Neutral Citation Number: [2017] EWCA Civ 2211

Case No: B2/2016/1690

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
HER HONOUR WALDEN SMITH
B10CL029

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before:

LORD JUSTICE SALES
and
LORD JUSTICE LINDBLOM

Between:

Peter Farrar — **Appellant**

- and –

Leongreen Limited — **Respondent**

Stuart Armstrong (instructed by **Candey Ltd**) for the **Appellant**
Andy Creer (instructed by **Swan Turton Solicitors**) for the **Respondent**

Hearing date: 14 December 2017

Approved Judgment

Lord Justice Sales:

1. This is an appeal in respect of the judgment of HHJ Walden-Smith in the Central London County Court in relation to her determination of a dispute regarding a flat in Artillery Mansions in Victoria Street, London SW1. The proceedings which culminated in that judgment were commenced by the respondent and a company associated with it ("Galleondeal") on 29 August 2014. In them, the respondent and Galleondeal claimed, amongst other things, mesne profits against the appellant for periods of occupation of the flat by him when the respondent and Galleondeal maintained that he was a trespasser. The judge awarded mesne profits, among other relief, in favour of Galleondeal (which had been the original owner of the flat) in relation to a period of occupation by the appellant as a trespasser and also in favour of the respondent in relation to a second period of occupation by the appellant, after the ownership of the flat (in the form of a long leasehold) was conveyed by Galleondeal to the respondent on 21 November 2012.

2. Irwin LJ granted the appellant permission to appeal, limited to one ground of appeal. The material part of the judgment for the purposes of this appeal concerns the award of mesne profits to be paid by the appellant to the respondent in respect of the occupation of the flat by the appellant as a trespasser between 21 November 2012 and 26 March 2014.

3. The appellant contends that it was not open to the judge to award mesne profits in favour of the respondent, because on 7 December 2012 the respondent had commenced an earlier action against the appellant seeking an order for possession of the flat ("the first action"). In the first action, the respondent simply sought a summary order for possession. It did not include a claim for mesne profits as well in relation to the period of unlawful occupation of the flat by the appellant, although as a matter of procedure it could have chosen to do so. The first action resulted in a hearing before HHJ Dight on 24 February 2014 at which he made the possession order as claimed by the respondent.

4. The appellant submits that by virtue of principles relating to the doctrine of res judicata the respondent thereby lost the right to claim mesne profits in the present action which culminated in the award by HHJ Walden-Smith. The judge was therefore wrong to grant mesne profits in favour of the respondent.

Factual background

5. The factual background to the case is somewhat complicated, but a brief summary suffices for present purposes. The appellant occupied the flat for some time pursuant to an arrangement with Galleondeal and the owners of Galleondeal. As the courts below found, that arrangement was regularised by the grant of a year's lease by Galleondeal to the appellant commencing on 1 March 2008. The appellant maintained that this arrangement was a sham, concealing the fact that he was permitted to use the flat by Galleondeal without payment. His case in that regard was rejected by HHJ Dight at trial and HHJ Walden-Smith proceeded on the basis that the lease was genuine.

6. When the lease expired, the appellant remained in occupation of the flat as a trespasser. On 21 November 2012, Galleondeal granted the respondent a long lease of the flat. The appellant remained in occupation as a trespasser.

7. On 7 December 2012 the respondent commenced the first action against the appellant, claiming a summary order for possession of the flat. Galleondeal was not a party to that action. The respondent did not include a claim for mesne profits in its claim in that action. In correspondence, the respondent and Galleondeal intimated that they proposed claiming rent and mesne profits at a later stage.

8. At the hearing on 24 February 2014, HHJ Dight determined the first action in favour of the respondent and granted the possession order sought. He found that the lease granted to the appellant in March 2008 was genuine and that the appellant was not the beneficiary of any underlying arrangement which gave him a right to occupy the flat free of charge. HHJ Dight found that when the tenancy agreement came to an end by effluxion of time, the appellant remained in occupation of the flat as a trespasser. He had remained a trespasser down to the date of the hearing.

9. The appellant eventually vacated the flat on 26 March 2014.

10. On 29 August 2014 Galleondeal and the respondent instituted a claim against the appellant for (in the case of Galleondeal) rent and mesne profits in respect of his occupation of the flat from 1 March 2008 and (in the case of the respondent) for mesne profits in respect of his occupation of the flat between 21 November 2012 and 26 March 2014 and for damages in relation to the state in which the flat was left at the end of that period.

