

Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck and Another
[2006] SGHC 124

Case Number : Suit 797/2005, SUM 84/2006
Decision Date : 18 July 2006
Tribunal/Court : High Court
Coram : Andrew Ang J
Counsel Name(s) : Wong Siew Hong and Teh Ee-Von (Infinitus Law Corporation) for the plaintiff;
Sarbjit Singh and Sarbrinder Singh (Kerta & Co) for the defendants
Parties : Alliance Entertainment Singapore Pte Ltd — Sim Kay Teck; Dallas Entertainment
Pte Ltd

Civil Procedure – Striking out – Previous action struck out on narrow ground concerning party's failure to show chain of title giving party right to commence action – Court commenting that fresh proceedings may be commenced – Whether commencement of second action precluded on grounds of res judicata or issue estoppel – Applicable principles

18 July 2006

Andrew Ang J:

1 This was an application by the defendants in Suit No 797 of 2005 to strike out the plaintiff's claim, as embodied in the writ of summons and the statement of claim, under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) on the grounds that:

- (a) it discloses no reasonable cause of action;
- (b) it is scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the action; and/or
- (d) it is an abuse of the process of the court; and alternatively, under the inherent jurisdiction of the court.

Though framed in these wide terms, the bone of contention between the parties was whether the plaintiff, Alliance Entertainment Singapore Pte Ltd ("Alliance"), was precluded from bringing this action in Suit No 797 of 2005 by reason of *res judicata* or issue estoppel. The defendants' ground for so contending was that the claim in Suit No 978 of 2004 ("Suit 978") on substantially the same issues had previously been struck out. For a better understanding of this issue, it is necessary to go into the background to ascertain what transpired in regard to Suit 978.

2 In that action, Alliance together with three other parties, namely, Comic Ritz Production Co Ltd ("Comic"), Catalyst Logic Co Ltd ("Catalyst") and Speedy Video Distributors Sdn Bhd ("Speedy"), brought legal proceedings against the defendants for copyright infringement.

3 By Summons in Chambers No 3032 of 2005 ("SIC 3032/2005"), the defendants sought to strike out the claim in Suit 978 on the ground, *inter alia*, that Alliance had no title to commence proceedings; it was contended that there was no "chain of title" linking the owner of the copyright with Alliance as sub-licensee of the right to replicate and distribute the film "Meteor Garden 2" ("the Film") in Singapore. At the hearing of SIC 3032/2005 on 22 July 2005, I allowed an adjournment for the plaintiffs in Suit 978 to file an application to amend the writ and/or pleadings as appropriate with a view to avoiding a striking out.

4 The plaintiffs duly made an application in Summons in Chambers No 4130 of 2005 ("SIC 4130/2005") to amend the writ of summons and the statement of claim and the same was heard on 6 October 2005 together with the adjourned striking-out application in SIC 3032/2005.

5 In the application for leave to amend, the position taken by Alliance was that it was the exclusive licensee and that by reason of the new s 124 of the Copyright Act (Cap 63, 2006 Rev Ed) it was entitled to maintain the action without the owner of the copyright joining in as plaintiff. The proposed amendments also set out how Alliance derived copyright in the Film, thereby answering the defendants' objections as to the lack of a "chain of title" to the copyright. I would have allowed the plaintiffs' application to amend but for the defendants' contention at the hearing that it appeared that there was more than one sub-licensee of the copyright in Singapore. If that was true, Alliance could not claim to be the exclusive licensee and therefore could not maintain the action on its own. Counsel for the plaintiffs was unable to respond to that contention at the hearing.

6 He therefore sought an adjournment to apply for leave to further amend the writ of summons and statement of claim but I declined to allow the plaintiffs a second bite at the cherry. I disallowed the amendments sought in SIC 4130/2005, adding that, in view of the defendants' objection as to the apparent lack of exclusivity, the amendments sought would not have sufficed anyway. It was in that context that I said, "They will not save plaintiffs' case in any event." However, in refusing to adjourn to allow the plaintiffs to apply for further amendment, I added that proceedings could be instituted afresh. (Although, unfortunately, this was not recorded in the minutes, when I reminded counsel for the defendants of this at the hearing of Summons No 84 of 2006 ("Sum 84/2006") in this action, he agreed that I had done so. However, he added that he thought I had meant that the proceedings had to be brought afresh in the names of all four plaintiffs. Whilst he may have thought so, in truth I had not thus prefaced or circumscribed my remarks. The application in Sum 84/2006 was therefore considered on the basis that I had made a general point that fresh proceedings could be instituted.)

