IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CIVIL APPEAL. NO. 20 OF 1993
GRAND COURT CAUSE NO. 434 OF 1992

BEFORE: THE RT. HON. MR. JUSTICE EDWARD ZACCA, PC., OJ. PRESIDENT
THE RT. HON. MR. JUSTICE P. TELFORD GEORGES, PC., JA.
THE HON. MR. JUSTICE JAMES KERR, JA.

BETWEEN:	G.H. LTD GEORGE TOWN, GRAND CAYMAN	APPELLANT/ PLAINTIFF
AND:	MARTYN BOULD GEORGE TOWN, GRAND CAYMAN	FIRST RESPONDENT/ FIRST DEFENDANT
AND:	PHYLLISSON LTD. GEORGE TOWN, GRAND CAYMAN	SECOND RESPONDENT/ SECOND DEFENDANT

Mr. Ramon Alberga QC. instructed by Mr. Brian Ashenheim of Messrs. Myers & Alberga for the Appellant.

Mr. Leo-Rynie QC. instructed by Mr. Alan Turner of Messrs. W. S. Walker & Co. for the 1st and 2nd Respondent.

On 6th, 7th, 8th, 9th December, 1994 and 20th April, 1995

JUDGMENT

This is an appeal from a ruling by Schofield J. striking out the writ of summons and the statement of claim in this action as an abuse of the process of the court and as being vexatious.

G. H. Ltd., the appellant plaintiff, was formed for the purpose of developing and marketing a luxury condominium complex called the Great House on Seven Mile Beach in Grand Cayman. The first respondent, Martyn Bould, (Mr. Bould) was the promoter of G. H. Ltd. and, on June

3, 1988, was its sole director. Mr. Bould was also the sole beneficial owner of the second respondent, Phyllisson Limited, (Phyllisson) a company limited by guarantee.

The land on which the Great House was to be built was owned by Mr. Webster through a family company - Newco. Newco, by an agreement, granted G. H. Ltd. an option to purchase the land for US$4 million; payable as to $2 million in cash and on completion of the sale by the issue to Newco of US$2 million in preference shares in G. H. Ltd. The capital of G. H. Ltd. consisted of $50,000 in ordinary shares of $1.00 each and $4.5 million in preferred shares also of a par value of $1.00 each. Of the preferred shares US $2 million would have to be issued to Newco on completion of the sale and US $2.5 million would be issued for cash to other investors. The option to purchase expired on June 30, 1988 and could not be exercised unless two conditions were met - Mr. Bould had to raise US $2.5 million in cash from the sale to investors of the preference shares and he had to secure contracts for the purchase of 12 apartments.

On June 3, 1988, while Mr. Bould was the sole director of G. H. Ltd. Phyllisson entered into a contract with G. H. Ltd. to purchase apartment 21 in the Great House complex. Mr. Bould did not notify the intended investors in G.H. Ltd. that he was the sole beneficial owner of Phyllisson. Indeed he told Mr. Webster in May 1988 that Phyllisson was owned by an Englishman well Known to him (Mr. Bould). In November 1988 he told another investor in G. H. Ltd. that Phyllisson was owned by a friend of his in England and that he was a minor partner - later corrected to shareholder - in the company.

As the development proceeded Mr. Webster and three other major investors in the project grew dissatisfied with Mr. Bould's management. Eventually they gained control of G. H. Ltd. and on September 28, 1990 the company served notice on Phyllisson that it was rescinding the contract for the purchase of apartment 21 on the ground that -

> "Martyn Bould the sole director of G. H. Ltd. at the date of (sic) the contract was made did not disclose to G. H. Ltd. or to its shareholders that he had a financial interest in Phyllisson Ltd. which he should have

> disclosed to G. H. Ltd. and that Phyllisson Ltd. was at that time aware of Martyn Bould's interest in G. H. Ltd."

Phyllisson filed an action - No. 401 of 1990 - against G. H. Ltd. claiming a declaration that the notice of rescission was ineffectual, an order that G. H. Ltd. perform its obligations under the contract and damages for breach of contract. G. H. Ltd. counter-claimed for a declaration that it was entitled to rescind the contract and in the alternative for damages for conspiracy.

