#### DCPI 401/2006

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 401 OF 2006

**-------------------------------------------**

BETWEEN

|  |  |  |
| --- | --- | --- |
|  | MOHAMMAD BASHIR | Plaintiff |
|  | and |  |
|  | KAM HOI INTERNATIONAL INDUSTRIAL LIMITED | 1st Defendant |
|  | KAM HOI INDUSTRIAL COMPANY LIMITED | 2nd Defendant |
|  | YIELD CROWN INTERNATIONAL INDUSTRIAL LIMITED | 3rd Defendant |
|  | STEPHEN FUNG KAP HUEN | 4th Defendant |
|  | CHAN WING MUI JANET | 5th Defendant |
|  | LEE SIU CHING | 6th Defendant |

**-------------------------------------------**

##### Before: Deputy District Judge Richard Khaw in Chambers (open to public)

Dates of Hearing: 18 July & 8 August 2008

Date of Handing Down of Decision: 6 February 2009

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## D E C I S I O N

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# **The Application**

1. In this action, the Plaintiff claims damages arising from an accident which happened in a work site in Tuen Mun on 30 June 2004 (“the accident”). When the Writ was originally issued in March 2006, the claim was only brought against Kam Hoi International Industrial Limited, the 1st Defendant (“D1”).

2. By Summonses dated 1 December 2006 and 28 February 2007, the Plaintiff applied to join further parties as defendants and also to amend the Writ together with the Statement of Claim.

3. By an Order dated 17 March 2008, leave was granted to the Plaintiff to join Kam Hoi Industrial Company Limited as the 2nd Defendant (“D2”), Yield Crown International Industrial Limited as the 3rd Defendant (“D3”), Stephen Fung Kap Huen as the 4th Defendant (“D4”), Chan Wing Mui Janet as the 5th Defendant (“D5”) and Lee Siu Ching as the 6th Defendant (“D6”). The Plaintiff was also granted leave to amend the Writ and the Statement of Claim.

4. This is an application by D2 to D6, pursuant to Order 18 rule 19 of the Rules of the District Court and also the Court’s inherent jurisdiction, to strike out and also dismiss the Plaintiff’s claim against them. D2 to D6 rely on the grounds that the Plaintiff’s claim:-

1. is scandalous, frivolous and/or vexatious; and/or
2. may prejudice, embarrass or delay the fair trial of this action; and/or
3. is otherwise an abuse of process.

5. As a result of the accident, the Plaintiff on 21 February 2005 commenced an application for employees’ compensation (“the EC Application”) in DCEC 240/2005 against D1 only. It was alleged in the EC Application that D1 was the Plaintiff’s employer at the time of the accident.

6. By an Order dated 14 April 2005 (which was made by consent between the parties in the EC Application), judgment on liability (“the Consent Judgment”) was entered against D1 with compensation to be assessed. On 14 March 2006, it was ordered (also by consent) that a sum of HK$37,600 be paid by D1 to the Plaintiff in full and final settlement of the EC Application.

7. I wish to point out that D2 to D6, in their submissions in this application, have placed much reliance on the effect of the Consent Judgment in the EC Application mentioned above. I will go into the details of the parties’ arguments shortly. I will first set out the relevant factual background.

**Background**

8. After the accident, a “Notice by employer of the death of an employee or of an accident to an employee resulting in death or incapacity” (commonly known as “Form 2”) dated 20 November 2004 was submitted to the Labour Department. In view of the contents of Form 2, the following points have been noted:-

(1) It was apparently signed by D4 for and on behalf of D1 and it also bore D1’s company chop.

(2) It was stated that D4 was in the position of a “partner” of D1 when he, in fact, was then a shareholder and director of that company.

(3) D1 and Gan Assurances IARD (“Gan Assurances”) were named as the Plaintiff’s employer and the insurer respectively as at the time of the accident. An insurance policy (no. A4CPSN019739) was also referred to.

9. On the basis of the information provided in Form 2, the Plaintiff commenced the EC Application in February 2005 and notice of the EC Application was also sent to Gan Assurances at the same time.

10. By a letter dated 3 March 2005, Gan Assurances wrote to the Plaintiff’s solicitors, Messrs Massie & Clement (“M&C”), pointing out that the insured under the policy (no. A4CPSN019739) was D3 as opposed to D1 and as a result, they were not in a position to handle the claim which was made against D1 only.