7 In the event, a fresh action (Suit No 797 of 2005) was begun by Alliance and it was met with an application for striking out in Sum 84/2006.

8 I now turn to the law.

The law

9 In *Spencer Bower, Turner and Handley, The Doctrine of Res Judicata* (Butterworths, 3rd Ed, 1996) ("*Spencer Bower*"), it is stated at para 19 as follows:

A party setting up *res judicata* by way of estoppel as a bar to his opponent's claim, or as the foundation of his own, must establish the constituent elements, namely:

- (i) the decision was judicial in the relevant sense;
- (ii) it was in fact pronounced;
- (iii) the tribunal had jurisdiction over the parties and the subject matter;
- (iv) the decision was –
 - (a) final, and

- (b) on the merits;
- (v) it determined the same question as that raised in the later litigation; and
- (vi) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was *in rem*.

The passage quoted above was cited with approval in a number of cases including *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 at 607.

10 In a similar vein, in the recent case of *Lee Tat Development Pte Ltd v Management Corporation of Grange Heights Strata Title No 301 (No 2)* [2005] 3 SLR 157 ("the *Lee Tat Development* case"), the Court of Appeal held that the requirements of an issue estoppel were as follows (according to the headnote of the report):

- (a) there needed to be a final and conclusive judgment on the merits; (b) that judgment had to be by a court of competent jurisdiction; (c) there had to be identity between the parties to the two actions that were being compared; and (d) there had to be an identity of subject matter in the two proceedings. In relation to the last requirement, the decision on the issue must have been a "necessary step" to the decision, or a "matter which was necessary to decide and which was decided as the ground work of the decision": at [14] and [15].

11 For the purpose of the present case, it is necessary to examine two of the constituent elements, *viz*:

- (a) whether the earlier decision was final; and
- (b) whether the earlier decision determined the same question as that raised in the later litigation.

Whether earlier decision determined the same question as that raised in the later litigation

12 *Spencer Bower* describes this element thus (at para 177):

The party setting up the estoppel must establish identity of subject matter – that is, that his opponent is seeking to re-agitate some question of law, or issue of fact, which has been the subject of a final decision between the same parties by a tribunal of competent jurisdiction.

In the *Lee Tat Development* case, the majority in the Court of Appeal elaborated on this requirement as follows (at [15]):

The final requirement is that there must be an identity of subject matter in the two proceedings. The correct approach to identify the issue is to ask what had been litigated and, secondly, what had been decided. In the case of issue estoppel, the decision on the issue must have been a "necessary step" to the decision or a "matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision": see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 965 *per* Lord Wilberforce quoting from *R v The Inhabitants of the Township of Hartington Middle Quarter* (1855) 4 El & Bl 780 at 794; 119 ER 288 at 293.

This element was not satisfied in the present case.

13 The defendants submitted that the subject matter in Suit 978 was the same as that contained in a substantial number of paragraphs in the present action. Even so (leaving aside the fact that the present action also pleads copyright infringement in relation to two other films), the fact of the matter is that there was no judicial determination on the merits of the cause of action in Suit 978. *Res judicata* or cause of action estoppel therefore does not apply. What about issue estoppel? Diplock LJ (as he then was) defined issue estoppel thus in *Thoday v Thoday* [1964] P 181 at 198:

... "issue estoppel," is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his causes of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.

14 Pursuant to the defendants' interlocutory application in SIC 3032/2005, the action was struck out on a narrow ground, *viz*, that the pleadings in the statement of claim failed to show a chain of title from the owner of the copyright to the fourth plaintiff (Alliance) as sub-licensee.

15 The defendants erroneously contended that Suit 978 was struck out because "the plaintiffs [*sic*] did not have exclusive licence". If that was so, issue estoppel would apply. However, that was not the ground upon which the defendants' striking-out application was advanced nor was it the ground on which it was allowed. The court did not decide that Alliance was not the exclusive licensee.

16 In the circumstances, it is clear that there is no identity of subject matter and therefore no issue estoppel precluding Alliance in the present action from suing as exclusive licensee.

