Top Fresh Foods (M) Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara & Anor

HIGH COURT (SHAH ALAM) — SUIT NO 21NCVC-101–12 OF 2018
GUNALAN MUNIANDY J
31 OCTOBER 2019

Civil Procedure — Action — Striking out of action — Whether there was res judicata — Rules of Court 2012 O 18 r 19(1)(a), (1)(b) & (1)(d)

This was an application by the first defendant to strike out the plaintiff's writ and statement of claim ('SOC') pursuant to O 18 r 19(1)(b) or (d) of the Rules of Court on the ground of res judicata. The first defendant contended that the claim was based on facts which are identical to and/or in substance the same as the facts in another suit before the High Court of Malaya in Kuala Lumpur ('Suit 567') commenced by the first defendant against Muafakat Kekal Sdn Bhd ('MKSB') and the plaintiff and second defendant (as the second and third defendants in Suit 567). Suit 567 was concluded after a full trial where the learned judge allowed the first defendant's claim to which the plaintiff appealed to the court of appeal where it was dismissed.

Held, allowing the application with costs of RM3,000 subject to allocator:

(1) It is trite law that a claim should not be struck out save in exceptional circumstances where, for instance, it was without any sustainable basis or had no prospect at all of success. The strength or weakness of the claim was not a relevant factor (see para 8).

(2) In Suit 567 it was alleged that the first defendant had purportedly acted ultra vires. It was noteworthy that the present suit and Suit 567 clearly involved the same set of facts. It is indisputable that the aforesaid allegation was considered and disposed of by the court in Suit 567. It was evident from the learned judge's grounds of judgment that all relevant issues and the disputes between the parties were litigated and adjudicated in Suit 567. Thus, as the issue of ultra vires had already been fully litigated and disposed of in Suit 567, the plaintiff was now estopped from re-litigating the same issues or any other issues which were covered in Suit 567 (see paras 24–28).

(3) Although there may be several issues that may be considered different and the plaintiff had in the present case prayed for a different reliefs/orders, it was trite law that the principle of res judicata has, on the law as it stood, wide application and implications that would operate in the present scenario in the wider sense. Both suits shared the same set of facts, subject

matter and the same primary questions of law that have been litigated and adjudicated by the High Court whose decision had been affirmed by the Court of Appeal. Hence, the plaintiff would be barred from regurgitating and relitigating the issues that were essentially the same (see para 31).

[Bahasa Malaysia summary

Ini merupakan permohonan defendan pertama untuk membatalkan writ dan penyataan tuntutan selaras dengan A 18 k 19(1)(b) atau (d) atas alasan res judicata. Defendan pertama menegaskan bahawa tuntutan adalah berdasrakan fakta yang sama dengan dan/atau mempunyai intipati yang sama dengan fakta dalam satu lagi guaman dihadapan Mahkamah Tinggi Malaya di Kuala Lumpur ('Guaman 567') yang dimulakan oleh defendan pertama terhadap Muafakat Kekal Sdn Bhd ('MKSB') dan plaintif dan defendan kedua (sebagai defendan kedua dan ketiga dalam Guaman 567). Guaman 567 telah selesai selepas perbicaraan penuh yang mana Hakim terpelajar membenarkan tuntutan defendan pertama, yang mana plaintif telah merayu ke Mahkamah Rayuan yang mana ianya telah ditolak.

Diputuskan, membenarkan rayuan dengan kos RM3,000 tertakluk kepada alokatur:

(1) Adalah menjadi undang-undang mantap bahawa satu tuntutan tidak patut dibatalkan kecuali dalam keadaan luar biasa, sebagai contoh, ianya tanpa asas atau tiada kebarangkalian untuk berjaya. Kekuatan atau kelemahan tuntutan bukanlah satu faktor yang relevan (lihat perenggan 8).

