In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 434

BETWEEN:

(1) PITT & COMPANY LIMITED
(2) BGA LIMITED

Plaintiffs

-v-

GARY WHITE AND MICHAEL WHITE

Defendants

RULING ON STRIKE OUT APPLICATION

(in Chambers)

Date of hearing: April 22, 2013
Date of Ruling: May 7, 2013

Mr. Jai Pachai, Wakefield Quin, for the Plaintiffs
Mr. Kim White, Cox Hallett Wilkinson Limited, for the Defendants

Introductory

1. By a Specially Endorsed Writ of Summons issued on November 22, 2013, the Plaintiffs sought $1,036,349.59 from the Defendants whom it was alleged were liable for the debts of two companies (White's at Southside Ltd. and White's at Hayward's Ltd.), although they had formally guaranteed the debts of only one company (White and Sons Limited). White and Sons Limited was wound-up by Order of Simmons ACJ on August 10, 2012; I granted winding-up orders in respect of the other two companies on August 31, 2013.

2. By Summons dated January 7, 2013, the Defendants applied to strike out the Writ and Statement of Claim on the grounds that it failed to disclose a reasonable cause of action and on the grounds that the claims were scandalous, frivolous, vexatious and/or an abuse of the process of the Court. The Plaintiffs filed an Amended Specially Endorsed Writ on February 5, 2013. The Amended Statement of Claim pleaded the following causes of action:

    (a) the Defendant's execution of a personal guarantee of the debts of White and Sons Limited only constituted a fraudulent or negligent representation that the debts of all three companies in the Group were being guaranteed;

    (b) further or alternatively, there was an oral agreement by the Defendants that they would guarantee the debts of all three companies.

3. On the face of the pleading, there is some ambiguity as to whether the Plaintiffs claim is for damages for fraudulent or negligent misrepresentation or deceit, but Mr. Pachai ultimately conceded that further amendments to the pleading were required to adequately particularise the bare allegations of fraud and negligence. Nevertheless, a reasonable cause of action was disclosed.

4. The main argument deployed by Mr. White with a view to sinking the Plaintiffs' ship altogether was that because the present claims not only could and should have been pursued in an earlier action, but actually were pursued and abandoned, it was an abuse of process for the claims to be pursued herein. In Civil Jurisdiction 2012: 216 ("the First Action"), the Plaintiffs sued the three companies together with the Defendants. The initial case against the Defendants was pleaded on the basis that the written guarantee signed by them in relation to the debts of White & Sons Limited extended to the debts of the entire Group. The claim against the Defendants was amended when the true position was discovered and limited to enforcing the terms of the written guarantee.

5. The First Action was commenced on June 11, 2012; the claim against the Defendants in this action was amended on June 22, 2012. The Consent Order in favour of the Plaintiffs entering judgment for the sum claimed under the written guarantee was entered on August 14, 2012. That judgment has now been satisfied.

6. It was common ground that when the First Action was compromised by way of a Consent Order, the preceding discussions between counsel contained no express references to waiving or reserving the Plaintiffs' right to pursue the Defendants for the balance of the Group's indebtedness. Thus the *res judicata* argument turned essentially on a consideration of whether it was open to the Plaintiffs to limit their claim against the Defendants in the First Action to enforcing a simple written

agreement and to defer pursuing the present more complicated claims until they had sufficient time to file the present action, without expressly reserving the right to do so.

7. A *res judicata* argument typically arises in one of two factual scenarios. Either the new claims are quite obviously an attempt to re-litigate issues which formed the subject of an earlier proceeding; or, alternatively, the claims were not raised at all in the earlier action but because they are grounded in the same broad dispute it is contended that they could and should have been raised in the earlier action. The present application, uniquely in my experience, concerned a claim for compensation (as regards the indebtedness of two companies) which was asserted and then abandoned in the earlier proceedings.

