

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 246

Suit 1878/1997

Between

Transpac Capital Pte Ltd

... Plaintiff

And

Lam Soon (Thailand) Co Ltd

... Defendant

GROUND OF DECISION

Civil Procedure — Judgments and orders; Civil Procedure — Pleadings

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Transpac Capital Pte Ltd v Lam Soon (Thailand) Co Ltd

[1999] SGHC 246

Suit 1878/1997
Tay Yong Kwang JC
20 September 1999

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2 The matter before me concerns an appeal by the plaintiffs against the order of an assistant registrar of the Supreme Court dismissing the plaintiffs' application for leave to amend their statement of claim. I allowed the appeal and granted the plaintiffs the leave sought.

3 ***Chronology of material events***

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5 Listed below are the events following the filing of the writ of summons with the statement of claim endorsed on 27 October 1997.

31 October 1997	Second and third defendants entered an appearance in this action
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17 November 1997	Plaintiffs applied ex parte for leave to serve the writ on the first defendants in Thailand.
9 December 1997	Leave to serve out of jurisdiction granted
22 December 1997	Further and better particulars provided by the plaintiffs to the second and third defendants upon their request.
5 January 1998	Second and third defendants filed their defence.
16 January 1998	Second and third defendants filed their amended defence.
20 April 1998	First defendants entered an appearance after having been served in Thailand.
21 April 1998	First defendants applied to set aside order of court dated 9 December 1997 granting leave to serve out of the jurisdiction
12 June 1998	First defendants' application dismissed with costs.
16 June 1998	First defendants filed their defence
18 June 1998	First defendants appealed against order dismissing their application
22 June 1998	Plaintiffs filed reply to first defendants' defence and to second and third defendants' amended defence.
12 August 1998	Amarjeet Singh JC allowed the first defendants' appeal and set aside the order dated 9 December 1997 granting leave under O 11.
3 September 1998	Plaintiffs appealed against Amarjeet Singh JC's decision.
21 January 1999	The Court of Appeal (Karthigesu JA and Lai Kew

	Chai J) dismissed the plaintiffs' appeal.
10 March 1999	Plaintiffs' solicitors wrote to the Registrar requesting the grounds of decision of the Court of Appeal as the plaintiffs intended to amend their statement of claim and to apply to re-serve the first defendants in Thailand but the first defendants had written to the plaintiffs to state that they would apply to set aside any fresh leave to re-serve on the ground of res judicata.
12 March 1999	The Registry replied: "Please be informed that the judges have directed as follows: "When the Court of Appeal dismisses an appeal and decided not to give a written judgment it means that the judgment of the court below is confirmed. In this appeal the Court of Appeal will not be giving a written judgment."`
29 April 1999	Plaintiffs applied for leave to amend their statement of claim.
19 May 1999	Plaintiffs' application was dismissed by the assistant registrar.
2 June 1999	Plaintiffs appealed against the assistant registrar's decision.

6 Thus it was that this appeal came before me.

7 ***The statement of claim***

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9 The plaintiffs are an investment company incorporated in Singapore while the first defendants are a company incorporated in Thailand. The second and third defendants are the directors of the first defendants.

10 By a loan agreement dated 4 December 1992, the plaintiffs agreed to provide a convertible loan of S\$14m to the first defendants for 36 months commencing on 9 December 1992, the drawdown date. The said amount was disbursed partly in US dollars (some US \$7m) and partly in Singapore dollars (some S\$2.3m).

11 By a guarantee of the same date, the second and third defendants jointly and severally guaranteed the payment of all amounts due and payable under the loan agreement and also agreed to pay the plaintiffs a commitment fee, payable in Singapore dollars, calculated at an amount equal to 5% per annum of the principal amount of the loan, compounded from year to year. The obligations of the guarantors to pay the commitment fee continued for as long as the first defendants were not listed on the Stock Exchange of Thailand pursuant to an investment agreement dated 4 September 1992.

12 On or about 23 August 1995, the plaintiffs and the first defendants agreed to vary the terms of the loan agreement by a divestment agreement under which the plaintiffs agreed to an early repayment of the loan. In addition, it was agreed that part of the S\$14m loan was to be converted to 11 million shares at 12.5baht per share amounting to 137.5m baht. These shares were then sold to the second and third defendants in two tranches of 5.5 million shares each at 17baht per share for the first tranche and 18baht per share for the second tranche. The first defendants agreed to repay the balance of the loan of 79.3 million baht then outstanding by instalments ending on 30 December 1995, dividends of 7.098m baht to the plaintiffs and interest on the loans to be calculated from the

time of disbursement in December 1992. It was also averred that the divestment agreement did not supersede the original loan agreement.