The trial of that action took place before Schofield J. Hearing began on October 30, 1991 and continued for 3 weeks. In the course of that period of hearing Mr. Bould was cross-examined and admitted under cross-examination for the first time that he was the sole beneficial owner of Phyllisson. Hearing resumed on January 13, 1992 and continued to February 6, 1992. There were further hearings on March 9 and 10, 1992. Written closing submissions were handed to the judge on March 11, 1992 and on July 1, 1992 he delivered his judgment. He found that Phyllisson was not entitled to any of reliefs sought. This was based on his finding that -

> "Phyllisson, through its beneficial owner Bould, practised and continued a deceit on the shareholder of G. H. Ltd. to whom Bould owed a duty of disclosure".

He also declared that G. H. Ltd. was entitled to rescind the Phyllisson contract. G. H. Ltd. was, however, to compensate Phyllisson by -

> "repayment of all installments so far paid together with interest and payment of all expenses related to the alteration".

That sum was apparently agreed at $676,937.35. There has been no appeal from that judgment.

On November 18, 1992, G. H. Ltd. filed this action against Mr. Bould and Phyllisson for -

> "1. Damages for deceit including interest paid by the Plaintiff to the Second Defendant by way of restitutio in integrum pursuant to the judgment of Mr. Justice Schofield ....
>
> 2. Interest.

3. An injunction restraining the Defendants from removing, disposing of or otherwise dealing with the money paid to the Second Defendant by way of restitutio in integrum pursuant to the judgment of Mr. Justice Schofield aforementioned until further order of this Honourable Court.

4. A declaration that the said money is held by the Second Defendant as trustee for the Plaintiff as creditor of the Second Defendant, the First Defendant or both."

The statement of claim filed on December 29, 1992, after reciting the facts, described Phyllisson as being -

> "in equity the alter ego of the First Defendant as agent for an undisclosed principal in the perpetration of the deceit on the Plaintiff and its shareholders......"

Paragraph 22 stated -

> "22. The First Defendant's original act of deceit on 3rd June, 1988, in not declaring his interest in the Second Defendant to the potential shareholders or an independent Board of Directors of the Plaintiff was the direct cause of loss or damage to the Plaintiff amounting to the difference between the amount of taxed costs which the Second Defendant pays to the Plaintiff and the actual costs to the Plaintiff of defending Cause No. 401 of 1990 since an honest declaration of interest at that time would have made it impossible for that suit to have been issued, as the Agreement for Sale would either have been rescinded or ratified at that time.
>
> **Particulars**
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> (i) The amount of the actual costs was US$772,492.00. The amount of the taxed costs has yet to be determined and will be provided to the Defendants.
>
> (ii) Interest to be calculated by reference to the figures determined under (i) above.

Additional loss and damage were claimed but these are not crucial to the issues now to be considered.

The defendants on January 11, 1993 filed a summons applying for an order that the writ of summons and statement of claim be dismissed on three grounds - that they disclosed no cause of action, that they were vexatious and that they were an abuse of the process of the Grand Court. Schofield J acceded to the application, hence this appeal.

In reaching his conclusion the trial judge relied on the doctrine of res judicata in its wider sense as stated in **Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. and another** [1975] A.C. 581

at p. 590 -

> "....there is a wider sense in which the doctrine (of res judicata) 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. The locus classicus of that aspect of res judicata is the judgment of Wigram V -C in **Henderson** v **Henderson** (1843) 3 Hare 100, 115, where the 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."

In the opinion of the trial judge the statement of claim did no more than recite the facts which had emerged in the trial of action #401 of 1990. The very essence of that suit was Mr. Bould's deceit in failing to declare the full extent of his interest in Phyllisson. The claim which was the subject of action #434 of 1992 could, therefore, have been raised in the course of the trial of action #401 of 1990 by amending the pleadings and adding Mr. Bould as a party to the counterclaim filed by G. H. Ltd. in that action.

It was forcefully urged on appeal that the principle applied in the **Yak Tung Investment Co. Ltd.** case applied only to the raising of points which could properly have been the subject matter of the earlier litigation. It did not apply to the adding of parties. Mr. Bould had not been a party in action #401 of 1990 and although the trial judge had stated that an application to have him joined would "inevitably" have been granted that was not necessarily so. The application would almost certainly have been stoutly resisted in which event it may well not have been granted.

Reliance was placed on the reasoning of Megarry V -C in **Gleason** v **J. Wippell & Co.** [1977] 1 W.L.R. 510. The plaintiff in that case

claimed for breach of copyright of drawings for the manufacture of a clerical collar which she had designed. In 1970 she had filed an earlier action against H. R. Denne Ltd. also for breach of copyright of her drawings of the collar. Her claim then was that H. R. Denne Ltd. had copied a shirt manufactured by the defendant H. R. Wippell (which was not disputed) and that H. R. Wippell Ltd. had indirectly copied her drawings by copying her shirts which were made from those drawings. A central issue in her case against H. R. Denne Ltd. was whether the Wippell shirt infringed the plaintiff's copyright. This fell to be decided in the action against H. R. Denne Ltd. to which the defendant, J. Wippell & Co. Ltd. was not a party.