11. As mentioned above, on 14 April 2005, judgment on liability was entered by consent on 14 April 2005 with compensation to be assessed in the EC Application. On 14 March 2006, it was agreed and ordered that a sum of HK$37,600 as compensation be paid by D1 to the Plaintiff in full and final settlement of the EC Application.

12. After this action was commenced and notice of the proceedings given to Gan Assurances in March 2006, Gan Assurances in both March and June 2006 wrote to M&C reiterating the position that D1 was not covered under the policy.

13. On 13 June 2006, interlocutory judgment was entered against D1 in this action as it had failed to serve a Defence.

14. Subsequently, the Plaintiff engaged a company to conduct an investigation of D1. In July 2006, a “Credit Report” was obtained and revealed the following information:-

(1) D1 was incorporated on 9 August 2004 (i.e. after the accident).

(2) D2, D4 and D6 were shareholders of D1 whereas D4, D5 and D6 were the company’s directors.

(3) D5 was a shareholder and director of D2 whereas D6 was a shareholder and director of D3.

15. Further, according to the Plaintiff, D1, D2 and D3 shared the same office at Unit 1504, 15th Floor, Nanyang Plaza, 57 Hung To Road, Kwun Tong, Kowloon.

16. In September 2006, M&C wrote to the Labour Department complaining that the information provided in Form 2 was false as D1 was not incorporated at the time of the accident and the insurance policy referred to in Form 2 did not cover D1. In that letter, M&C also pointed out that D1 had contravened s.40(1) of the Employees’ Compensation Ordinance (Cap. 282) (“EC Ordinance”) because it failed to take out an insurance coverage.

17. In the meantime, on 22 September 2006, D6 on behalf of D1 filed an Application for Deregistration of a Defunct Private Company with the Companies Registry.

18. On 28 September 2006, the Labour Department replied to M&C stating that the insurance cover subscribed by D1 was with Asia Insurance Co. Ltd (as opposed to Gan Assurances) but that policy did not cover the date of the accident. The Labour Department also informed M&C that it had forwarded the matter to the Labour Inspection Division to conduct an investigation on compliance of s. 40 of the EC Ordinance.

19. On 1 December 2006, the Plaintiff issued a Summons to seek leave to join D2 and D3 as “alternative employer” and also to amend the Writ and the Statement of Claim. It transpires from the Affirmation of Richard Mark Clement made on 29 November 2006 (for the Plaintiff) that the following grounds were relied on in support of the application:-

(1) D2 and D3 were affiliated companies to D1.

(2) They shared an office and also general work force.

(3) Whilst D1 claimed to be the Plaintiff’s employer as at the time of the accident, it is likely that the Plaintiff was instructed by either D2 or D3 to work on the day of the accident.

20. On 28 February 2007, the Plaintiff made an Affirmation on what happened before and after the accident. According to his evidence, in about May 2004, he was looking for a job in the area of Tuen Mun. The Plaintiff said that he was subsequently offered to work as a labourer at the work site (where the accident happened) through the arrangements of one Mr Wu and a Chinese lady (which was later known to be D5).

21. In his Affirmation, the Plaintiff produced a letter (which was erroneously dated 28 January 2004 and should be dated 28 January 2005) to the effect that he was offered to work as a security guard at the site in about June 2004 but he failed to report duty on 1July 2004 as a result of the injuries sustained in the accident. The Plaintiff further said that after the accident, he went back to the site to see D6 and money was passed to him by D6.

22. By Summons dated 28 February 2007, the Plaintiff made another application for leave to join D2 to D6 as defendants and also to amend the Writ and Statement of Claim. In the Summons, the Plaintiff specifically sought to join each of D3 to D6 as “alternative employer” of the Plaintiff in this action.

23. The Plaintiff’s two Summonses were contested. Various affirmations have been filed for and on behalf of D2 to D6 disputing the Plaintiff’s allegations (in particular, those concerning the involvement of D2 to D6 in the Plaintiff’s work as at the time of the accident).

24. By an Order dated 3 January 2008, the interlocutory judgment entered against D1 in this action was set aside. However, the Consent Judgment in the EC Application has remained intact.

25. As I have referred to at the outset of this judgment, it was ordered on 17 March 2008 that the Plaintiff be granted leave to join D2 to D6 as defendants and also to amend the Writ and Statement of Claim.

