[2011] JMCA Civ 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 31/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**TEWANI LIMITED**	**APPELLANT**
AND	**INDRU KHEMLANI**	**RESPONDENT**

Miss Carol Davis for the appellant

Mrs Denise Kitson and Miss Sherise Gayle instructed by Grant Stewart Phillips & Co for the respondent

9, 11 May and 29 July 2011

MORRISON JA

[1] I have read in draft the judgment of my brother Dukharan JA. I agree with his reasoning and conclusion and have nothing to add.

DUKHARAN JA

[2] This is an appeal against the decision of Brooks J striking out the appellant's claim as being an abuse of the process of the court and in contravention of the rules of issue estoppel.

Background to the Appeal

[3] The genesis of this matter was the appellant's purchase of premises at 70A King Street at an auction. He was registered as proprietor of the property in 2001. The respondent was the former owner of the property but remained in possession of same until 31 December 2010.

[4] By consolidated Claims No T024 of 2001 and T151 of 2001, the appellant sought possession and mesne profits respectively for the respondent's occupation of the said premises. The appellant was successful in its claim and on 4 December 2006, Beswick J granted the appellant mesne profits as reasonable rental for the years 2001 to 2006, based on evidence before the court from a valuer, David Delisser. The order of Beswick J reads as follows:

> "1. … Judgment for the claimant Tewani Ltd for mesne profits in the amount to be calculated as follows:
>
> | | |
> |---|---|
> | 2001 | $1,356,686.70 |
> | 2002 | $1,493,975.90 |
> | 2003 | $1,643,373.40 |
> | 2004 | $1,807,228.90 |
> | 2005 | $1,987,951.80 |
>
> Total to 2005 $8,289,216.70
>
> For 2006 rental of $181,500 per month until Mr Khemlani vacates the premises.
>
> 2. In the claim by Tewani Ltd. against Mr Khemlani for possession of 70A King Street:
>
> Judgment for Tewani Ltd. Mr Khemlani to give up possession within <u>twelve weeks of today</u>." (emphasis supplied)

[5] The respondent failed to give up possession of the property within the 12 weeks. He appealed the judgment of Beswick J, and obtained a stay of execution of the judgment. The appeal was determined in this court on 1 October 2010 and the respondent gave up possession on 31 December 2010.

[6] The appellant, on 12 January 2011, filed proceedings in the Supreme Court against the respondent (Claim No CD 00002 of 2011) and claimed mesne profits for the same premises from January 2007 to December 2010. On 7 February 2011, the respondent filed an application for Claim No CD 00002 of 2011 to be struck out on the basis that the appellant was estopped from bringing the claim or any further similar claims based on the legal principle of res judicata on the grounds that:

a. the issue for determination in the action was a claim for mesne profits accrued between 1 January 2007 and 31 December 2010 in respect of 70A King Street;

b. the issue had already been adjudicated upon by the Supreme Court of Jamaica in Claim No. CLT 151 of 2001, Tewani Limited v Indru Khemlani, and was determined by the judgment of the Hon. Mrs Justice Beswick delivered on 4 December 2006; and

c. that decision was upheld by the Court of Appeal by decision delivered on 1 October 2010.

[7] On 28 February 2011 after hearing the application, Brooks J agreed with the contentions of the respondent and struck out the claim. In his brief oral judgment, Brooks J, in delivering his decision, concluded that:

> "… the present claim clearly seeks adjudication on an issue for which a judgment specifically exists. The claim must therefore be barred on at least two bases:

> "a the rules of issue estoppel; and
>
> b because it constitutes an abuse of the process of the court."

[8] It is against this background that the appellant challenges the findings of Brooks J.

Grounds of Appeal

[9] The following grounds of appeal were filed:

> "i. The Learned Judge in chambers erred in striking out the claim
>
> ii. The Learned Trial Judge erred in finding that the claim was an abuse of process
>
> iii. That the Learned Trial Judge erred in finding that issue estoppel was applicable to the claim
>
> iv. The first claim covered the period until the date of the judgment or in the alternative until the date that the Defendant [Respondent] was ordered to give [sic] possession of the premises to the Claimant [Appellant], and the Claimant [Appellant] is entitled to bring a new action for the subsequent period."