Findings: res judicata

8. Mr. White placed before the Court an array of authorities on the *res judicata* principle, including many of the local cases to deal with this topic: *Tensor Endowment. Ltd. and UBS Fund Services (Cayman) Ltd.-v- New Stream Capital Fund Ltd.* [2010] Bda LR 38; *Bermuda Fire & Marine Insurance Company limited (in liquidation)-v- BF&M Ltd.* [1998] Bda LR 63; *Englehorn-v-Douglas Barnard Inc.* [2002] Bda LR 9; *Thompson & Thompson-v-Thompson* [1991] Bda LR 9 (CA); *Phillips-v-Phillips et al* [2003] Bda LR 45; *Wilson and Craig-v- First Bermuda Securities Ltd et al* [2002] Bda LR 60[1].

9. Mr. Pachai responded with a more streamlined approach, relying primarily on two persuasive authorities: *Johnson-v-Gore Wood & Co (a firm)* [2001] 1 All ER 481 (House of Lords); and *Stuart-v- Goldberg Linde (a firm)* [2008] EWCA Civ 2.

10. The various cases essentially demonstrate the application to different facts of legal principles which are not in dispute; accordingly, I do not propose to consider each case here. The Court of Appeal for Bermuda in *Thompson & Thompson-v-Thompson* [1991] Bda LR 9 (CA) approved the principles governing when it is an abuse to litigate issues which could and should have been raised in earlier proceedings. These were the same principles articulated by the Judicial Committee of the Privy Council in *Yat Tung Investment Co. Ltd.-v- Dao Heng Bank Ltd.* [1975] AC 581, where Lord Kilbrandon (at 590-591) opined as follows:

> "*But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.*

[1] *Moulder-v- Cox Hallett & Wilkinson et al* [2010] Bda LR 78, [2011] Bda LR 40 (CA) and *Wilson and Craig-v- First Bermuda Securities Ltd et al* [1997] Bda LR 65, [1998] Bda LR 16, were also cited in support of the adequacy of pleadings grounds.

The locus classicus of that aspect of res judicata is the judgment of Wigram VC in Henderson v Henderson [1843] 3 Hare 100 at p 115 where the learned judge says:

> *' 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. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'*

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 cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule. For example, if it had been suggested that when the counterclaim in No 969 came to be answered Mr. Lai was unaware, and could not reasonably have been expected to be aware, of the circumstances attending the sale to Choi Kee, it may be that the present plea against him would not have been maintainable. But no such averment has been made.

The Vice-Chancellor's phrase 'every point which properly belonged to the subject of litigation' was expanded in Greenhalgh v Mallard [1947] 2 All ER 255 at p 257 by Somervell LJ:

> *' ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'*

Again, a phrase used by Lord Shaw of Dunfermline in delivering the opinion of the Board in Hoystead v Commissioner of Taxation [1926] AC 155 at p 171,

'the present point was one which, if taken, went to the root of the matter on the prior occasion',

appears precisely apposite to the failure, in answer to the counterclaim in No 969, to raise the matters founded on in No 534 which, if then substantiated, would have been then decisive. An instance of a hard case in which the rule was applied is Re Koenigsberg [1948] Ch 727…"

11. The core principle is that it will generally be an abuse of process to raise in subsequent litigation issues which were not only expressly or impliedly determined in the earlier proceedings but also issues which were not raised but which ought to have been. Whether or not the issue ought to have been raised turns in large part on an analysis of:

    (a) the subject-matter of the earlier proceedings; and

    (b) the extent to which the later claim may fairly be said to be one which ought to have been raised in the context of the former proceedings because it was logically an integral part of the dispute which formed the subject of the prior proceedings.