13 Part of the unconverted loan was paid by the first defendants to the plaintiffs between 2 January 1996 to 10 May 1996. The first defendants failed to pay the remaining portion of the unconverted loan together with accrued interest thereon amounting to some S\$520,000 and dividends amounting to the equivalent of S\$404,099.06.

14 The plaintiffs claimed that the second and third defendants were liable for these amounts by virtue of the guarantee given by them.

15 ***The proposed amended statement of claim***

16

17 The proposed amendments were necessitated essentially by the judgment of Amarjeet Singh JC, which will be referred to later in this judgment. The plaintiffs now pleaded cl 22 of the loan agreement pursuant to which the plaintiffs and first defendants agreed that the said agreement be governed by the laws of Singapore and to submit to the jurisdiction of the Singapore courts. Similarly, the plaintiffs averred that they and the second and third defendants agreed that the guarantee was to be governed by Singapore laws and to submit to the jurisdiction of the Singapore courts.

18 The plaintiffs also set out the fact of discussions between them and the defendants in both Singapore and Thailand leading to the variation of the loan agreement. The divestment agreement was now said to be contained in three

faxes dated 8 June 1995, 15 June 1995 and 23 August 1995, all from the plaintiffs to the first defendants and, in essence, the terms of that agreement as spelt out previously were repeated here save that the balance of the unconverted loan to be repaid by 30 December 1995 was now indicated as S\$1,049,995 and US \$2,488,270.85.

19 Again, it was averred that the divestment agreement did not supersede the loan agreement but only varied the manner in which the loan was to be repaid. It was further pleaded that the divestment agreement therefore continued to be governed by the laws of Singapore or that such were the proper law of the contract.

20 The plaintiffs then set out in a new Sch 1 the precise payments made by the defendants under the divestment agreement and averred that these payments were appropriated by them for the payment of the shares with the object that the purchase consideration for the shares be extinguished first. The remaining amount was then utilised to discharge the outstandings on the unconverted loan. Details of such application of the payments listed in Sch 1 to the statement of claim had been given to the first defendants on 27 May 1996, which accepted the manner of appropriation and application by the fact that they had made no protest.

21 An alternative claim for S\$117,344.28 against the first defendants was pleaded (with particulars spelt out in a new Sch 2) together with compound interest and dividends amounting to 7.098m baht.

22 The plaintiffs averred that the second and third defendants were liable for the sums outstanding from the first defendants, save for the dividends mentioned above. Alternatively, they claimed that the second and third

defendants were liable for the commitment fee pursuant to the guarantee furnished by them together with compound interest.

23 ***The arguments***

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25 The second and third defendants' objections to the application to amend the statement of claim were encapsulated in paras 8 to 12 of their written submissions tendered at the hearing before the assistant registrar which read:

8 Having reviewed all the admissible material before it, and applying the above principles of law to the same, both the learned judicial commissioner and the Court of Appeal came to the following conclusions: 8.1 that the loan agreement was superseded by the divestment agreement (and not merely varied by the same), see paras 8.4 line 7 of Amarjeet Singh JC's decision (***Tab-1***); and 8.2 that the outstanding loan had been fully repaid, see paras 8.4 and 9 of Amarjeet Singh JC's decision (***Tab-1***). 9 As such both the Judicial Commissioner and the Court of Appeal has made a decision on the merits. On the ***lower*** standard of proof of a 'good arguable case' and 'serious question to be tried' both courts found that the plaintiff's claim was wholly without merit as against the first defendant based on the above two conclusions. In the circumstances, the plaintiff's original statement of claim, as summarised in paras 1.1 to 1.4 above must fail. The burden of proof which the plaintiffs must prove at trial, if this matter were allowed to proceed to trial is one on the civil balance of probabilities. By the plaintiffs' own submission in their appellants' case in CA 219/98 as quoted above, this burden is higher than that of a 'good arguable case' and 'serious question to be tried'. As both the judicial commissioner and the Court of Appeal had found that the plaintiff had failed to even discharge the lower burden, a fortiori the plaintiff's claim at trial is bound to fail. 10 Based on the original statement of claim, the plaintiff's case against the second and the third defendants is based on the guarantee and necessarily predicated on any sum found to be due by the first defendants. Given the above, the plaintiff's case against the second and the third defendants as

guarantors based on the original statement of claim is also bound to fail. 11 The issue has been conclusively determined by the Court of Appeal and it is an abuse of process of the court for the plaintiff to attempt to re-litigate the issue.