11. These claims were determined at the trial before HHJ Walden-Smith resulting in the judgment, part of which is now under appeal. The appellant relied upon various principles relating to res judicata and abuse of process identified in the speech of Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [17]. The appellant contended that the claims of Galleondeal and the respondent should be struck out, by reason of the absence of such claims when the first action was brought against the appellant. The judge rejected this submission in relation to both Galleondeal (which had not been a party to the first action) and the respondent.

12. Amongst other relief, the judge awarded both Galleondeal and the respondent mesne profits in respect of the periods of occupation of the flat by the appellant as a trespasser. It is not necessary to say more about the position of Galleondeal. As regards the respondent, the judge held that, having regard to *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore-Wood & Co.* [2002] 2 AC 1, there was no abuse of process arising out of its decision to bring the first action only to recover possession and then instituting a separate legal action later to recover mesne profits. The appellant does not have permission to appeal in relation to this part of her ruling. The appellant also relied on the second and third principles of res judicata identified by Lord Sumption, discussed below. The judge also implicitly rejected this submission. It is in relation to this aspect of the judgment that the appellant has been granted permission to appeal.

Discussion

13. The *Virgin Atlantic* case is the leading recent judgment regarding the various overlapping principles which form the background to the modern law in relation to res judicata. All members of the Supreme Court agreed with Lord Sumption's summary of the principles. At para. [17] he said this:

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355 . "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197–198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (18430 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the

> above principles with the possible exception of the doctrine of merger."

14. Although in the hearing at first instance the appellant relied on the second, third, fifth and last of these principles, as I have explained it is only in relation to the second and third of them that he has permission to appeal to this court.

15. Mr Armstrong for the appellant rightly accepts that the appellant cannot bring himself within the scope of the first principle, because each day (to take a convenient division of time for the purposes of exposition) of unlawful occupation of the flat as a trespasser constitutes a fresh, separate cause of action giving rise to a claim for mesne profits for that occupation for that period. In the first action, the respondent's claim was limited to a claim for possession, which only involved the respondent in having to show that it had a good cause of action as at the date of the order for possession made in its favour by HHJ Dight. It did not maintain any claim in relation to any cause of action regarding the previous period of trespass by the appellant. It is clear, in relation to the first principle, or cause of action estoppel, that it can only arise where the cause of action in the later proceedings is identical to that in the earlier proceedings: see *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 105D per Lord Keith of Kinkel, cited by Lord Sumption in *Virgin Atlantic* at [20]. Therefore, the appellant could not say that the determination of the first action gave rise to any cause of action estoppel in this narrow sense.

16. Despite this, Mr Armstrong maintains that the appellant is entitled to rely on the second and third principles identified by Lord Sumption. As to the second principle, he relies on *Conquer v Boot* [1928] 2 KB 336 and an authority referred to by one of the judges in that case, *Serrao v Noel* (1885) 15 QBD 549, CA.

17. In my judgment, the appellant cannot bring himself within the second principle. Neither of these authorities assists him.

18. As regards *Conquer v Boot*, it was concerned with successive claims for different damages in relation to the very same cause of action, constituted by a breach of contract. It is, therefore, clearly to be distinguished from the appellant's case, in which the respondent in its second action seeks to rely upon causes of action which are different from the cause of action on which the respondent sought to rely in the first action.

19. The precise status of *Serrao v Noel* is not entirely clear. Lord Sumption did not discuss it in *Virgin Atlantic*, let alone state where it should be allocated in terms of his summary of the principles relating to res judicata. Indeed, the case was not even cited. In *Conquer v Boot*, Sankey LJ, the senior judge in the constitution, did not refer to it and Talbot J referred to it only for the purpose of drawing on one part of the judgment of Bowen LJ, in which he said, "The principle is, that where there is but one cause of action, damages must be assessed once for all" (cited at [1928] 2 KB 336, 346). The reasoning of the three judges in *Serrao v Noel* is expressed in different ways and is opaque in places, so that extracting its *ratio decidendi* is not straightforward.

20. The case concerned shares in a mining company which the claimant (their owner) had handed to a broker together with a signed instrument of transfer left blank as to the name of the transferee, in order to facilitate an eventual sale of the shares.

Unbeknown to the claimant, the broker had without authority lodged the shares with the defendant firm as security for an advance. The claimant learned that the company was about to register the shares in the name of the defendant and commenced proceedings in the Chancery Division to restrain the defendant and the company from parting with the shares or registering them in the name of the defendant, concluding with the usual general prayer for "such further or other relief as the nature of the case may require". On 23 February 1882 the defendant consented to an order for the delivery up of the shares to the claimant forthwith, which also stated that upon delivery up and payment of costs "all proceedings in the said Chancery action shall be stayed". Despite this order, the shares were not delivered up until 28 April 1882, when they were sold at a loss.