12. Thus Mr. Pachai aptly focussed on the different character of the claims asserted in the present action when contrasted with the simple and straightforward claim under the guarantee asserted in the First Action. Pointing to the speed with which judgment was obtained (and subsequently enforced) after the Plaintiffs' claim was amended and limited to the sums recoverable under the written guarantee, the Plaintiff's counsel said not pursuing the present claim in the first Action was commercially and tactically appropriate. Mr. Pachai relied in particular on the following *dicta* of Lloyd LJ in *Stuart-v- Goldberg Linde (a firm)* [2008] EWCA Civ 2 as being strongly supportive of his client's case:

> "*62. Here, by contrast with Johnson v Gore Wood, and even more so with Aldi Stores v WSP Group plc, the parties to both proceedings are the same (disregarding Mr Vardinoyannis, who is important, but not for the purposes of this application). But the separate claims are very different. The claim on the undertaking is by its nature intended to be a relatively summary and easy procedure, and should be so because the issues are so limited: was the undertaking alleged given, and if so was it given by the person in question as a solicitor? No question of consideration arises, nor of causation, foreseeability or proving loss. Admittedly in the present case there was the unusual difficulty on the first point that it was not in writing, and there was an acute dispute of evidence on the factual question. But it was a relatively confined enquiry, as compared with that which would be necessary on either of the other claim.*
>
> *63.Neither the Inducement Claim, of which Mr Stuart was aware by the time of the 2000 Action trial, nor the Misrepresentation Claim, as to which he knew some but not all of the relevant facts, is at all straightforward. The evidence as to the original statements would overlap with that which was involved on the Undertaking Claim, but that would be just the starting point. There would in addition be important, substantial and no doubt controversial evidence on causation, and on damages. Moreover, it seems to me also highly relevant that the first knowledge that Mr Stuart had of the facts relevant to the Inducement Claim came from a witness statement of Mr Linde filed less than 3 months before the trial of the 2000 Action. No doubt it did make Mr Stuart and his advisers aware of the possible Inducement Claim, but it seems to me altogether a different proposition to say that it was incumbent on Mr Stuart, having become aware of these facts in these circumstances, to risk delaying the trial of the Undertaking Claim by drawing attention to the possibility that he might assert the Inducement Claim in separate proceedings.*
>
> *64. The cases on this aspect of abuse of process include many reminders that a party is not lightly to be shut out from bringing*

before the court a genuine cause of action. That point is now underwritten by article 6 of the European Convention on Human Rights, but I do not think that this article changes English domestic law at all. It is consistent with the article to allow the court to strike out a claim which is an abuse of the process, but at common law it must be clearly shown to be an abuse before it can be struck out. The court must consider critically any suggestion that a particular cause of action should not be allowed to be asserted because of the bringing of other proceedings based on a different claim. The typical example of abuse is where the claimant is really trying to relitigate a claim or contention already unsuccessfully advanced. A good example of that is Manson v Vooght [1999] BPIR 376. The principle is not, of course, limited to cases where the earlier proceedings were unsuccessful. But the present case is not an example of relitigating the subject-matter of a previous claim, despite the overlap between the evidence relevant to the respective claims…

Conclusion

…68.I do not consider that it was incumbent on Mr Stuart to seek to add the Inducement Claim to the 2000 Action, because the facts came to his attention so late before the trial of the 2000 Action, because to do so would (if successful) have delayed the trial of the 2000 Action, and because of the disparity between the different claims, the Undertaking Claim being essentially summary and certainly relatively simple, and also relatively (at least by comparison with the other claims) speedy, the other claims being much more complex in terms of issues and evidence, and therefore likely to take much more time to come to trial, and at trial as well…

…71. In my judgment to hold that this fact makes the bringing of the 2005 Action an abuse of process would be a substantial and unjustified extension of the law in this respect. It is not right, in my view, to say, as a general proposition of law, that where the claimant in existing proceedings comes to know, in the course of those proceedings, from information provided by the defendant, of an additional cause of action against the defendant, which is quite different from that asserted in his existing claim and one which it would not be reasonable, in the circumstances, to expect him to seek to combine with that existing claim, he must inform the defendant of the fact that he is contemplating bringing such a claim in future before he brings his existing proceedings to trial…."

13. I agree that the last-cited case is highly persuasive due to the material similarity of the facts. In that case, in the course of proceedings to enforce an undertaking, the plaintiff discovered the existence of potential claims for inducement and misrepresentation. He continued with the narrow and straightforward action and

pursued the more complicated claims in a subsequent action, without expressly reserving the right to do so in the context of the earlier proceedings.