The plaintiff failed in that action. When subsequently she filed the claim for breach of copyright against J. Wippell and Co. Ltd. the defendant applied to have the action struck out on the ground that that issue had been decided against her in the action against J. R. Denne Ltd. The application was based on the wider principle of res judicata stated in the **Yat Tung Investment Co. Ltd.** case.

Meggary V -C stated at p, 517 -

> ".....Mr. Skone James contended that in the Denne proceedings it was so plain that Wippell was at the heart and core of the case that the plaintiff ought to have joined Wippell, and that as she failed to do so, she ought not now to be permitted to sue Wippell. In the Yat Tung cas, the question was one not of failure to add a party, but of failure to advance a contention. There was a sufficient identity of parties in the two sets of proceedings, but the Judicial Committee of the Privy Council held that the statement of claim in the second action should be struck out as being an abuse of a process of the court because it was founded on a contention which ought to have been advanced in the first action, but which had not been. Mr. Skone James very properly accepted that he was seeking to extend the Yat Tung case, but urged that there was no great difference between adding contentions and adding parties.
>
> It seems to me that the difference is very considerable. Where there is a chain of possible defendants, running perhaps from a designer to a manufacturer, and thence to a wholesaler, and then to a retailer, with some degree of dependence of one upon another a plaintiff may be put in a position of some difficulty. Some defendants may be more worth powder and shot than others; but if Mr. Skone James is right, the failure to join a possible defendant in the chain may mean that, whatever additional evidence or acquisition of riches subsequently emerges, that possible defendant cannot be sued in subsequent proceedings. At least for those in the chain, those not sued initially will be released. Furthermore, if the plaintiff succeeds against those whom he sues, then those in the chain who have not been sued may be told that they are bound by the decision. Mr. Skone James's riposte was that they could avoid being

> condemned unheard by applying to be joined as defendants; but this seems to me to be unrealistic. If this were the law, there would no doubt be what some would regard as bigger and better litigation, with a multiplication of parties.
>
> I fully accept, of course, that it will often be desirable not to have a series of successive actions in place of one action with many parties; but circumstances vary greatly, and it is impossible to lay down rules for every case. Sometimes a multiplicity of parties would make litigation too cumbersome, protracted and expensive. The doctrine for which Mr. Skone James contends seems to me to be one that will put litigants into a position of some peril, requiring them to judge correctly whether or not the case is one in which under Ord. 15, 6. 6(2)(b)(ii) a court would or would not add parties......."

It is clear that Megarry V -C was not attempting to lay down a general rule. As he pointed out in the course of his judgment, if he debarred the plaintiff from suing J. Wippell & Co. Ltd. it would follow that had the plaintiff succeeded against H. R. Denne and Co. Ltd. and had subsequently sued J. Wippell and Co. Ltd. - that company would be debarred from defending on the basis that the core issue had been decided against it in the earlier case - a clearly unacceptable position.

It should also be noted that in the <u>Yat Tung Investment Co. Ltd.</u> case the raising of the issue which was the subject matter of the subsequent action would have require the addition of another party, Choi Kee, to which the mortgaged premises had been sold.
The matter receives no attention in the judgment. This can only be because it was so obvious that leave to add that party would have been granted that the issue needed no discussion, the position which was here quite correctly adopted by the trial judge.

In the case of <u>Gleason v Wippell & Co.</u> (supra) Megarry V -C was dealing with a "chain of possible defendants". He also made clear that in the <u>Yat Tung</u> case "there was sufficient identity of parties in the two sets of proceedings." In the matter before him he held that there was no identity of parties. The connection between Wippell & Co. and H. R. Denne Ltd. was purely one of contract. In this case there was clearly an identity of interest between Mr. Bould and Phyllisson. Indeed the appellant itself describes Phyllisson as the "alter ego" of Martyn Bould.

It was strongly urged that res judicata in the broader sense can only apply to cases where the issue raised in the subsequent action was at the first action decided against the party raising it at that subsequent action. A party successful on an issue in an earlier action cannot be debarred from pleading that issue in another action where that issue is an element to be proved in establishing a different cause of action.

