Court of Appeal
Nesbitt Thomson Deacon Inc. v. Everett
Date: 1989-06-13

G.E.H. Cadman, for appellant.

F.G. Potts, for respondent, T.R. Everett.

P.T. McGivern, for respondent, National Trust and E.F. Kellof.

(Vancouver No. CA008633)

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[1] June 13, 1989. HINKSON J.A.:- I have had the advantage of reading in draft form the reasons for judgment of Hutcheon J.A. and Locke J.A. in this matter. For their reasons, with which I agree, I would allow the appeal.

[2] HUTCHEON J.A.:- The appellant Nesbitt Thomson Deacon Inc. sued its former employee, Theodore Robert Everett, for breach of his duties in the bandling of the brokerage account of their client, Jillian Ewan. The action was dismissed in December 1987 on Everett's application under R. 18A that the claim was barred by reason of issue estoppel.

[3] According to the judge in chambers the issue estoppel arose because in September 1985 Nesbitt Thomson had settled the action brought by Jillian Ewan against Nesbitt Thomson and against Everett and others and in particular because the settlement took the form of an order whereby the action of Ewan against Nesbitt Thomson was dismissed by consent. As an aside, I note that at the same time the action against Everett was discontinued by Ewan without costs.

[4] In short the issue on this appeal is whether by reason of what occurred in the Jillian Ewan action, Nesbitt Thomson is barred from proceeding with its action against Everett to recover from him the $92,500 paid to Ewan in the settlement. It was said by the judge that, because of the consent order dismissing the Ewan action against Nesbitt Thomson, no issue remained with respect to any liability of Nesbitt Thomson to Jillian Ewan.

[5] The allegations against Everett in the Ewan action and the allegations against Everett in the Nesbitt Thomson action are of the same nature; the improper handling of the account in the buying and selling of shares, sometimes called "churning the account".

[6] Mr. Potts, counsel for Everett, did not pursue in his argument the point made in his factum that Nesbitt Thomson could not succeed in its claim because it had failed to issue third party proceedings against Everett in the Ewan action. That is clearly a point without merit.

[7] He relied upon two points. The first and major point was that Nesbitt Thomson could not be permitted to obtain an order against Everett that was inconsistent with the order in the Ewan action; the effect of the Ewan order was that Nesbitt Thomson *was not liable* to Ewan for the improper handling of the account; a later order to the effect that Nesbitt Thomson *was liable* to Ewan would be inconsistent; no action could proceed that had for its object that inconsistent result.

[8] No authority was cited for the point. Inconsistent orders in different actions, in themselves, are not prohibited. What is prohibited, as a matter of policy, is fresh litigation between the same parties over the same transaction. That is the policy that lies behind the notion of issue estoppel and of res judicata. I shall return to those notions at a later point in these reasons.

[9] The second point relied on by Mr. Potts is that the present action is an abuse of process. The action is said to merit that description because the first action was settled without any participation by Mr. Everett and Nesbitt Thomson sued its insurer in Ontario and Everett was made a third party to those proceedings by the insurance company.

[10] In my view, there is no merit in the point. The cases cited in the factum are cases in which the abuse is found in the attempt by a losing party to retry issues already decided against that party. That was not the situation in this present case.

[11] I turn then to the argument submitted by Mr. McGivern, counsel for National Trust Company Limited and one of its employees, Edward F. Kellof. They had been defendants in the Ewan action and they had joined in the settlement with Nesbitt Thomson that led to the consent dismissal of the action. In the present action Everett joined them, with their client Jillian Ewan, as third parties. They wish to uphold the order striking out the claim of Nesbitt Thomson against Everett.

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[12] Mr. McGivern relied upon issue estoppel and res judicata. He said that even though Everett was not a party to the consent dismissal order he was entitled to rely upon that order as a bar to the present action. Because the issues in the two actions were the same, the legal barrier created by the order that prevented Ewan from suing Nesbitt Thomson likewise prevented Nesbitt Thomson from claiming against Everett the amount of the settlement money paid to Ewan.

[13] For the proposition that issue estoppel and res judicata were not confined to the parties in the original action Mr. McGivern cited three cases:

1. *Nigro v. Agnew-Surpass Shoe Stores Ltd.; Shankman v. Agnew-Sur-pass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215, 3 C.P.C. 194, 82 D.L.R. (3d) 302, affirmed 18 O.R. (2d) 714n, 84 D.L.R. (3d) 256n (C.A.).