Submissions

[10] On ground two, it was submitted by Miss Davis for the appellant that it is not in the interests of justice for the appellant's claim for mesne profits for the period 2007 to 2010 to be deemed an abuse of process. While the appellant in the previous action had brought evidence before the court as to appropriate rental values for the period 2001-2006, it had no opportunity to bring similar evidence as to the period 2007 to 2010. The current claim seeks to bring that evidence before the court, and for the court to

adjudicate on it. It was further submitted that the current claim covers new issues. The respondent remained on the appellant's premises for four years after he was ordered to leave, pursuant to the judgment of Beswick J. His appeal was unsuccessful and he should not benefit from the delay, to the detriment of the appellant.

[11] Miss Davis further submitted that res judicata and abuse of process have much in common. The crucial question was to determine whether a party was seeking to raise an issue before the court which could, and should have been raised before. The court should take a broad approach and determine whether, in all the circumstances, the party's conduct is an abuse. Miss Davis relied on the case of **Johnson v Gore Wood & Co**. [2001] 2 WLR 72.

[12] In response to ground two, Mrs Kitson for the respondent, submitted that the claim was properly struck out as an abuse of the process of the court. She submitted that the matter at hand had already been adjudicated on and judgment given. Beswick J gave judgment for the appellant granting an order for possession and for mesne profits for 70A King Street in the following terms inter alia: "for 2006, rental of $181,500.00 per month until Mr Khemlani vacates the premises". The only cogent interpretation that may be given to such an order is that there is a judgment ordering the respondent to pay $181,500.00 per month until he vacated the premises, which occurred in December 2010. Mrs Kitson further submitted that the appellant, by this recent action, sought to re-litigate the amount of mesne profits for a period which had already been determined. She sought guidance for this contention from the case of

Wright v Bennett and Anor [1948] 1 All ER 227. Mrs Kitson also referred to the cases of **Gordon v Williams** (1994) 31 JLR 437, **Halstead v Attorney General of Antigua and Barbuda** (1995) 50 WIR 98 and **Johnson v Gore Wood & Co**.

[13] On ground three, it was submitted by Miss Davis that the issue of mesne profits for the years 2007 to 2010 and/or the appropriate rental values on which mesne profits could be assessed, was not judicially determined in the earlier proceedings. Beswick J had made a determination based on the evidence of Mr Delisser as to the appropriate rental value for the period 2001 to 2006. No evidence was before her as to the appropriate rental values for the period 2007 to 2010. It was further submitted that the appellant had no opportunity to present evidence as to the rental values subsequent to 2006. The issue of issue estoppel was not applicable, because the rental values for the years 2007 to 2010 were material facts which could not have been produced in the earlier proceedings.

[14] Mrs Kitson, in response, submitted in her written and oral submissions that the elements of issue estoppel have been met, in that, Beswick J clearly pronounced a judicial decision which was final and on the merits of the case which determined the issue of mesne profits for 70A King Street for the period up to when Mr Khemlani vacated the premises, and the parties are the same in both actions. She further submitted that the appellant is in fact seeking to reopen a decision of the court in respect of a period (2007 to 2010) which was definitely determined. There is no new material or fresh evidence being adduced in this claim which would entirely change the

aspect of the case. It was further submitted that the appellant could have, with reasonable diligence, adduced evidence on mesne profits beyond the judgment date. Mrs Kitson urged this court to take guidance from **Arnold v National Westminster Bank** [1990] 1 All ER 529, CA, where Dillon LJ in the conclusion to his judgment at page 543 said:

> "There can be no doubt that the courts must in general enforce the principle of res judicata. The waiting lists are long enough in all conscience, and the expense and anxiety for litigants great enough, when disputes are tried only once; they would be vastly increased if disputes were tried twice or several times. **So I would confine narrowly the special circumstances in which a party may reopen an issue already decided against him.** But there is a danger that the law will appear absurd if identical or similar cases are finally decided in different senses..." (emphasis supplied)

[15] On grounds one and four, it was submitted by Miss Davis that the overriding objective set out at rule 1.1 of the Civil Procedure Rules 2002 (CPR) is to enable the court to deal with cases justly and that to strike out the appellant's claim, without giving it the opportunity to present evidence as to the rental values for the period 2007 to 2010 would be unjust. She further submitted that the rental values are likely to have been higher in 2007 to 2010 and that the respondent wrongfully remained in its premises until 2010. The appellant, she contended, is seeking to adduce evidence relating to that period (2007 to 2010) and had no opportunity to adduce this evidence.