Particularly relied on was a passage from **Spencer Bowen and Turner** Res Judicata para 197 p. 160 -

> "Whenever it is shown that the party against whom a judicial decision is ultimately pronounced omitted to raise by pleading, argument, evidence, or otherwise some question, or issue, or point which he could have raised in his favour by way of defence or support to his case without detriment to his position or interests in the pending, or in future, proceedings, and which, therefore, it was his duty (in a sense) to have then raised, the adverse general decision, though it contains no express declaration to that effect, is deemed to carry with it a particular adverse decision on the question, issue, or point so omitted to be raised, just as much as if it had been expressly raised by the party, and expressly determined against him. And this is so whether the question or issue is simply passed over through inadvertence, or is made the subject of express or implied assumption or admission.
>
> The decision generally cited as the prime authority on this principle is that of **Sir JAMES WIGRAM, V-C.** in Henderson v Henderson so long ago as 1843."

In Henderson v. Henderson (supra) it was the unsuccessful party in proceedings in Nova Scotia who filed proceedings in England and was met with the demurrer that all and every part of the matter in question had been concluded by a final decree of the Supreme Court of Nova Scotia. The formulation of the principle by Wigram V.-C refers, however, to the "parties" to litigation being required to bring forward their whole case whenever a given matter becomes "the subject of litigation". As Schofield J observed, the reported cases would predictably involve unsuccessful parties seeking a reversal of a decision against them. Successful parties are more likely to garner the fruits of their success and leave well alone.

The subject of litigation in action #401 of 1990 was Mr. Bould's failure to declare his interest in Phyllisson when Phyllisson

contracted on June 3, 1988 to purchase Apartment 21. To succeed in the counterclaim for rescission filed in that suit G. H. Ltd. did not have to prove deceit on the part of Mr. Bould but the evidence available even before the commencement of the trial pointed to deceit. Mr. Bould had told Mr. Webster in May, 1988 that Phyllisson was an Englishman whom he knew well. Subsequently in November, 1988, Mr. Bould stated in writing that he was a minority shareholder in Phyllisson. Certainly by November, 1991, as Schofield J correctly stated, it was obvious that Mr. Bould had been lying. If damages for deceit could be claimed the proceedings could have been amended to include such a claim.

It has been contended that the damage claimed subsequently in this action could not have been claimed then. The damage would have been suffered only when action #401 of 1990 had ended favourably for G.H. Ltd. an order for costs obtained and a deficit realised between the amount actually spent and the sum awarded on taxation of costs.

I find this contention unacceptable. It is possible to determine that a plaintiff will suffer damage even though quantum of that damage cannot at that stage be assessed. Not infrequently a case is heard in two stages - a determination of liability to be followed by an assessment of damages. This procedure could have been adapted had the pleadings in action #401 of 1990 been amended to include the claim for damages for deceit.

There would appear, however, to be good reason why G.H. Ltd. would not have wished to adopt that course. Had the pleadings been amended to include a claim for damages for deceit, an award of costs on the successful outcome of the action in favour of G. H. Ltd. would have been an award in the action for deceit. The authorities are quite clear that in such circumstances it is not possible to claim as damages the difference between costs as taxed and amount actually spent. It was vital to have separate actions so that the difference claimed was the difference between actual outlay and taxed costs in the first action.

As is stated in McGregor on Damages 15th Ed., para 663 -

> "Not even where the plaintiff was formerly involved necessarily in two separate actions with the defendant could he normally claim as damages in the second action the costs incurred by him in the first action which went beyond those awarded by the court therein; now that relief can be claimed in one action this situation will not even arise today."

Even if the principle stated in the Yat Tung Investment Co. Ltd. case did not strictly apply to this case, (the plaintiff being the successful party in action #401 of 1990) it would appear that it was an abuse of the processes of the court to refrain from seeking an amendment to permit the hearing of both claims when plainly the joinder of the two claims would have made the claim for damages for deceit as framed in the instant case clearly unsustainable.

Strong reliance was placed on three cases which Schofield J correctly distinguished as inapplicable.

In Goldrei Foucard & Son v Sinclair et al [1918] 1 K.B. 180, the point at issue was whether the case fell within the principle laid down in King v Hoare (1844) 13 M & W 404, Kendall v Hamilton (1879) 4 App Cas. 504 and Brinsmead v Harrison (1872) L R 7 C. P. 547. This principle is that if judgment be given against one of two joint tortfeasors, the whole cause of action merges in that judgment and therefore the action cannot proceed against the other tortfeasor. This was categorised as a "technical rule". The court held in the case that the causes of action were different in relation to each tortfeasor - damages for fraud against one and a claim for rescission against the other for which proof of fraud was not necessary. A judgment granting an order for rescission did not therefore preclude seeking a judgment for damages for fraud. No issue of res judicata was considered and Henderson v. Henderson supra was not mentioned.

