First, where the Court's silence means that the Court has considered the matter and dismissed the application. For example, where the prayers are in the alternative, the fact that the Court has granted the first prayer, but was silent on the second can normally be taken to mean that the Court has considered the second prayer and dismissed it. Another example would be the adjournment of an interlocutory matter where the Court is silent as to costs for the adjournment. This would normally mean that the Court has decided not to award costs for the adjournment.

10 Second, where the Court's silence means that the Court has decided not to deal with the matter despite being asked to. In this scenario, no decision has been rendered. This would of course be rare as the Court would normally consider all matters before it.

11 Third, it is also possible for the Court to be silent on a prayer because the parties had not asked the Court to consider the prayer. An example would be the instant application, the effect of which I will delve into further below. It must thus be clear that the implications to be drawn from the Court's silence in these three cases are different and not necessarily the same as that of an order of "no order".

12 With this in mind, I now turn to consider the arguments raised before the Court. Mr Tan raised three grounds, being : (1) the court was *functus officio*; (2) a party should not be allowed to

approbate and reprobate; and (3) it was an abuse of process. I move to his first submission.

Functus officio

13 The gist of Mr Tan's submission was that the Court was *functus officio* given my earlier order made at the first hearing. As authority, he referred me to the case of *Re VGM Holdings Ltd* (1941) 3 All ER 417. In that case, Bennett J had ordered the respondent to pay a sum of money and further ordered that this order be stayed pending appeal provided that a sum of £5,000 was paid as security. The respondent then applied to Morton J for an order that the security be reduced to £3,000. Morton J declined to give the order stating that Bennett J's order had already been made, passed and entered. As such, even if Bennett J was sitting on this matter, he would be *functus officio*. Morton J further stated that the only option open in the present case would be for the respondent to appeal to the Court of Appeal.

14 Mr Lee did not challenge the doctrine as laid down. Instead, he merely disagreed as to the application of the doctrine on the basis that the Court could not be *functus officio* as the matter had not yet been adjudicated on and finally disposed of.

15 I did not agree with either counsel. In my opinion, the issue here was not whether the Court was *functus officio*. Instead, the proper issue should be whether res judicata estoppel had arisen. I say this because the doctrine of *functus officio* arises in relation to whether a judge has the ability to change an order that he himself had made previously. The position is clearly stated in the decision of *Re Harrison's Share under a Settlement* [1955] 1 All ER 185 where Jenkins LJ stated conclusively at 187 that:

> We think that an order *pronounced by the judge* can always be withdrawn, or altered or modified, by him until it is drawn up**,** passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced. For example, the granting of an injunction, though open to review, would generally operate immediately, ie, as soon as the relevant words are spoken. But an order which could only be treated as operative at the expense of making it, in effect, irrevocable, eg, an order for the payment of money, cannot be treated as operative until it has been passed and entered.
>
> [emphasis mine]

16 This is clearly not the situation here. I was not asked to amend my previous decision as to costs, which would not have been possible as that order of court had been extracted already. Instead, I was asked to decide upon a fresh application which was identical in scope to the earlier application. The issue must be one of res judicata estoppel. I was unable to see how the doctrine of *functus officio* was relevant.

Res judicata estoppel

17 Thus, I turned to consider this matter from the perspective of res judicata estoppel. The applicable law on res judicata is well established: see the Singapore decision of *Tan Yeow Khoon and another v Tan Yeow Tat and others* [2003] 3 SLR 486, the English decision of *Midland Bank Trust Co Ltd and Another v Green and Another* [1980] Ch 590 and the Canadian decision of *R v Duhamel* (No 2) (1981) 131 DLR 352 for an exposition on the law. From these cases, it can be seen that an estoppel on the grounds of res judicata can only be established if it is shown that the:

i. decision was judicial in the relevant sense;

ii. decision was in fact pronounced;

iii. tribunal had jurisdiction over the parties and the subject matter;

iv. decision was final and on the merits;

v. decision determined the same question as that now raised; and

vi. parties to the later litigation were either parties to the earlier litigation or their privies or the earlier decision was in rem.

18 Of these six requirements, the only one in dispute here was (ii): whether a decision was in fact made. In this particular situation, I was silent on the application. The reason for this was simple. I had not been asked by either counsel to make or even consider making such an order. Instead, counsel for both sides had submitted only on the appropriate amount to order for costs.

19 Mr Tan took the position that the fact that costs had been ordered against his client must mean that I had decided upon the substantive merits of the application. I did not agree with him, although speaking generally, it is of course true that a cost order cannot stand on its own. By this, I mean that a party would only be entitled to costs under an order of Court and such an order of court must be tied to some other application. An order of costs cannot, by itself, be the subject matter of a summons-in-chambers. In other words, parties cannot apply to Court solely for costs to be awarded in its favour. There must be a reason entitling the applicant to costs.