14. Here, the Plaintiffs discovered from the Defendants after commencing the First Action against them based solely on the written guarantee that the written guarantee only applied to the debts of White & Sons Limited and that this company was only one of three members of the corporate Group. They decided to proceed with the claim based on the guarantee alone and quickly obtained a consent judgment for the full amount of the amended claim. They did not expressly reserve the right to bring the present claims, which are obviously of a wholly different character albeit that they related to monies advanced to companies related to the company dealt with in the First Action. Nor were the Plaintiffs asked, when compromising the First Action, to release the Defendants from all connected claims.

15. The First Action was resolved in the Plaintiffs favour, so no question of the Defendants being harassed by a re-litigation of unmeritorious claims arises. In my judgment the present action is not an abuse of process and it was reasonable in all the circumstances of the present case for the Plaintiffs not to add the present claims to the limited clear-cut claim asserted in the First Action which from the outset was based solely on the written guarantee.

16. This conclusion is further supported in a general way by the following observations made in a case which was not referred to in argument. In *Re Glencore Grain Limited*[1996] Bda LR 64, Ground J (as he then was), after also citing *Yat Tung Investment Co. Ltd.-v- Dao Heng Bank Ltd.* [1975] AC 581, opined as follows:

> "*In my judgment, the doctrine of res judicata, even its wider sense, does not apply to a defence of set-off arising under an unrelated contract. The doctrine is only applicable to defences which should have been raised by reference to 'the same subject of litigation'. The doctrine does not apply to general defences such as set off arising out of monies due under an unrelated contract. First, as a general principle, a defendant cannot be compelled to plead a set off and the defendant has an option to enforce his claim by an independent action…Secondly, it is wholly impracticable to contend that that in any arbitration or litigation between two trading entities, the defendant must plead by way of set off all the monies which may be due to it by the plaintiff, failing which, all those claims will be irrecoverable. In my judgment, the doctrine of res judicata does not go this far.*"

17. This decision further illustrates the need, when applying the necessarily general core principles which delineate the *res judicata* rule, to take into account in a nuanced manner whether in practical terms it would have made sense for the subsequent claims to have been brought in the earlier proceeding. In the present case the

Plaintiffs' case is that they believed the Defendants were guaranteeing the Group's debts as a whole. In contrast, the First Action eventually proceeded in respect of the discrete issue of the debts of the one company subject to a written guarantee. The present action is not only concerned with the indebtedness of separate, albeit related, companies. It is primarily based on wholly different causes of action as well.

18. I decline to strike out the Writ and Statement of Claim on *res judicata* grounds.

Findings: is the pleading embarrassing?

19. I find that the Amended Statement of Claim is liable to be struck out as embarrassing because it fails to set out sufficient particulars of the fraud and negligence which form the basis of what amount to little more than bare allegations at this stage.

20. The usual practice is that a plaintiff is afforded an opportunity to cure these types of pleading deficiencies, unless it is obvious that the defects cannot be cured through an amendment. Accordingly, in the exercise of my discretion, I decline to strike out the pleading at this stage and direct instead that the Plaintiffs are at liberty to apply within 28 days for leave to re-amend the pleading. The Defendants' Summons should be adjourned to the hearing of any such application with general liberty to apply.

Conclusion

21. The Defendants' application to strike-out the action on *res judicata* grounds is refused. The Plaintiffs are at liberty to file an application for leave to re-amend the Amended Statement of Claim within 28 days. The balance of the Defendants' January 7, 2013 Summons is adjourned to the first return date of the Plaintiff's anticipated Summons for leave to re-amend, with general liberty to apply.

22. Unless either party applies within 14 days by letter to the Registrar to be heard as to costs, I would reserve costs until after the determination of the Plaintiffs' application for leave to re-amend their Amended Statement of Claim.

Dated this 7th day of May, 2013 _____

IAN R.C. KAWALEY CJ