See **Supreme Court Practice** (**Tab-6**).

See **Stephenson v Garnett** [1898] 1 QB 677 (**Tab-7**).

12 It is clear that the plaintiffs recognize this and that they are seeking to effect amendments of the statement of claim in an attempt to cure this fatal defect of the plaintiffs` case. It is submitted that the proposed amendments do not cure this defect. They are in fact immaterial and useless amendments within the meaning of para 20/8/24 of the **Supreme Court Practice** (**Tab-8**). Please see attached a chart setting out a comparison between the claims in the statement of claim and the proposed amended statement of claim. (**Tab-9**).

26

ex

parte

Before Amarjeet Singh JC, the first defendants` grounds for setting aside the O 11 proceedings were:

27 (1) The plaintiffs failed to satisfy O 11(2)(a) of the Rules of Court requiring grounds supporting the application.

28 (2) The plaintiffs failed to make full and frank disclosure in their application.

29 (3) The plaintiffs failed to show a serious question to be tried on the merits.

30 (4) Alternatively, Thailand was the appropriate forum for the trial of the claims pleaded.

31 ***inter alia forum conveniens*** The learned judicial commissioner found as follows:

32 (1) The affidavit in support of the O 11 application merely stated that the plaintiffs' claim was to recover damages in respect of, , the breach of a loan agreement, being an agreement which by its terms was governed by the laws of Singapore and that the plaintiffs' solicitor believed that the plaintiffs had a good cause of action against the first defendants. This was a bare assertion devoid of any grounds.

33 (2) Further, the statement of claim contradicted the O 11 application in that the former pleaded breach of the divestment agreement while the latter described the claim as one for damages for breach of the loan agreement.

34 (3) The divestment agreement, constituted by a document dated 4 September 1995, stipulated in para 5 thereof that it superseded the loan agreement which shall cease to be operative with immediate effect.

35 (4) The unconverted portion of the loan amounting to approximately 79m baht had been settled by the first defendants on or about 28 December 1995. By a letter of demand dated 23 May 1997 written by the plaintiffs' solicitors to the third defendant, it was admitted that the principal amount of S\$14m had been repaid in full by the first defendants and the learned judicial commissioner was satisfied that it had been so paid.

36 (5) The outstanding balance of \$464,448.17 (plus interest) claimed as the remaining portion of the unconverted loan was described by the plaintiffs in their solicitors' letter as the balance of a commitment fee due from both the guarantors. Under the loan agreement, only the guarantors were liable for the

commitment fee and the plaintiffs were not entitled to treat the first defendants and the guarantors as one debtor. Further, the loan agreement provided that the loan was an interest-free one. In any case, since the loan had been repaid, there was no good arguable case of further interest arising. The plaintiffs had `failed to show a good arguable case not just a case that could be argued`.

37 (6) The plaintiffs had failed to make full and frank disclosure of the following material facts:

38 (a) the divestment agreement dated 4 September 1995 which contradicted their claim;

39 (b) the fact that the unconverted loan had been fully repaid;

40 (c) their letter dated 23 May 1997 confirming the principal sum of S\$14,000,000 had been repaid in full by the first defendants.

41 (7) No particulars as to whether the first defendants had profits available for distribution or whether there was a declaration of payment of dividends had been pleaded nor was any evidence of such deposed to. The plaintiffs had therefore `also failed to produce a good, arguable case that in the circumstances, Singapore is the `.

42 Amarjeet Singh JC concluded in his judgment as follows:

Whilst a court does not try such a case upon affidavit evidence, I had to reach a tentative or provisional conclusion that the respondents were right in permitting the order obtained by them for service out of jurisdiction to stand. I could not for the reasons I have given reach such a conclusion at all. Accordingly, I allowed the appeal with costs discharging the assistant registrar's order for service of the writ out of the jurisdiction.

43 The plaintiffs argued that the objections raised by the second and third defendants on *res judicata* were wrong because the learned judicial commissioner's decision was only:

44 (a) that the plaintiffs' application and supporting affidavit for service of the writ out of jurisdiction were flawed for the reasons mentioned in the judgment;

45 (b) a tentative or provisional conclusion on the facts.