26. The Writ was amended and the Amended Statement of Claim filed in April 2008.

27. On 17 May 2008, D2 to D6 filed a Summons for the present striking out application.

**The case of D2 to D6**

28. It transpires from the Amended Statement of Claim that the Plaintiff’s causes of action against D1 to D6 are based on negligence, breach of contract of employment, breach of statutory duty and also breach of common duty of care as occupier of the work site. In respect of each cause of action, the Plaintiff, in his pleaded case, lumps all six Defendants together without specifying the actual involvement of each one of them in the accident.

29. However, the present application is not premised on whether the Plaintiff’s claim against D2 to D6 (or any of them) discloses any reasonable cause of action. In any event, I am not concerned with the substantive merits of his pleaded case. The primary contentions put forward by D2 to D6 can be summarised as follows:-

(1) As a preliminary objection, it has been argued by D2 to D6 that according to the Order dated 17 March 2008, the Plaintiff was only allowed to join them as “alternative employer”. However, it has been pleaded in the Amended Statement of Claim that D2 to D6 were the proprietors of the site which is within the meaning of “industrial undertaking” under the Factories and Industrial Undertakings Ordinance (Cap. 59) (in respect of the cause of action based on breach of statutory duty) and occupiers of the site (in respect of the cause of action based on breach of common duty of care as occupier). Those allegations, as submitted by D2 to D6, fall outside the scope of the Order and are thus liable to be struck out.

(2) It has been contended by D2 to D6 that the Consent Judgment in the EC Application carries the effect that D1 has been regarded as the Plaintiff’s employer as at the time of the accident. In view of the Consent Judgment, D2 to D6 argue, on the basis of the doctrines of *res judicata* in the narrow sense and issue estoppel, that the Plaintiff should be estopped or prevented from re-litigating the issue as to the identity of Plaintiff’s employer as at the time of the accident.

(3) D2 and D6 have also referred me to *res judicata* in the wider sense in support of the argument that it will amount to an abuse of process if the Plaintiff is allowed to ask the Court to determine in this action the issue on the identity of the employer as against D2 to D6, which should have been raised in the EC Application.

(4) Further, the Plaintiff’s claim against D2 to D6 as “alternative employer” at the time of the accident amounts to a collateral attack on the Consent Judgment in the EC Application.

(5) Finally, D2 and D6 allege that it has been oppressive of the Plaintiff to claim against all of them insofar as the employment relationship with the Plaintiff is concerned. It is also argued that the Plaintiff should not on the one hand enjoy the fruits of the Consent Judgment in the EC Application and on the other hand pursue the claim on the basis that D2 to D6 should be liable as “employers” (insofar as the issue on the employer’s identity is concerned).

30. In considering the relevant arguments in this application, I bear in mind that it is only in “plain and obvious” cases that the Court should exercise its summary powers to strike out any pleading.

**Preliminary objection**

31. This argument turns on the wording and scope of the Order dated 17 March 2008 which provided as follows:-

“1. the Plaintiff do have leave to join the parties, namely Kam Hoi Industrial Company Limited to be the 2nd Defendant; Yield Crown International Industrial Limited to be the 3rd Defendant as the alternative employer of the Plaintiff in this action; Mr. Stephen Fung Kap Huen to be the 4th Defendant as the alternative employer of the Plaintiff in this action; Ms. Chan Wing Mui Janet to be the 5th Defendant as the alternative employer of the Plaintiff in this action; and Mr. Lee Siu Ching to be the 6th Defendant as the alternative employer of the Plaintiff;

2. the Plaintiff do have leave to amend the Writ of Summons and Statement of Claim in the manner as shown in red as per copy annexed to the Plaintiff’s Summons filed herein on 28th February 2007 within 14 days from the date of the Order to be made herein…”

32. It appears to me that the basis on which D2 was joined is not expressly spelt out in the Order. The argument of D2 to D6 in this respect, therefore, should not apply to D2.

33. On the issue of joinder, the test is whether the presence of a party (sought to be joined) before the Court is necessary to ensure that all matters in dispute in the action may be effectually and completely determined and adjudicated upon (O. 15 r.6 of the Rules of the District Court). It is normally unnecessary to specify, in an Order for joinder of parties, the basis on which a claim will be made against the party ordered to be joined.

34. The question whether the Plaintiff is entitled to claim that D3 to D6 are liable (in capacities other than being an employer) should not be straitjacketed by mere technicalities arising from the wording of paragraph 1 of the Order, which obviously deals with the question of joinder rather than pleading. The real issue should always be whether the Plaintiff can maintain any valid cause of action for his claims against D2 to D6.