The landlord of a shopping centre sued a number of its tenants as a result of a fire. At trial, one of the tenants, Agnew-Surpass Shoe Stores, was held to be liable in negligence.

In the second action a number of the tenants then sued Agnew-Surpass Shoe Stores, Consumers' Gas Company and Blue Flame Heating & Air Conditioning Limited. Agnew-Surpass took third party proceedings against the landlord.

The tenants, as plaintiffs in the second action, applied to strike out the defence of Agnew-Surpass. It was held that by bringing the motion, the tenants had identified themselves with the landlord and it was not open to them now to blame any of the defendants other than Agnew-Surpass. On the application of the other defendants the claim against them was struck out.

In addition the third party claim by Agnew-Surpass against the landlord was struck out.

2. *Demeter v. Br. Pac. Life Ins. Co.,* 48 O.R. (2d) 266, 8 C.C.C.I. 286, [1985] I.L.R. 1-1862, 13 D.L.R. (4th) 318, 7 O.A.C. 143 (C.A.).

Demeter, the plaintiff, had been found guilty by a jury of the murder of his wife. The Ontario Court of Appeal held that it was an abuse of process to attempt to relitigate the same issue in an action on insurance policies.

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3. *Grewal v. Small* (1985), 69 B.C.L.R. 121 (S.C.).

[14] Following an accident involving three vehicles, the driver of the tractor-trailor, Small, sued the drivers of the other two vehicles, Smith and K. Grewal.

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[15] A consent order was granted dismissing the action by Small against Smith. In another action, a passenger in Grewal's vehicle sued Small and the owner of the tractor-trailer, Langis Transport Ltd., and in turn they took third party proceedings against Smith. Mr. Justice Macdonell held that the issues between Small, Langis and Smith were res judicata.

[16] I do not find anything in these three cases to support the proposition that Nesbitt Thomson is barred from proceeding against Everett.

[17] Insofar as Nesbitt Thomson has added fraud to the claim that was advanced by Ewan against Everett, the trial judge has a discretion to show his disapproval in costs if the claim in fraud is not made out. The suggestion is that the claim has been added only because of the terms of the insurance policy on which Nesbitt Thomson is suing its insurer.

[18] For these reasons, I would allow the appeal and set aside the order dismissing the action.

[19] LOCKE J.A.:- This appeal concerns the application of the doctrine of res judicata in the case of a consent order. In action No. C840112 commenced 4th January 1984 Jillian Ewan ("Ewan"), the owner of an investment portfolio, sued stockbrokers Nesbitt Thomson Bongard Inc. ("Nesbitt"), its servant/agent T.R. Everett, trustee of the portfolio, National Trust Company Limited ("National Trust") and its servant E.F. Kellof, alleging negligence and breach of fiduciary duty in changing and "churning" the investments in the portfolio.

[20] All the defendants defended. Counsel appeared for Nesbitt, National Trust and Everett. After one day's evidence on trial before Madam Justice Southin all of the defendants except Everett reached a compromise, returned to the courtroom and the plaintiff's counsel said:

> I would like to advise the court that counsel … have agreed … that the matter be dismissed without costs so far as National Trust and Nesbitt Thomson and the individual Kellof are concerned. Further, the plaintiff did discontinue against Mr. Everett without costs …

Everett's counsel joined in approving the order which read:

> THIS COURT ORDERS that the herein action be and the same is hereby dismissed as against the Defendants, National Trust Company Limited, Nesbitt Thomson Bongard Inc. and Edward Kellof, by consent, without costs to any party.

[21] The compromise included a payment of $92,500 which with Nesbitt's agreed legal costs of $15,342.44 totalled $107,842.44. Nesbitt claimed against its insurer, the Guarantee Trust Company of North America in Ontario. The insurer declined to pay on the ground that its fidelity policy insured only against fraud or dishonesty and none had been demonstrated. On 23rd September 1986 Nesbitt sued in Ontario alleging that it had received a legal opinion that Everett's conduct was dishonest and it was therefore within the policy. The insurer defended and issued a third party notice to Everett. We were advised that this action is now in abeyance, pending the result of the present proceedings.