46 While it was not disputed that the issues raised in the proposed amendments to the statement of claim were contained in the affidavits before the learned judicial commissioner on a general basis, his Honour did not make a final and conclusive finding on every single general issue raised before him. Further, the learned judicial commissioner did not find that no further steps should be taken in the proceedings because of his decision.

47 It was also argued that the 'tentative or provisional conclusion' of the learned judicial commissioner did not satisfy the conditions necessary to found a plea of issue estoppel.

48 ***My decision***

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50 In **Reebok International Ltd v Royal Corporation** [1989] 1 MLJ 209, Chao Hick Tin JC summarized the principles of the doctrine of *res judicata* and issue estoppel thus:

Three essential conditions must therefore be present before this plea can be successfully raised. First, there must have been a final judgment or decision; second, there must be an identity of subject matter or issue in the former and in the present litigation; and third, there must be identity of parties.

51 On the facts of the present case, it seems to me beyond dispute that the third condition set out above has been met. Although the earlier proceedings were between the plaintiffs and the first defendants only, the question of the first defendants' liability would obviously affect the second and third defendants' liability to the plaintiffs.

52 Although Amarjeet Singh JC's findings on the facts appeared quite unequivocal, they were qualified by the learned judicial commissioner's concluding paragraph that his decision was a 'tentative or provisional conclusion'. The qualification left the doors of factual finality ajar and the plaintiffs are therefore entitled to bring in new facts to meet the attack of the defendants.

53 Alternatively, the plaintiffs may re-formulate their claim so as to modify the issues or to bring new issues before the court. The plaintiffs now aver that the 'divestment agreement' consisted of the discussions in May and August 1995 and the three faxes particularized in their amended statement of claim and not the letter dated 4 September 1995. They have included two schedules setting out the payments made by the defendants and the particulars of the first defendants' alleged debt in the alternative claim. They further plead an alternative claim against the second and third defendants for the commitment fee with the outstanding amount and the interest payable specified. The plaintiffs are entitled to do so and once they have done that, it appears to me that the issues are no longer identical to those which were before the court in the O 11 proceedings. I am unable to say that these amendments are immaterial

or useless ones which do no more than re-state the same things in a different way. I also do not follow the second and third defendants' logic in their submissions that the plaintiffs should commence a fresh action instead of amending the present one.

54 If the plaintiffs' claim as originally formulated was so clearly unsustainable, one wonders why the second and third defendants took no step to strike it out since 5 January 1998 (when they filed their defence) or 16 January 1998 (when the amended defence was filed). The only move that they appeared to have made was to write to the plaintiffs' solicitors to enquire whether they would be withdrawing the action against them after the learned assistant registrar had dismissed the plaintiffs' application to amend their statement of claim on 19 May 1999.

55 It is useful to bear in mind the cautionary note sounded by the New Zealand Court of Appeal in **Joseph Lynch Land Co Ltd v Lynch** [1995] 1 NZLR 37 when dealing with issue estoppel in the context of interlocutory proceedings. At pp 42 and 43 of the report, Tipping J (who delivered the judgment of the court) said:

In principle a sufficiently final and certain conclusion can no doubt be found in what is effectively an interlocutory judgment so as to found a subsequent issue estoppel. We consider, however, that considerable caution is necessary before coming to such a conclusion. If the parties have clearly accepted that an interlocutory ruling on a point shall be finally decisive between them then no doubt an issue estoppel or even a cause of action estoppel may arise....

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. We consider that the statement in **Cross** at para 12.9 (p 317) that a decision on an interlocutory matter will not suffice for an issue estoppel is too widely expressed. But the need for caution in the interlocutory field is supported by the decision of the English Court of Appeal in **Bobolas v Economist Newspaper** [1987] 3 All ER 121 in which the court held that rulings made and issues decided by a judge in the course of a trial where no final decision had been reached and a retrial had been ordered were not res judicata and were not binding at the retrial whether by way of issue estoppel or otherwise.*

*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.

56 I therefore allowed the plaintiffs to amend their statement of claim and granted the second and third defendants leave to re-amend their defence within three weeks after service of the amended statement of claim. I also ordered costs of the amendment fixed at \$2,000 to be paid by the plaintiffs to the second and third defendants but that costs of the appeal before me should be costs in the cause.

57 **Outcome:**

58 Appeal allowed.

Tay Yong Kwang JC

Valerie Tan (Harry Elias Partnership) for the plaintiffs/appellants
Josephine Chong (David Lim & Partners) for the second and third
defendants/respondents