(2) Dalaman Guaman 567 ianya dikatakan bahawa defendan pertama telah bertindak ultra vires. Ianya juga perlu diingat bahawa guaman ini dan Guaman 567 dengan jelas melibatkan fakta yang sama. Ianya tidak boleh dinafikan bahawa pengataan tersebut telah dipertimbangkan dan diselesaikan oleh Mahkamah dalam Guaman 567. Ianya jelas daripada alasan penghakiman hakim terpelajar bahawa semua isu relevan dan pertelingkahan diantara pihak-pihak telah dibicarakan dan diputuskan dalam Guaman 567. Oleh itu, isu ultra vires telah pun dibicarakan dan diselesaikan dalam Guaman 567, plaintif kini dihalang daripada membicarakan isu yang sama atau apa-apa isu lain yang telah diselesaikan dalam Guaman 567 (lihat perenggan 24–28).

(3) Walaupun terdapat beberapa isu berbeza yang boleh dipertimbangkan dan plaintif telah dalam kes ini memohon untuk relif/perintah yang berbeza, adalah menjadi undang-undang mantap bahawa prinsip res judicata telah, berdasarkan undang-undang, pengunapakaian yang luas dan implikasi yang ianya akan digunapakai dalam keadaan kini. Kedua-dua guaman berkongsi fakta, bahan teras dan persoalan undang-undang yang sama yang telah dibicarakan dan diadili oleh

A Mahkamah Tinggi yang mana keputusannya telah dikekalkan oleh Mahkamah Rayuan. Oleh itu, plaintif dihalang dari membicarakan semula isu yang pada asasnya adalah sama (lihat perenggan 31).]

Cases referred to

B *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

C *Hap Seng Consolidated Bhd v Darinsok bin Pangiran Apan & Ors and another appeal* [2014] 1 MLJ 335; [2014] 1 CLJ 333, CA (refd)

Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body [2014] 3 MLJ 467, CA (refd)

See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235, CA (refd)

D **Legislation referred to**

Rules of the High Court 1980 O 18 r 19(1)

Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(d)

Strata Management Act 2013 ss 15, 42, 59, 76, 143, 143(2)

E Strata Titles Act 1985 s 42(1)

Muhammad Azwar (Azwar & Partners) for the plaintiff.

Justin TY Voon (Yap Bing Yew with him) (Justin Voon Chooi & Wing) for the first defendant.

F *Maizurah Munirah (State Legal Advisor, State Legal Advisor's Office) for the defendant.*

Gunalan Muniandy J:

G **[1]** This is a notice of application (encl 8) by the first defendant ('D1') in this civil action to strike out the plaintiff's writ and statement of claim ('SOC') pursuant to O 18 r 19(1)(b) or (d) of the Rules of Court 2012 and/or the court's inherent jurisdiction.

H **[2]** The gist of encl 8 is summarised in the plaintiff's submission as follows:

> ... D1's application is solely on the ground of res *judicata* ... According to D1, the cause of action filed by the Plaintiff has been adjudicated, there was a judgment and its finality has been decided. It was also alleged by DS1 that issues of fact and law were previously adjudicated and disposed of before a different Court.

I D1'S CONTENTIONS AND BACKGROUND FACTS

[3] It was first and foremost submitted that the claim herein is actually based on the facts which are identical to and/or in substance the same as the facts in

Suit No 22NCVC-567–10 of 2013 ('Suit 567') in the High Court of Kuala Lumpur ('KLHC') commenced by D1 against one Muafakat Kekal Sdn Bhd (as D1 in Suit 567 and hereinafter referred to as 'MKSB'), the plaintiff (as the second defendant in Suit 567) and the second defendant in the plaintiff's claim herein (as the third defendant in Suit 567), where, inter alia:

(a) at all material times, the plaintiff is the management corporation of Palm Spring Condominium ('the condominium');

(b) the development order for the condominium which was approved by Majlis Bandaraya Petaling Jaya ('MBPJ') required MKSB as the developer of the condominium to provide Block J as a 'taska' (ie kindergarten as part of the 'Kemudahan Umum Yang Disediakan' alongside other common facilities);

(c) vide a sale and purchase agreement ('SPA') dated 20 September 2006, MKSB sold Block J (ie, the common facilities under the said development order) together with 44 car parks (accessory parcels) to the plaintiff for the consideration of RM200,000 only; and

(d) thereafter, the plaintiff was registered as the owner of the strata title for Block J together with the 44 accessory parcels by D2 on or about 1 November 2009.