17 The pleadings in the present action now appear to show a proper chain and the defendants have not suggested otherwise. Alliance now also avers that the other licence was voided. The action therefore should be allowed to continue.

18 The following statement by Goulding J in *Jelson (Estates) Ltd v Harvey* [1983] 1 WLR 1401 at 1405, although made in a different context, is apropos:

Where there is a litigation of a certain question or issue before the court resulting in a final or substantial order which decides it, then it is well established that it is too late (save in exceptional cases) for a party to adduce in subsequent litigation against the same opponent, or one privy to him, a fact that might well have been brought forward on the previous occasion. That doctrine, however, does not apply where there is a mere procedural defect and the court has never gone into the merits, though both parties were before it.

Whether earlier decision was final

19 As to this element, the important consideration is not so much whether the judgment or order

was in its nature and form final or interlocutory as whether it could be considered final as to the rights of the parties: *Macfarlane v Leclaire* (1862) 15 Moo PC 181 at 188; 15 ER 462 at 465, *Peareth v Marriott* (1882) 22 Ch D 182, *Ex parte Moore*. *In re Faithfull* (1885) 14 QBD 627 at 632, *In re G J*. *Ex parte G J* [1905] 2 KB 678 at 682 and *In re Riddell*. *Ex parte Earl of Strathmore* (1888) 20 QBD 512 at 514.

20 *Spencer Bower* sets out in para 160 examples of decisions lacking in finality, including those which are temporary, provisional or preliminary. Amongst these are a judgment of a court of equity expressed to be without prejudice to an action at law (*Langmead v Maple* (1865) 18 CB NS 256; 144 ER 441) and a judgment of a court of common law expressed to be subject to the decision of a court of equity (*Jones v Reynolds* (1836) 7 Car & P 335; 173 ER 149).

21 In *Midland Bank Trust Co Ltd v Green* ([9] *supra*), Oliver J observed *en passant* (at 609) that a decision striking out part of a pleading was final but *Spencer Bower* submits (at para 172) that that *dictum* should not be followed. Of particular interest is the editors' suggestion that, if further evidence becomes available, it may be appropriate for leave to be granted to restore the expunged material and that a trial judge should be free to grant such an application without being confronted by a plea of *res judicata*.

22 There is no gainsaying that there was no "finality" to my order allowing the defendants' application to strike out the plaintiffs' claim in Suit 978. When I formed the view that the amendments sought to be made to the plaintiffs' pleadings were not efficacious in establishing Alliance's right to maintain the proceedings (by reason of the apparent lack of exclusivity in the licence), I could have allowed Alliance's counsel's application for leave to further amend the pleadings. However, I eschewed such a course in fairness to the defendants who would otherwise have had their striking-out application further adjourned while Alliance was given a second bite at the cherry. Alternatively, I could have allowed the plaintiffs to discontinue the action without their being precluded from bringing a fresh action: see O 21 r 4 of the Rules of Court and *Wardley Ltd v Town & City Properties Ltd* [1990] SLR 1080. The course which I took instead was to allow the defendants' striking-out application without prejudice to fresh proceedings being commenced. That being the intent of my order allowing striking out, issue estoppel should not apply.

23 That, in this respect, the intention of the judge is critical can also be seen in *Hendrawan Setiadi v OCBC Securities Pte Ltd* [2001] 4 SLR 503. In that case, Woo Bih Li JC (as he then was) had to decide whether the plaintiff was estopped from bringing a second action against the defendants by reason of an earlier action between the same parties having been struck out after counsel for the plaintiff unsuccessfully sought leave to discontinue. The plaintiff argued that as his claim in the first action had not been dismissed he was not precluded from re-litigating it. Woo JC went through the trial judge's notes of the proceedings in chambers on the plaintiff's application for leave to discontinue and concluded that, in refusing the plaintiff's application and ordering a striking out of the action, the trial judge had intended to preclude any fresh action.

24 I have of course found that there was no issue estoppel in the present case. But even if there were, one would do well to heed the words of Lord Keith of Kinkel in *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 where his Lordship said at 109:

In my opinion your Lordships should confirm it to be the law that there may an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work

justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl Zeiss* case [1967] 1 A.C. 853, 947.

In the passage referred to in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 947, Lord Upjohn had said:

All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

Conclusion

25 For all the foregoing reasons, I dismissed the defendants' striking-out application in Sum 84/2006 with costs.

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