20 That is not to say that the Court can only award costs where it has determined the merits of the matter. Costs are awarded at the discretion of the court: see *Chiarapurk Jack & Ors v Haw Par Brothers International Ltd & Anor and another appeal* [1993] 3 SLR 285. Hence, it is always possible for the Court to award costs despite not having made an order on the substantive merits of the matter. The instant case is one such situation. Another situation is where costs are awarded for an adjournment.

21 Coming back to the instant case, I had found at the first hearing that the third defendant had by their tardiness forced the plaintiff to take out the application and hence awarded the plaintiff costs of the application. As such, I saw no merit in Mr Tan's contention that it was a necessary inference that the Court must have determined the merits of the application. As such, it could not be said that a res judicata estoppel had arisen.

Application of res judicata estoppel to interlocutory applications

22 In the event that I am wrong in holding that no decision had been made, I now turn to consider the effect of the res judicata estoppel here, given that this was an application for further and better particulars which would clearly be an interlocutory matter: per *Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd* [1992] 1 SLR 73 which adopted the test expounded in *Bozson v Altrincham Urban District Council* [1903] 1 KB 547. On first sight, it would appear that that there was no reason why res judicata estoppel should not apply with full force even to an interlocutory matter. After all, the policy concerns behind res judicata estoppel – (1) to protect the interest of the community in the termination of disputes; (2) to safeguard the finality and conclusiveness of judicial decisions; and (3) to enshrine the right of individuals to be protected from vexatious multiplication of suits; – appear to apply equally to interlocutory matters: see *Re May* (1885) 28 Ch D 516, *Lockyer v*

Ferryman (1877) 2 App Cas 519, *Green v Weatherill* [1929] 2 Ch 213 and *Carl-Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 for an elucidation of these policies.

23 However, the Courts have hesitated in applying with full force the doctrine of res judicata estoppel to interlocutory applications. In explaining this approach, I can do no better than to cite the words of Tipping J in *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 at 43 who was quoted by Tay Yong Kwang JC (as he then was) in the decision of *Transpac Capital Pte Ltd v Lam Soon (Thailand) Co Ltd & Others* [2000] 1 SLR 264 at [26] that:

> The purpose behind cause of action estoppel and issue estoppel is that litigants should not be twice vexed by the same claim or point and it is in the public interest that there be an end to litigation....
>
> While we acknowledge that points decided in interlocutory proceedings may in certain circumstances lead to an estoppel, *the rationale is less powerful in an interlocutory context. Therefore the justice of the case must be compelling before a decision which is in substance interlocutory is held to prevent the later ventilation of an issue…*
>
> It is not a long step from that proposition to the proposition that ordinarily interlocutory rulings and decisions should not give rise to an issue estoppel. Obviously they could hardly give rise to a cause of action estoppel except in a limited sense, ie as here that the company had no caveatable interest in the land. Relevant also, particularly at the interlocutory stage, are the cautionary words of Lord Reid in the ***Carl Zeiss*** case at p 917C: see also to the same effect Lord Upjohn at p 947D. *While an interlocutory judgment can contain a determination which is final for estoppel purposes, care must be taken not to allow the doctrine of issue estoppel, designed to prevent injustice to one litigant, from causing greater injustice to the other.*
>
> In our judgment the ultimate question is concerned not so much with the character of the earlier decision, ie whether it should be regarded as final or interlocutory. The question is rather whether in the circumstances it is reasonable to regard the earlier decision as a final determination of the issue which one of the parties now wishes to raise.
>
> [emphasis mine]

24 This however does not mean that all interlocutory applications are not binding on parties. In particular, the authorities support the view that a dismissal of an interlocutory application is not final (as opposed to one granting the application) and will not bar a further application on the ground of res judicata estoppel: *Hall v Nominal Defendant* [1966] 117 CLR 423. In that case, an application was filed to extend time to sue. It was allowed at first instance, but disallowed on appeal. On further appeal, the Australian High Court had to consider whether a Court could grant an extension of time even after a previous application had failed. On this issue, Taylor J (with whom Owen J concurred) held at 440 that:

> The order in the present case was made in proceedings preliminary to the bringing of an action and although it deprived the appellant of the benefit of the order of the learned judge of first instance, it did not operate to prevent him from making a further application for an extension of time. No doubt its practical effect was that any further application would have been fruitless unless supported by additional relevant facts but *the order made by the Full Court did not of its own force conclude his right to bring an action.*
>
> [Emphasis mine]