[4] In Suit 567 commenced by D1 the following reliefs were sought:

(a) a declaration that Block J is a common property;

(b) a declaration that the sale and purchase agreement between MKSB and the plaintiff dated 20 September 2006 in respect of Block J together with the 44 accessory parcels is invalid and unenforceable;

(c) an order that the name of the plaintiff be removed from the strata title as the owner for Block J; and

(d) an order that the strata title for Block J be cancelled and the ownership of Block J to be transferred to D1 for the purposes of management and maintenance.

[5] Suit 567 was concluded after a full trial where both parties called their respective witnesses and the learned judge allowed D1's claim on 11 November 2014. Thereafter, the plaintiff appealed to the Court of Appeal but it was dismissed on 8 September 2015.

THE PLAINTIFF'S CASE

[6] D1 has to show to this court that the whole cause of action has been decided and that the current case is similar not only on the facts with the

previous suit but that the subsequent judgment upon disposal of this claim would result in the same effect. Meaning, the reliefs sought by the plaintiff in the current case shall also have been decided before another court.

[7] D1's application has no resemblance as to the facts and the reliefs sought that have been adjudicated and there were no other similar reliefs pronounced before the other court.

[8] The cause of action relied upon by the plaintiff is founded and based on 'Ultra Vires' cause of action in the sense that D1 has exceeded its statutory powers under the Act.

[9] There are glaring differences as to the reliefs sought by the litigants in the current suit and the previous suit referred to by D1.

[10] There are ample facts and which have not been litigated and the laws governing the surrounding facts need to be ascertained.

[11] The plaintiff's claim now is governed by different laws and relate to different facts altogether. The plaintiff is invoking the principle of ultra vires against D1 when exercising its powers under s 42(1) of the STA and also relying on ss 15, 59, 76, 42 of Act 757. This must be given consideration and the representative from D1 must be given an opportunity to testify at a different trial involving different issues altogether.

[12] The grounds of judgment in the previous suit have no bearing to this case as it was decided on its own facts which are wholly different from this case.

[13] The current action was never intended to reopen a case which was already litigated. The case at hand is totally different as the previous suit involves one more defendant, which is Muafakat Kekal Sdn Bhd. But it is not named in this suit and therefore, it cannot be said that all parties are the same.

[14] The plaintiff is now commencing this action in a totally different capacity from the previous suit where the plaintiff in that suit is now sued as the second defendant.

THE LAW ON STRIKING OUT OF PLEADINGS

[15] Order 18 r 19(1)(a), (b) and (d) of the ROC provide as follows:

> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, on the ground that —
>
> (a) It discloses no reasonable cause of action or defence, as the case may be;

(b) It is scandalous, frivolous and vexatious; A

(c) ...

(d) It is otherwise an abuse of the process of Court,

And may order the action to be stayed or dismissed or judgment be entered accordingly, as the case may be. B

[16] The principles applicable to the exercise of the court's discretionary powers under O 18 r 19(1) of the RHC have been lucidly expressed by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 where Mohd Dzaiddin SCJ (later CJ) pronounced that: C

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* 7, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co* 8). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence ... D E

[17] It is trite law that a claim should not be struck out save in exceptional circumstances where, for instance, it is without any sustainable basis or has no prospect at all of success. The strength or weakness of the claim is not a relevant factor. In the Court of Appeal case of *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235, Ramly Ali JCA (as he then was) concluded that: F

> The statement of claim is not hopeless, baseless or without any foundation in law. The statement of claim may not be perfect and 'not-so strong' in supporting the appellants' claim; but the mere fact that the case is weak and is unlikely to succeed at trial is not a ground for the claim to be struck out. G

Further that: H

> Striking out a claim for no reasonable cause of action under sub-para (1)(a) is only appropriate in a plain and obvious case. The learned judge must be satisfied that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief which they asked for. The procedure is a summary procedure. It should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. Just look at the statement of claim. The test to be applied is whether on the face of the statement of claim, the court is prepared to conclude that the cause of action is obviously unsustainable (see Federal Court decision in *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226). I

[18] In *Hap Seng Consolidated Bhd v Darinsok bin Pangiran Apan & Ors and another appeal* [2014] 1 MLJ 335; [2014] 1 CLJ 333 the Court of Appeal held:

> The court will only strike out a writ and statement of claim when it is plainly obvious that the action cannot be sustained and was liable to be struck out pursuant to O 18 r 19 of the Rules of the High Court 1980. Herein, this was not a proper and fit case for the plaintiffs' writ and statement of claim to be struck out. ...