35. In any event, the contents of the Order, properly construed, simply do not allow the argument of D2 to D6 to stand. Paragraph 2 of the Order refers to the draft Amended Statement of Claim in which allegations involving breach of statutory duty and also breach of common duty of occupier (in addition to the “employer” issue) have already been pleaded. In other words, at the time when the Order was made, D2 to D6 were fully aware that the Plaintiff’s intended claim against them was not confined to the “employer” issue. Hence, D2 to D6 do not have any proper grounds to say that the Order has, in any way, limited the scope of the Plaintiff’s claim against them.

36. Finally, in respect of this preliminary objection, I wish to mention the English Court of Appeal’s decision in *C Lindley Ltd v BG Plating Ltd* and Another, 11 April 1989 (Lexis transcript) cited by D2 to D6. In *C Lindley*, it was held that the court was not prevented from exercising its jurisdiction to strike out part of the Amended Defence and Counterclaim even after leave to amend the Defence and Counterclaim had previously been granted pursuant to an order made by consent between the parties. The decision, however, does not touch on whether and how a previous order for joinder or amendment can limit the scope of a party’s pleaded case and therefore does not assist the case of D2 to D6.

**Res judicata/Issue Estoppel**

37. *Res judicata* is treated as a branch of the law of estoppel. The distinction between the terms “*res judicata*”, “issue estoppel”, “cause of action estoppel” is not always clear as they are from time to time loosely used. Strictly speaking, *res judicata* in the narrow sense is intended to prevent a party from re-litigating in subsequent proceedings the legal rights and obligations of the parties which have already been adjudicated upon by a court of competent jurisdiction in previous proceedings concerning the same causes of action between the same parties (*Halsbury’s Laws of Hong Kong*, Vol. 11(2), 2008 Reissue, 170.024). “Issue estoppel” may arise where a plea of *res judicata* could not be established as only the issues (but not the causes of action) in both sets of proceedings are the same (*Halsbury’s Laws of Hong Kong*, Vol. 11(2), 170.027).

38. The doctrines of *res judicata* and issue estoppel are intended to ensure finality of litigation and eliminate any unfairness which may be caused if one party intends to have a second bite of the cherry. One of the essential ingredients of *res judicata* and issue estoppel is that the matter or cause already determined in the first action must be the same as that sought to be determined in the second action. Further, the same parties or their privies must be involved in both sets of proceedings.

39. It has been accepted that *res judicata* may apply to not only judgments considered and decided by the Court, but also consents judgments (see Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, paragraph 38).

40. As stated by Lord Herschell LC in *Re South American and Mexican Co* [1895] 1 Ch 37 at 50:-

“ … a judgment by consent is intended to put a stop to litigation between the parties, just as much as a judgment which results from the decision of the court after the matter has been fought to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments and were to allow questions that were really involved in the action be fought over again in a subsequent action.”

The above demonstrates that, before one can ascertain if a consent judgment operates to preclude a subsequent litigation between the parties, it is necessary to construe such a consent judgment for the purpose of determining the question which has been canvassed and resolved by such a judgment.

**Res judicata in the wider sense**

41. The extended doctrine of *res judicata* originated from *Henderson v Henderson* (1843) 3 Hare 100 in which Wigram VC expressed (at p. 114) as follows:-

“ … 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 as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted, part of their case.” (emphasis added)

42. *Yat Tung Investment Co Ltd v Dao Heg Bank Ltd* [1975] AC 581 has been considered as having laid down a general principle that it is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. As stated by Lord Kilbrandon at p.590:-

“The shutting out of a “subject of litigation” – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to case where reasonable diligence would have caused a matter to be earlier raised.”

43. The law in this area was closely examined by the House of Lords in *Johnson v Gore Wood & Co* [2002] 1 AC 1. Lord Bingham took the view that the principle in *Henderson v Henderson* should not be applied too widely and said (at p.31C-D):-

“ … 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 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.”

44. Further, it should be borne in mind that the Court’s jurisdiction to prevent continuation of civil proceedings on the ground of abuse of process must be exercised with extreme caution. It is a very serious matter to prevent a party from pursuing his claim in an action. The Court should only do so in appropriate circumstances (*Tsang Chin Keung v Employees Compensation Assistance Fund Board* (No. 2) [2003] 1 HKC 499, 510G-H). In the words of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536C:-

“ … the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would bring the administration of justice into disrepute among right-thinking people.”