25 Any further application is however unlikely to succeed unless different arguments are raised or further evidence in support is adduced. This point was made in the judgment of Mason J in *Carr v Finance Corporation of Australia Ltd [1980-1981] 147 CLR 246* where he states:

> The question remains whether the refusal of an application amounts to a final order, when the practical effect of that order is to preclude the defendant from making another application to set aside the judgment, although in strict law the defendant is free to bring his application, knowing that it will inevitably fail. The present case is a striking example. *Naturally, the Court of Appeal could not be expected to depart from its earlier decision. Consequently, a further application to set aside the judgment is of no value to the appellants.*
>
> [Emphasis mine]

26 This can also be seen in *WT Lamb & Sons v Rider* [1948] 2 KB 331 at 334 where Scott LJ in delivering the judgment of the Court of Appeal stated:

> The defendant's appeal from the master's order to the judge in chambers was, as we understand, founded on the view that having regard to the order which the master had made dismissing the plaintiffs' similar summons some two years previously, the matter was res judicata and could not be reopened. We do not know whether this was the view on which the judge acted, but we do not think that it was right. *The dismissal of a summons for relief under Or. 42, r. 23(a) does not in, our opinion, of itself shut the door against a subsequent application for the same relief. On the other hand, the subsequent application should only be granted if founded upon material which was not before the court on the first occasion…*
>
> [Emphasis mine]

27 This approach has also been adopted locally in the case of *Surge Electrical Engineering Pte Ltd v Powertec Engineers Pte Ltd* [Unreported decision of the Singapore High Court in Suit No. 782 of 2002 dated 25 November 2002] from [13] where Lai Siu Chiu J stated that:

> my refusal to grant item (ix) presently did not preclude the defendants from making a fresh request at some future date. It depended very much on the information to be gleaned from the Particulars were ordered to furnish…

28 It would thus appear that the dismissal of an application does not normally act to bar the applicant from having a second bite at the cherry. The reason for this is simple. Interlocutory proceedings by nature serve to ventilate, conceptualise and crystalise the issues to be decided by the trial judge. As such, they are facilitative in nature and serve to assist the parties in knowing not only their own case, but also the case that they have to meet. Furthermore, interlocutory applications by their nature tend to be taken out at an early stage in the litigation process. As such, the parties often do not possess all the evidence yet. Thus, it would be the case that the parties obtain more evidence especially after the process of discovery has been completed. In such a scenario, an interlocutory application that had earlier failed may now become tenable. Thus, it would appear that both on principle and on the grounds of litigation convenience, the view that the dismissal of interlocutory applications should not attract res judiciata estoppel should prevail.

29 Additional support for this conclusion can also be drawn from the cases dealing with summary judgment under Order 14 of the Rules of Court ("O14"). In *Techmex Far East Pte Ltd v Logicraft Products Manufacturing Pte Ltd* [1998] 1 SLR 483 Chao Hick Tin J (as he then was) considered the question of whether a second O14 application may ever be made in an action after the first has been

dismissed and no appeal has been brought against that earlier decision. Chao J's view on this matter can be seen at [15] where he stated:

> If an application fails because of some technical defects, not because the registrar thinks that there are factual issues to be tried, there can hardly be any estoppel as there was no determination on the merits whether there ought to be a trial. It seems to me if the factual or legal basis of a claim has been altered because of amendments to the pleadings, there is much to commend itself, on the rationale expounded by Colman J in ***Bristol & West Building Society***, namely, the efficient administration of justice, to allowing a second application. Quite clearly what would constitute a new factual or legal basis must vary from case to case. I do not think it possible or advisable to lay down any single criterion to determine that question. Lest it be thought that this might lead to the opening of a flood-gate, I wish to add this clarification. If on an application leave to defend is allowed, and no appeal is brought against that decision, a second application should not be permitted if it relates to the same claim or claims with perhaps better evidence. That would not constitute a new factual basis. The plaintiff would have to live with his default, tendering of inadequate evidence at the first application, and should proceed to trial.

30 This approach must however be contrasted to the more permissive decision of TS Sinnathuray J in *United Commercial Bank v Yap Cheng Hai and Others* [1978-1979] SLR 535. In that case, Sinnathuray J in dealing with the same problem of whether a second O14 application could be taken out after leave to defend had been granted in the first application stated that:

> In my view, for res judicata or estoppel by record to arise putting the matter broadly, there must be a judgment on the issues that are before the court, and an order giving leave to defend is not a judgment. It is a decision. Indeed, it is a decision that there should not be judgment for the plaintiffs.