ANALYSIS OF ISSUES AND EVIDENCE

[19] In contending that D1 did not have a case to answer based on the plaintiff's pleadings, the main thrust of D1's submission was that its application ought to be allowed, premised, inter alia, on the basis that the plaintiff's action herein is clearly barred by res judicata and/or issue estoppel.

[20] In essence, the plaintiff in the present suit alleges that, in commencing Suit 567 against MKSB and the plaintiff, D1 was ultra vires, and/or in excess of power under the Strata Management Act 2013 ('the SMA') the details of which are as enumerated in D1's written submission.

[21] In regard to the fundamental issue of res judicata, the plaintiff's contention is twofold:

(a) it is imperative that D1 must show to this court where are the facts, what are the similar facts that are now being adjudicated upon which were already adjudicated and not merely rely on the grounds of judgment. Further, the deponent must show to this court in his affidavits which part of the statement of, claim or the grounds of judgment give rise to res judicata. Simply invoking res judicata but failing to address which are issues in question would, thus, tantamount to uncertainty and is vagueness at best. D1 cannot in this application deny the plaintiff's right to challenge which material facts lead to res judicata; and

(b) there are glaring differences as to the reliefs sought by the litigants in the current suit and the previous suit referred to by D1. The said reliefs can be found in para 34 of Suit 567 (p 28 of the AIS) and in para 22.

[22] Thus, the reliefs sought by the plaintiff aretotally different in each suit which render them issues to be tried (no matter how weak) in the plaintiff's case and merited a full trial and should not be dismissed.

[23] Further, the plaintiff asserts that the issues raised in this claim are not only new but bona fide as well and would not result in a conflicting outcome than the one in Suit 567.

[24] Apart from the main issue of res judicata, D1 also raised the issue. of the presentation being unsustainable for being premised on the wrong law. It arises from the plaintiff's allegation that D1 was a management corporation purportedly established under the Strata Management Act 2013 ('Act 757') and premised its claim substantially on, inter alia, ss 15, 42, 59 and 76 of Act 757 (refer to paras 2, 11–12 of the statement of claim). Further, the main prayers and/or reliefs in paras 22(a), (b), (c) and (e) of the statement of claim directly refer to relief under Act 757.

[25] Hence, the plaintiff's primary allegation in para 2 of the SOC can be considered misconceived as D1 was not established under Act 757 but in fact established under Strata Titles Act 1985 ('the 1985 Act') of which the plaintiff clearly stated in the intitulement of the writ and statement of claim that D1 was established under the 1985 Act.

[26] As pointed out, the reference to Act 757 is completely misplaced and out of context when the said Act only came into force in 1 June 2015.

[27] As Suit 567 was only filed on 4 October 2013, Act 757 would not be applicable to all the facts of this case which transpired before 1 June 2015.

[28] At the material time in 2013, the applicable law was the Strata Titles Act 1985 ('the 1985 Act'). Under s 42(1) of the 1985 Act the management corporation ('MC') (D1 in this case) is the proprietor of common property.

[29] It is beyond dispute that a MC has an interest and locus to sue for common property by virtue of:

(i) Section 76(1) of the 1985 Act which provides that:

> 76 Management corporation as representative of proprietors in legal proceedings
>
> (1) Where proprietors are jointly entitled to take legal proceedings against any persons or are liable to have legal proceedings taken against them jointly, where such legal proceedings are proceedings for or with respect to common property, the legal proceedings may be taken by or against the management corporation, and any judgments or orders given or made in favour of or against the management corporation in any such legal proceedings shall have effect as if they were judgments or orders given or made in favour of our against the proprietors.

(See also *Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body* [2014] 3 MLJ 467 at p 484 (Court of Appeal)).