[16] In response, Mrs Kitson submitted that on principles of law, the appellant is not entitled to bring a claim on this issue. The judgment of Beswick J covered not only the period 2001 to 2006, but also such period up to the date when the respondent vacated the premises, which was in 2010. The learned trial judge, she said, used clear and unambiguous words, "until Mr. Khemlani vacates the premises". Mrs Kitson urged this court to dismiss the appeal and uphold the judgment of Brooks J.

The Discussion

[17] As counsel for the appellant stated, the crucial question is to determine whether a party is seeking to raise before the court an issue which could, and should have been raised before. The court has to take a broad approach and determine whether in all the circumstances a party's conduct is an abuse. The case of **Johnson v Gore Wood & Co** is quite instructive and was relied on by the appellant and distinguished by the respondent. Lord Bingham said at page 89:

> "It may very well be, as has been convincingly argued (Watt, 'The Danger and Deceit of the Rule in **Henderson** v **Henderson**: A new approach to successive civil actions arising from the same factual matter,' Civil Justice Quarterly, (July 2000), page 287), that what is now taken to be the rule in **Henderson** v **Henderson,** has diverged from the ruling which Wigram V.-C. made, which was addressed to res judicata. But **Henderson** v **Henderson** abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should 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 attack 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. It is, however, wrong to hold that because a matter could have been raised in early 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 the 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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my

> view a valuable part to play in protecting the interests of justice."

[18] Guidance can also be taken from the case of **Wright v Bennett and Anor**, where it was held that the proceedings were an abuse of the process of the court, which ought to exercise its inherent jurisdiction to prevent the respondents being called on to meet what in substance was the same charge as that in the earlier action. Tucker LJ at page 230 agreed with Somervell LJ in **Greenhalgh v Mallard** (1) (1947) 2 All ER 257 where the latter said:

> "I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that 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."

[19] It is quite clear that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. In **Gordon v Williams** it was held that, on an examination of the statement of claim in both actions filed by the plaintiff, the court was satisfied that not only were the parties the same, but the issues raised were unquestionably similar. The order striking out the previous claim constituted a final determination of the matter. The subsequent claim by the plaintiff was an attempt to litigate the matter all over again.

[20] On the question of issue estoppel, Halsbury's Laws of England 4th Edition Volume 16 para 1528 states:

> "In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered on the first action that which he seeks to recover in the second …"

[21] It can be gleaned from the evidence before Beswick J, that a determination had been made based on the evidence of Mr Delisser as to the appropriate rental values for the period 2001 to 2006, and as such, mesne profits had been assessed for that period. However, there is no indication that any evidence was presented before Beswick J as to the rental values for the period 2007 to 2010.

[22] It is to be noted that the order of Beswick J relates to the years up to 2006 with different amounts. There appears to be no assessment beyond 2006. In revisiting the order of Beswick J on 4 December 2006, it states, "… for 2006 rental of $181,500 per month until Mr. Khemlani vacates the premises… judgment for Tewani Limited. Mr Khemlani to give up possession within twelve weeks of today" (my emphasis). In my view, there is no ambiguity as to when the respondent should have vacated the premises (or, indeed, to which period the order for payment of $181,500 per month was intended to relate). It is clear from the order that the respondent should have vacated within 12 weeks of 4 December 2006, which would allow him to remain in possession up to March 2007.

[23] I am unable to agree with Brooks J that the present claim seeks adjudication on an issue for which a judgment exists. In my view, in the absence of a stay of execution of the judgment, the respondent ought to have vacated the premises by March 2007. In my view, issue estoppel does not arise in this case and bringing a claim in respect of the period beyond March 2007 is not an abuse of the process of the court.

[24] I am of the view therefore, that the appeal should be allowed and the order of Brooks J set aside. Costs to the appellant to be taxed if not agreed.

HIBBERT JA (Ag)

[25] I too agree with the reasoning and conclusion of Dukharan JA.

MORRISON JA

ORDER

Appeal allowed. Order of Brooks J set aside. Costs to the appellant to be taxed if not agreed.