31 It was perhaps unfortunate that this decision was not highlighted to Chao Hick Tin J in the *Techmex* case as apparent at [1] where Chao Hick Tin J stated "there does not appear to be a local decision on [this point]". As such, there appears to be a difference between the two cases as to the conditions that must be satisfied before the losing applicant in the O14 application can take out a second O14 application. Be that as it may, what is clear is that both judges had accepted that res judiciata estoppel does not apply in its full force where the O14 application did not succeed and that it was open to the losing applicant to apply a second time.

32 Given the above, even if my silence at the first hearing was construed to mean that I had dismissed the substantive prayers in SIC 7579 of 2003, this dismissal would not necessarily prevent the plaintiffs from making a second application. Furthermore, given the factual matrix of the instant application, I would have proceeded to hear it as the application was, in my opinion, justified on the facts.

Approbation and reprobation

33 Mr Tan next argued that the plaintiff was precluded by his actions in taking out this application. Mr Tan based his contention on the principle of approbation and reprobation. The position in relation to approbation and reprobation is clearly stated by Lord Atkin in *United Australia Limited v Barclays Bank Limited* [1941] AC 1 at 30:

> If a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue

the other, which after the first choice is by reason of his inconsistency no longer his to make.

34 He contended that the plaintiff's action at the first hearing of only seeking an order for costs was inconsistent with their current application for further and better particulars. He cited me the case of *Tinklet v Hilder* (1849) 4 Exch 187 for the proposition that once a party has accepted costs under the order, he cannot afterwards challenge the order.

35 While that may be correct, I was unable to agree that the principle of approbation and reprobation was applicable on the instant facts. It is axiomatic that for the principle to apply there must be two inconsistent claims and the party has chosen expressly or implicitly to adopt one. On the facts, I could not see the inconsistency of the plaintiff's acts. The fact that the plaintiff had at the first hearing only asked for costs was not inconsistent with their current application for further and better particulars for it did not indicate that they had accepted the adequacy of the further and better particulars provided.

36 I draw support for my conclusion from the earlier mentioned case of *United Australia Limited v Barclays Bank Limited* [1941] AC 1. There, a cheque payable to the appellants was converted by a company and collected on behalf of that company by its bank. The appellants brought an action against the company for money had and received. They subsequently discontinued the action and brought another action against the bank for conversion. The bank raised the defence of approbation and reprobation which was allowed by the Court of Appeal. In allowing the appeal, Lord Atkin stated that the appellants were at no stage in the proceedings called upon to make an election to claim in contract and not to claim in tort. The position here is similar. The plaintiffs were not called upon at the first hearing to choose between two rights. This was because the right to ask for costs and the right to ask for further and better particulars are not inconsistent with each other. They can exist both independently and concurrently. The costs order that I had made in this case was not linked to the outcome of the application. Rather, it was meant to reimburse the plaintiffs for having to take out the application due to the third defendant's tardiness. As such, I dismissed this objection.

Abuse of process

37 Mr Tan's last submission was that this application constituted an abuse of process as there was already a pre-existing order on the same subject matter. Thus if the plaintiff wanted further and better particulars, the proper procedure was to appeal against my earlier order. On this point, Mr Tan referred me to the case of *Henderson v Henderson* [1843-1860] All ER 378 where Wigram VC stated that:

> Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward only because they have, from negligence, inadvertence or even accident, omitted part of their case.

38 I agreed with the principle articulated above. However, I did not see how it applied to the present case. As I had already stated above, there was no pre-existing order on the same subject matter. As such, I could not see how the plaintiffs could follow what Mr Tan had suggested as being the proper procedure and appeal my decision in the first hearing. There was simply no order to appeal from. Even if the plaintiffs had tried to appeal my decision, what could the judge on appeal do? There was no order to allow the appeal against. The only possible option would be to send the matter back down for determination. As such, I could not agree that there was an abuse of process.

39 Having dismissed the preliminary objections, I then proceeded to hear the substantive application for further and better particulars and made certain orders. The details of these orders are not material to the preliminary objections and I do not propose to elaborate on them.

Conclusion

40 The fact that res judicata estoppel does not apply when an application has been dismissed does not then mean that parties are free to repeatedly apply, hoping for a more sympathetic coram. First, repeated applications on the exact same evidence and arguments would of course constitute an abuse of process. Second and more importantly, while I would of course admit that the exercise of discretion can vary from judge to judge, a second application on the same evidence and arguments would normally fail as due respect would be accorded to the earlier decision. It is thus imperative in any subsequent application that the applicant prove to the judge how the new relevant evidence before the Court would change the complexity and nature of the factual matrix before the earlier judge such that the applicant should be entitled to succeed.