IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 84

CA 99/1999

Between

Haco Far East Pte Ltd

… *Appellant*

And

Ong Heh Lai Francis

… *Respondent*

GROUNDS OF DECISION

Res Judicata — Issue estoppel; Civil Procedure — Originating processes

Version No 1: 20 Nov 2026 (01:16 hrs)

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Haco Far East Pte Ltd v Ong Heh Lai Francis

[1999] SGCA 84

CA 99/1999
Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
24 November 1999

1 (delivering the grounds of decision of the court): This was an appeal against a decision of Choo Han Teck JC dismissing the appellant`s (Haco`s) originating summons (OS 332 of 1999) which sought certain declarations and incidental reliefs. We heard the appeal and affirmed the decision of the court below. As the reasons for our decision did not quite coincide with those of the court below, we have prepared these written grounds.

2 ***The background***

3 The circumstances giving rise to the institution of this originating summons (`OS`) were straightforward. The appellant was incorporated in 1984 with two shareholders, Haco NV, a Belgian company and the respondent (Ong), and they held 69% and 31% respectively in the ordinary share capital of Haco. There were two directors in Haco, Ong and Mr Roger Havegoer, the Chief Executive of Haco NV. Ong became the managing director of Haco sometime in March 1984 pursuant to a contract of employment signed by Haco and Ong on or about 24 March 1984. Clause 13 of the contract provided that:

> *If any dishonesty appears from one of the shareholders, his share will automatically be transferred to the other shareholders.*

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4 In early 1993 Haco NV became aware of some irregularities in Ong`s management of Haco. In 1994, Haco brought an action (Suit 403/94) against Ong for breach of fiduciary duty, alleging that while holding the office of managing director, he had carried on his own business in competition with Haco, and also made use of Haco`s office facilities for the purpose of his business. That action did not concern the contract of employment. At the conclusion of the trial, Judith Prakash J entered interlocutory judgment in favour of Haco and ordered damages to be assessed. In the concluding part of her written grounds of decision (at [para] 83) she made the following statement:

> *The defendant [Ong] had clearly acted in breach of his fiduciary duty and dishonestly ...*

5 On 23 December 1998, Haco`s solicitors wrote to Ong requesting that he transfer his shares in Haco to Haco NV, pursuant to cl 13 of the contract of employment. Ong refused to comply.

6 Therefore, on 5 March 1999, Haco instituted the present OS and claimed (after amendments), inter alia, for the following reliefs:

> 1 a declaration that, based on the court`s findings in Suit 403/94, the defendant had acted dishonestly whilst an employee of Haco Far East Pte Ltd (prayer 1);
>
> 2 a declaration that accordingly, under cl 13 of the contract of employment between the defendant and Haco, the defendant`s shares in Haco are to be transferred to the other shareholder, Haco NV (prayer 2).

7 ***Decision below***

8 The court below dealt only with the first two prayers set out above as the other prayers were essentially consequential. The judge dismissed prayer 1 on the ground that it was res judicata by reason of issue estoppel. He noted that

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in the earlier action (S 403/94) before Prakash J for breach of fiduciary duty, Haco had relied on various allegations of dishonesty against Ong, which allegations had subsequently been proven, and upon which judgment was pronounced. He felt that Haco was therefore estopped from seeking that same declaration because it was `an issue which had been determined by a court of competent jurisdiction in previous litigation between the same parties.` Furthermore, a party ought not to be granted multiple declarations that a person was dishonest when the grounds for making that finding arose from the same set of facts; that would be duplicitous, amounting to an abuse of the process of the court.

9 In respect of prayer 2, the judge was of the opinion that Haco had commenced the action by the wrong procedure. He felt that as Ong was disputing that what he did fell within the purview of cl 13, the action should have been commenced by way of a writ where Haco should plead the contract of employment, the judgment and findings in the earlier suit, the demand for the transfer of shares made pursuant to the judgment, the respondent`s failure to comply, and a prayer that the respondent be compelled to transfer the said shares. Haco could then proceed by way of summary judgment. He thus dismissed the OS.

10 ***Issues***

11 Before us Haco advanced two main arguments. The first was that the principle of issue estoppel did not apply in the circumstances of this case. Secondly, even if OS was not the correct procedure, instead of dismissal, appropriate directions should have been given by the court under O 28 r 8 of the Rules of Court. We will consider each of these arguments in turn.

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12 ***Issue estoppel***

13 Counsel for Haco submitted that the judge erred in holding that the principle of issue estoppel prevented the grant of an order in terms of prayer 1. He contended that issue estoppel prevents a party from denying the finding made on a particular issue in a previous case. In the present proceeding Haco was certainly not doing that; it was in fact doing the reverse. It was relying on the finding in the previous decision in support of the declaration of dishonesty. So the principle of issue estoppel could not be a proper basis to deny the relief prayed for.