[30] In any event, assuming that Act 757 is applicable in the present suit, it does not assist the plaintiff's case as s 143 of Act 757 clearly provides that a

management corporation may commence proceedings in respect of common property by virtue of s 143(2) of Act 757 which reads as follows:

> 143 Representation in proceedings
>
> (2) Where all or some of the parcel owners or proprietors of the parcels in a development area:
>
> (a) are jointly entitled to take proceedings for or with respect to the common property in that development area against any person or are liable to have such proceedings taken against them jointly; or
>
> (b) are jointly entitled to take proceedings for or with respect to any limited common property in that development area against any person or are liable to have such proceedings taken against them jointly.
>
> the proceedings may be taken:
>
> (A) in the case of paragraph (2)(a), by or against the joint management body or management corporation; or
>
> (B) in the case of paragraph (2)(b), the subsidiary management corporation constituted for that limited common property,
>
> as if the joint management body, management corporation or subsidiary management corporation, as the case may be, were the parcel owners or the proprietors of the parcels concerned.

[31] Hence, it cannot be disputed that the plaintiff's present action premised on Act 757 is misconceived, without basis and unsustainable.

[32] More importantly, D1's primary contention is that the plaintiff's action herein is barred by res judicata and/or issue estoppel.

[33] In Suit 567, it was alleged that D1/plaintiff in that case had purportedly acted 'ultra vires' or in excess of its statutory powers. The present plaintiff alleged in its statement of defence in Suit 567 that D1 had no power to commence that action as the plaintiff pursuant to the 1985 Act (refer to para 12 of the defence).

[34] It is noteworthy that the present suit and Suit 567 clearly involve the same set of facts, of which the plaintiff did not deny knowledge and common core issues.

[35] It is indisputable that the aforesaid allegation was considered and disposed of by the court in Suit 567. Clearly, the High Court in Suit 567 did not agree with the plaintiff's contentions and ruled in favour of D1 in allowing its claim.

[36] It was evident from the learned judge's grounds of judgment that all the relevant issues and the dispute between the parties were litigated and adjudicated in Suit 567. Hence, D1 was correct in contending under the circumstances that:

> If there are any other issues left out by the Plaintiff in Suit 567, whether deliberately, negligently and/or inadvertently, the Plaintiff cannot raise it again here by reason of the principle of res judicata, including in the 'wider sense'.

[37] Thus, as the issue of ultra vires as adverted to has already been fully litigated and disposed of in Suit 567, the plaintiff is now estopped from relitigating the same issues herein and/or any other issues which were covered in Suit 567 as it would be tantamount to allowing the plaintiff to file its suits by instalments.

[38] The leading case on this aspect of the law is *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 200 (SC):

> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have beeh and which were not brought forward as described, though not actu,ally decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel per rem judicatum.
>
> We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.
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> It is further necessary at this stage to understand the import of the words in the said famous statement, ie '... every point which properly belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:
>
> > ... 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.

A DECISION

[39] Having considered the grounds advanced by the applicant/first defendant ('D1') in support of encl 8, the previous history of the dispute between the same parties, particularly the previous action ('Suit 567'), the contentions of both parties, the law applicable and the factual background of both suits, the court upholds D1's contention that the doctrine of res judicata ('RJ') would operate in this case to bar the commencement of present suit.

[40] Inter alia, although there may be several issues that may be considered different and the plaintiff/respondent has in this present instance prayed for different reliefs/orders, it is trite law that the principle of RJ has, on the law as it stands, wide application and implications that would operate in the present scenario in the wider sense. Both suits share the same set of facts, subject matter and the same primary questions of law that have been litigated and adjudicated by the High Court whose decision has been affirmed by the Court of Appeal. Hence, in principle and policy, the plaintiff would be barred from regurgitating and relitigating the issues that are essentially the same.

[41] In any event, the wrong law, which had yet to come into force has been cited as the basis and substratum of this action, which is, thus, rendered flawed and baseless.

[42] I, therefore, conclude that the plaintiff's suit does not disclose a reasonable and plausible cause of action in law and on the facts but is obviously unsustainable and frivolous, vexatious and an abuse of the court process.

[43] Enclosure 8 is, accordingly, allowed with costs.

[44] An order in terms is granted of prayers (i), (ii) and (iii).

[45] Costs of RM3,000 to D1, subject to allocatur.

Application allowed with costs RM3,000 subject to allocator.

Reported by Izzat Fauzan