45. To sum up the principles regarding the extended doctrine of *res judicata*, the following should be noted:-

1. Mere re-litigation of an issue or cause does not necessarily render the new proceeding an abuse of process. The fact that a party institutes a second claim (which could have formed part of an earlier claim) by itself would not automatically amount to an abuse of process (see *Ko Hon Yue v Liu Ching Leung & Others*, HCA 3494/2003, unreported, 4 August 2008, Chu J, paragraph 70).
2. In determining whether an abuse of process can be established, each case has to be judged according to its facts and circumstances.
3. The burden is on the party alleging abuse of process to prove such abuse. However, as stated above, the Court should only exercise its jurisdiction to prevent continuation of proceedings on the basis of abuse of process with great caution.
4. The extended doctrine seems to only apply to situations where both sets of proceedings are between the same parties. As Lord Millet said in *Johnson v Gore Wood* at p.60A-B:-

“ The rule in Henderson v Henderson 3 Hare 100 cannot sensibly be extended to the case where the defendants are different. There is then no question of double vexation … “

**Are the doctrines applicable in this case?**

46. Having regard to the relevant legal principles discussed above, I have considerable doubts as to whether the doctrines of *res judicata* (narrow and wide) and issue estoppel apply in the present case for the following reasons.

47. In support of their arguments on *res judicata* in its narrow sense and issue estoppel, D2 to D6 have referred me to the authorities such as *Arnold v National Westminster Bank plc* [1991] 2 AC 93; *Sze Lai Man v Wing On Department Stores (Hong Kong) Ltd* [2001] 1 HKC 297; and also *Hoystead & Others v Commissioner of Taxation* [1926] AC 155. It should be noted immediately that all those authorities concern situations where the relevant sets of proceedings involved the same parties.

48. Nevertheless, in this case, whilst the Consent Judgment in the EC Application was made between the Plaintiff and D1, the present application relates to the Plaintiff’s claims in this action against completely different parties, namely D2 to D6 (see, for example, *Lam Chun Lin v Lee Wai Chao* [1998] 2 HKC 68). D2 to D6 have never been parties to the EC Application.

49. Even if one accepts that the doctrine of *res judicata* may apply to consent judgments, it is only intended to prevent re-litigation of a question which has been properly dealt with or addressed by way of the consent judgment. In the present case, the Consent Judgment in the EC proceedings cannot be treated as a proper and final resolution of the issue as to the identity of the Plaintiff’s employer because:-

1. Parties other than the injured person’s employer can be held liable to pay employees’ compensation (EC Ordinance, ss. 24 and 25). Hence, a consent judgment in an EC Application does not necessarily address the issue as to the identity of the employer as at the time of the accident.
2. It is pertinent to note that D1 was not incorporated at the time of the accident. It is inconceivable as to how the Plaintiff could ever have been employed by a non-existent entity. In the circumstances, insofar as the issue on the identity of the employer is concerned, the Consent Judgment does not carry any meaning or value.

50. On the extended doctrine of *res judicata*, I accept that the Plaintiff might have acted differently by perhaps joining more parties in the EC Application had he conducted further investigation and search. The Plaintiff’s decision to name only D1 as the respondent in the EC Application was obviously based on the information stated in Form 2 which was, no doubt, erroneous.

51. However, I do not think that any proper case of abuse of process (not to mention a plain and obvious one) has been made out by D2 to D6. In this regard, I rely on and repeat my views set out in paragraphs 49 above on the effect of the Consent Judgment. Given that the Consent Judgment in the EC Application fails to address any substantive issue or cause of action in respect of D1, there is no reason why the Plaintiff should be prevented from alleging in this action that D2 to D6 or any of them may be liable as employer. As clearly put by Lord Millet in *Johnson v Gore Wood* at p.118:-

“ … It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon.”

52. In any event, the Plaintiff’s claim against D2 to D6 is not confined to the “employer” issue. As I have mentioned earlier, the Plaintiff’s pleaded case has included allegations based on other causes of action.

**Collateral Attack on the Consent Judgment**

53. If a party initiates proceedings for the purpose of mounting a collateral attack on a decision previously made, such conduct may amount to an abuse of process. Lord Bingham in *Johnson v Gore Wood* (above) said at p.90:-

“ … The underlying public interest is the same: that there should be finality in litigation and that a part would not be twice vexed in the same matter. 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. 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 attach 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.”