In Republic of India and anor v India Steamship Co. Ltd [1993] 2 W.L.R. 461, the issue turned on the interpretation of the Civil Jurisdiction and Judgments Act 1982 Section 34. The claim was for damages to a consignment of goods under a bill of lading. The plaintiff sued in Cochin, India for short delivery and obtained judgment for L6,000.00, the value of the undelivered cargo. Subsequently a claim was filed in London for the total loss of the

cargo. The defendant sought to have that writ struck out as being frivolous and vexatious. The Court held that there was identity between the causes of action under both sets of proceedings but the Civil Jurisdiction Act Section 34 operated as a bar against proceedings by the plaintiff rather than by excluding jurisdiction. The section provided circumstances in which the bar could be raised - waiver estoppel or contrary agreement. Since the plaintiff could raise these issues the matter was remitted to the Admiralty judge so that pleadings on these issues be filed and then determined. It would appear that but for the matters which could have been raised under the Civil Jurisdiction and Judgments Act 1982 the res judicata plea would have succeeded.

I have already discussed the case of **Gleason v J. Wippell & Co. Ltd.** [1977] 1 W.L.R. 510 supra. The potential difficulties graphically detailed by Megarry V -C. in the quotation set out above do not arise in this case. The dramatis personae are restricted to the three parties to the present action and could not possibly be increased. Phyllisson is controlled 100% by Mr. Bould and has been described by counsel as his "alter ego". No issue of additional evidence being later obtained which had not been available earlier could possibly arise. The statement of claim in action #434 of 1992 is a faithful and accurate resume of the evidence accepted in action #401 of 1990.

Mention should also be made of **Cayman Arms (1982) Limited v. English Shoppe Limited** [1990 - 91] CILR 299. In that case the plaintiff, the tenant of the defendant, had successfully resisted an attempt to evict him from the leased premises on the ground that the notice of forfeiture was not a valid notice. Allegations had been made in those proceedings that the plaintiff had been in breach of various covenants in the lease but that issue had never been canvassed, the plaintiff relying on the invalidity of the notice.

In the later action the plaintiff sought declarations in respect of specific performance of the lease and the defendant counterclaimed for repossession of the premises.

The defendant contended that the plaintiff could not in the present proceedings contest the allegations of breaches of the covenant since he had not done so in the earlier proceedings. Harre J (as he then was) at pp. 315 - 16 quoted from the judgment in the earlier case a passage which made it clear that counsel for the plaintiff had invited the court "without admission on the part of his clients, to take it for granted that there was a breach." On that basis the case was decided.

As Harre J put it at p. 316 -

> "It would be the height of injustice to tell the plaintiff who was successful in the earlier action that he is subject to an estoppel in this case because he did not seek to achieve his victory on different or additional grounds."

The plaintiff had made it clear that he was not admitting the allegations of breach of covenant. There was no failure to raise issues which could have been raised. Decision on these issues was postponed and the case decided on the issue of the validity of the notice of forfeiture. The application was, in effect, analogous to the trial of a preliminary point of law.

In Gleason v J. Wippell & Co. (supra), Megarry V -C referred to -

> "the territory entitled res judicata, estoppel per rem judicatam, issue estoppel and what for want of a better name was called quasi res judicatam. This last expression, I should say, was treated during the argument as being a label, inelegant but of convenient brevity, for the wider sense in which the doctrine of res judicata can be appealed to, where although there is no mandatory bar to the proceedings on the footing of res judicata or issue estoppel, there is a discretionary bar under the jurisdiction to strike out the proceedings as being an abuse of the process of the court."

The trial judge exercised this jurisdiction. In his view G. H. Ltd. had already had its day in court and had been vindicated. There was no question of its being deprived of the opportunity of putting forward its case. He did not in any way apply wrong principles of law, nor did he fail to take account of material which he should have taken into account or take into account material which he should not have taken into account. On an appeal from the exercise of the discretion of a judge of first instance the appellate tribunal should

not interfere unless the court of first instance has fallen into one of these errors. The decision cannot be said to be plainly wrong. The appellate tribunal cannot substitute its discretion for that of the court below.

Accordingly, the appeal is dismissed with costs to the respondent.