14 The principle of issue estoppel was enunciated by Diplock LJ in Thoday v Thoday [1964] P 181; [1964] 1 All ER 341, where he distinguished it from cause of action estoppel. Elaborating what would constitute issue estoppel, he said (at p 352):

> *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 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 on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends on 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.`*

15 Basically what the principle of issue estoppel seeks to do is to prevent contradiction of a previous determination. In our view, in prayer 1, Haco was not seeking to do that. It sought to reiterate the finding of the trial judge in S

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403/94 and upon that premise, to obtain a declaration that under cl 13 of the contract of employment, Ong was obliged to transfer the shares he held in Haco to the other shareholder, Haco NV. With respect, we did not agree with the judge that issue estoppel would preclude the grant of relief in terms of prayer 1. Neither could cause of action estoppel apply as the cause of action in this OS was quite different from that in S 403/94.

16 What remains is the question whether in seeking the relief in prayer 1, there had been an abuse of the court process. Again, we did not think so. In S 403/94 it was not essential that dishonesty on the part of Ong must be shown in order to enable Haco to succeed in that cause of action. As it transpired, the court in that action found there was dishonesty on the part of Ong. It was quite apparent to us that the declaration requested for in prayer 1 only provided the basis for the court to grant the relief in prayer 2, which was the real substantive relief sought.

17 The judge was also concerned about the question that if he were to grant the relief in prayer 1, it could give rise to confusion. We were unable to see how confusion could arise when the declaration prayed for was premised on the finding in S 403/94. Thus there could be no likelihood of people who were not familiar with the case believing that Ong `was found by various judges to be dishonest on different and separate cases.`

18 ***Was OS the correct procedure?***

19 We turn next to the second main contention, the question of the correct procedure. The judge was of the view that the claim in this OS should have been begun by writ. First, there were substantial disputes of fact. He noted that in the affidavits filed by Ong, he indicated that he was disputing the allegation of

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dishonesty. Secondly, the judge stated that the matters pleaded in the summons had not been properly framed. In his view, they were `far too bald, utterly inadequate and wrong. The supporting affidavits [were] of no assistance as they [did] not constitute pleadings.` He also noted that this OS had come before Goh Joon Seng J on 30 April 1999, who then adjourned the hearing for Haco to consider whether the correct procedure had been adopted. Haco stood by its ground, notwithstanding the indication given by Goh Joon Seng J. Haco failed to make the fundamental changes needed to found its action.

20 Under O 5 r 4 of the Rules of Court, the general rule is that the OS procedure is apposite where:

21 (a) the sole or principal question at issue is, or is likely to be, one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or some other question of law; or

22 (b) in which there is unlikely to be any substantial dispute of fact.

23 Prima facie, in the light of the relief sought in the instant case, ie a declaration for rights under a contract, this case would appear to be suitable to be commenced by OS.

24 In Ong`s case, this court`s attention was drawn to O 5 r 2(b) which provides that, notwithstanding the provisions in O 5 r 4, a claim which is based on an allegation of fraud must be commenced by writ. It was argued that as the present claim requiring Ong to transfer his shares in Haco to Haco NV was premised on Ong`s dishonesty in managing Haco, it came within O 5 r 2(b). In the Supreme Court Practice 1999 para 5/2/3, the learned authors suggested that

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`fraud` in that context refers to the tort of deceit. However, for the purposes of the present proceeding, we did not think we need to decide this point as there were other factors which would require that the action be commenced by way of a writ. In Ong`s affidavit, he raised, inter alia, the following points to counter Haco`s claim:

> (i) the contract of employment violated the memorandum and articles of association of Haco;
>
> (ii) the scope of cl 13 was vague - what aspect of `dishonesty` would come within that clause? Who were the other shareholders to whom Ong must transfer his shares? What number of shares were to be so transferred?
>
> (iii) there was no valid consideration in respect of cl 13 and even if there was, the contract would still be void, unenforceable and contrary to public policy;
>
> (iv) as `dishonesty` was alleged, particulars should have been given and this was not done;
>
> (v) Haco had no locus to institute this OS to compel Ong to transfer his shares in Haco to Haco NV;
>
> (vi) this action could be time-barred.

25 In the light of the abovementioned points, particularly (ii), (iii) and (vi) upon which oral evidence would be required, it seemed to us clear that the present action should have been commenced by way of a writ. Haco should set out in its pleadings the facts and circumstances upon which it relied to contend that cl 13 had been triggered. While it is true that under O 28 r 8 the court could ordinarily give directions that the OS be continued as if it had begun by writ, Haco failed to take up the suggestion when given the opportunity and persisted in its stand that its commencement of the action by way of an OS was the appropriate process. Having taken such a stand in the court below, we felt it was too late now for Haco to change its stance. In the circumstances, the court below was entitled to have refused to exercise its discretion under O 28 r 8. There was

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no basis for us to disturb the discretion exercised by the court below. Thus, we dismissed the appeal but, with a view to avoiding any doubt, we also gave liberty to Haco to file a fresh writ on the claim if it so wished.

26 ***Costs***

27 As Haco had failed before us only on the procedural point, we did not think it should bear the full cost of the appeal. In our view, a fair order would be that it should only bear of the costs of the appeal. The security for costs was ordered to be paid out to the solicitors for Ong to account of his costs.

28 **Outcome:**

29 Appeal dismissed.

Chao Hick Tin JA
L P Thean JA
Yong Pung How CJ

S Surenthiraraj and Elaine Tay (Harry Elias & Partners) for the appellant
P Suppiah and Elengovan Krishnan (P Suppiah & Partners) for the respondent

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