54. In the present case, I take the view that the Plaintiff’s claim in this action against D2 to D6 as “alternative employer” does not constitute any collateral attack on the Consent Judgment in the EC Application because:-

1. In order to address the question whether the Plaintiff’s claim in this action represents an abusive collateral challenge to the earlier judgment, the Court should take into account the nature and effect of both the earlier judgment and the present claim. In considering the earlier judgment, great weight should be accorded to a judgment pronounced after a contested civil trial than to a consent order (as in the present case) (see the English Court of Appeal’s decision in *Arthur JS Hall & Co v Simons* [1999] 3 WLR 873 at 903E, applied in *Tsang Chin Keung* (above) at pp.511-512).
2. Further, as stated above, the Consent Judgment in question was entered against a party which simply did not exist at the time of the accident. I reiterate my view that such a judgment failed to address any substantive issue at all. In the circumstances, I cannot see how such a Consent Judgment could, in any sense, be “attacked” by the present claim made against other parties.

**The Plaintiff’s claim: oppressive?**

55. It is most unlikely (if not impossible), as submitted by the Plaintiff, that D2 to D6 will, at the end of the day, all be held liable as the Plaintiff’s employers. Be that as it may, the Plaintiff has the freedom to bring an action against any party as he thinks fit. Obviously, there is a price which needs to be paid if, eventually, liability of some or all of the Defendants cannot be established. I, however, do not accept the argument of D2 to D6 that the Plaintiff’s decision to sue all of them in this action amounts to any oppression.

56. D2 to D6 have also complained that the Plaintiff should not pursue his claim against them as “alternative employer” after having enjoyed the fruit of the Consent Judgment in the EC Application. In the hearing, I raised the question with the Plaintiff’s counsel as to whether the Consent Judgment against D1, which was obviously entered under some kind of mistake, should continue to exist. However, any further arrangements to be made by the Plaintiff and D1 in relation to the Consent Judgment simply do not concern D2 to D6. If the Consent Judgment remains, the sum paid to the Plaintiff in the EC Application should be deducted from the damages (if any) awarded to him in this action. The Consent Judgment has not caused any particular prejudice to D1 to D6.

Effect of the joinder application

57. There is no dispute that D2 to D6 raised the issues of *res judicata* and issue estoppel in the hearing on 17 March 2008 of the Plaintiff’s two Summonses for the joinder applications. In the circumstances, the Plaintiff has submitted that D2 to D6 should be precluded from running the same points in this application.

58. This issue is now of little value as I have already ruled against D2 to D6 on the issues of *res judicata* and issue estoppel. However, in passing, I wish to add the following:-

1. According to the transcript of the hearing on 17 March 2008, D2 to D6 sought to rely on the issues of *res judicata* and abuse of process to resist the Plaintiff’s joinder applications.
2. The judge in the hearing refused to entertain and rule on those issues on the basis that no formal application under O.18 r.19 had been made. As a result, the issues were not fully ventilated in the hearing.
3. Clearly, D2 to D6 were only in a position to strike out the Plaintiff’s claim against them after the Plaintiff had been granted leave to join D2 to D6 and amend the Statement of the Claim. Hence, there is no reason why D2 to D6 should be required to make a formal application under O.18 r.19 before the joinder applications were determined.

(4) In the circumstances, the fact that the issues of *res judicata* and abuse of process were raised by D2 to D6 but not entertained by the Court in the joinder applications, in my view, should not preclude them from raising such arguments in the present striking out application.

**Conclusion**

59. By reason of the above matters, I come to the view that D2 to D6 have failed to show any proper grounds on which the Court should exercise its discretion to strike out any part of the Amended Statement of Claim. I therefore order that this application be dismissed. I also make an order *nisi* that costs of and occasioned by this application (including costs reserved) be paid by D2, D3, D4, D5 and D6 to the Plaintiff with certificate for counsel, to be taxed if not agreed. The Plaintiff’s own costs are to be taxed in accordance with Legal Aid Regulations. Further, I order that D2 to D6 be granted leave to file and serve their Defence within 14 days from today.

# (Richard Khaw)

# Deputy District Judge

Mr. Neal Clough, instructed by Messrs. Massie & Clement (assigned by D.L.A.), for the Plaintiff

##### Mr. Desmond Leung, instructed by Messrs. Or & Partners, for the 2nd to 6th Defendants