21. The claimant then sued in a new action in the Queen's Bench Division for damages for detention of the shares by the defendant, both in relation to the period of detention before the consent order and in relation to the period of detention after the consent order. Amongst other things, the defendant submitted that the claimant was estopped from claiming damages for the first period of detention because the matter was res judicata (with no award of damages) by virtue of the first action and the consent order. The trial judge held that the consent order did not preclude the claimant from seeking damages for that period; nor had he waived or settled the claim for such damages by the terms of the order. The judge also awarded damages for the second period of detention. The Court of Appeal allowed the claimant's appeal in relation to both periods of detention. We are only concerned with the reasoning in relation to the first period of detention. The judgments were given *ex tempore*.

22. Brett MR began his judgment by stating, "It is unnecessary now to determine whether there is a fresh cause of action for every day upon which goods are detained, and whether separate actions of detinue can be maintained for each day's detention of them": (1885) 15 QBD 549, 557; and it is significant that a number of authorities cited by counsel for the claimant in support of the view that a fresh cause of action arises each day were not discussed by any of the judges. Neither of the other judges disagreed with Brett MR's opening statement. Brett MR said that the claim for damages could have been brought in the Court of Chancery along with the claim for delivery up, and the thrust of his judgment was to the effect that it ought to have been. He expressed the view "that there is but one cause of action in the present case" (p. 558), but only in order to rebut an argument that as many actions could be brought as there were causes of action between claimant and defendant. In my view, given the opening of his judgment, Brett MR was not intending to opine upon the technical position in relation to when a cause of action arises in a case of detention of goods, but was using the phrase "one cause of action" in a looser sense to refer to what matter overall constituted the subject of the first action. In terms of Lord Sumption's scheme, Brett MR's reasoning is best explained as an illustration of the fifth principle, derived from *Henderson v Henderson*. Although *Henderson v Henderson* was not cited to the court, that is because it was lost sight of for a long period as the foundation for the basic legal principle which is reflected in it: see *Virgin Atlantic* at [19].

23. Baggallay LJ clearly explains the case in terms of what is in substance the fifth principle. He does not refer to the technical position on causes of action at all. Instead,

his view was that the appeal should be allowed because the relief sought in the second action could and should have been sought in the first action.

24. Bowen LJ's judgment began with the statement cited by Talbot J in *Conquer v Boot* and set out at [19] above. But in context, in my view, Bowen LJ was using the phrase "one cause of action" in the same loose and non-technical sense as Brett MR used it. This is supported by the absence of disagreement with the opening statement made by Brett MR and of any discussion of relevant authorities regarding whether in technical terms separate causes of action accrued day by day in relation to the detention of the shares. It is also borne out by the remainder of Bowen LJ's judgment, in which he explained that the claim for damages for detention of the shares could have been brought in the first action in the Court of Chancery, even though it had not been included in that action, and made it clear that it should have been. Therefore, this judgment also is best read as being based upon what is today identified as the fifth principle set out by Lord Sumption.

25. In my opinion, on a proper understanding of the case and what the judges decided, *Serrao v Noel* does not broaden the technical concept of a cause of action for the purposes of the second principle identified by Lord Sumption. It is simply an illustration of application of the fifth principle which we now associate most strongly with *Henderson v Henderson* and *Johnson v Gore-Wood & Co.*. As observed above, there is no appeal on foot in this court in relation to the judge's dismissal of the appellant's case in reliance on that principle.

26. Turning to the third principle identified by Lord Sumption, I do not consider that the appellant can bring himself within this either, essentially for the same reasons. As with the second principle, it only operates where the claimant seeks to sue again upon the same cause of action that has been determined in the first action. But in the present case, the respondent sought to rely in the second action upon causes of action which are distinct from the cause of action upon which it had relied in the first action. Its causes of action in the second action had not merged with the judgment given in the first action. The respondent remained entitled to seek to bring a claim in reliance upon the separate causes of action on which its second action was based, provided that it was not an abuse of process for it to do so, as the judge held it was not.

27. The position was the same as it would have been if the respondent had been unaware that the appellant had been in occupation of the flat between November 2012 and January 2014, had only discovered this after the determination of its claim for possession as at February 2014, and had then brought a second action to recover mesne profits in relation to that previous period of unlawful detention. In my view, assuming there was no infringement of Lord Sumption's fifth principle, there could be no objection to the bringing of a second action in such a case.

Conclusion

28. For the reasons given above, I would dismiss this appeal.

Lord Justice Lindblom:

29. I agree.