[22] On 6th March 1987 Nesbitt commenced this action against Everett and it alleged in almost identical terms the acts and defaults originally alleged by Ewan against itself. It claimed under its contract of employment with its implied indemnity that in the course of administering Ewan's account Everett had engaged upon a scheme which was not only negligent but fraudulent, and it pleaded that:

> … before the completion of the trial the plaintiff settled the aforesaid action on its own behalf and on behalf of the defendant Everett pursuant to which the plaintiff paid $92,500 to Jillian Ewan…

Everett defended and issued a third party notice to National Trust, Kellof and Ewan.

[23] On 1st December 1987 Everett brought an application under R. 18A, the Rules of Court, and under R. 19(24) (abuse of process), alleging that a public record showed Ewan's claim against Nesbitt had been dismissed and this conclusively established that Nesbitt had never been under any liability to Ewan and correspondingly could not claim to be indemnified from Everett; the matter was concluded by an estoppel of record. The trial judge heard the parties and said:

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> The first ground, it seems to me, entitles the defendant to success on this motion. Various cases have been cited dealing with the variety of instances on which the broad issue of res judicata has been raised. None of those cases raised the issue which is before this court. They all turned on different aspects. It may be that had the plaintiff consented to a judgment against it in the Ewan action, it may have been able to preserve the subsequent issue of whether or not its employee was required to indemnify it, but I do not need to decide that. What I am faced with is a judgment of the court which has dismissed the claim of Ewan against Nesbitt Thomson. Following upon that, there is no basis for a claim by Nesbitt Thomson for indemnity or contribution from its employee, and it is upon that simple ground that I accede to the application and dismiss the action.

[24] Nesbitt appeals to this court. It says very simply that the trial judge was in error in applying any branch of the law of estoppel and in particular res judicata could not apply as the parties in the action proposed to be brought might be the same in name but appeared in different relationships and there had not been in fact any adjudiction on Nesbitt's claim against its own employee.

[25] The respondent said the matter had been settled by an estoppel of record or alternatively an issue estoppel. It also argued a second ground for upholding the trial judge: abuse of process. Nesbitt, it submitted, ought not to be permitted to adopt one attitude in the Ewan action and another in the existing action against Everett; Nesbitt's settlement of the action without the participation of Everett or giving him an opportunity to have his case heard, and now suing him, was wrong and Everett had been misled. Nesbitt's conduct and delay in relation to bringing the insurance action which resulted in Everett being further implicated was quite wrong.

[26] Dealing first with the matter of abuse of process, while the conduct of Nesbitt may not be what Everett hoped it would be, there is no ground at all for alleging any abuse of the court process.

[27] The principal matter is more difficult. We are here concerned with the general doctrine of estoppel of which res judicata is a branch. The appellant sets great store on the "record", which on its face, dismisses the Ewan claim; and, the argument runs, leaves no claim against which Nesbitt could be indemnified, and settles the matter as to whether as between Nesbitt and Everett there was breach of duty. The books show, however, that the mysterious "record" is not the true basis of the estoppel. The basis is the decision of

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the court, not the formal piece of paper which supports it. The matter was argued in *Williams v. Jones* (1845), 13 M. & W. 628, 153 E.R. 262. The question was whether an action of debt would lie upon the judgment of an inferior court not of record. Pollock C.B. said (at p. 633):

> It is plain that, on principle, an action of debt will lie upon the judgment of a competent court, whether of record or not of record; where a party has recovered a sum of money by the judgment of a court of competent jurisdiction, a debt is created, which may be enforced by an action of debt in the superior courts.

[28] In *Re May* (1885), 28 Ch. D. 516, (C.A.), Brett M.R. said at p. 518:

> … counsel for the Petitioner has argued first of all that this is not *res judicata* because there was no record, and the doctrine of *res judicata* only applies where there is a record. To my mind that argument cannot be sustained. The doctrine of *res judicata* is not a technical doctrine applicable only to records. It is a very substantial doctrine, and it is one of the most fundamental doctrines of all Courts, that there must be an end of litigation, and that the parties have no right of their own accord, having tried a question between them and obtained *a decision of a Court,* to start that litigation over again on precisely the same questions. [emphasis added]

[29] Spencer Bower and Turner, The Doctrine of Res Judicata, 2nd ed. (1969), at p. 146 said:

> It is of the essence of all estoppels that there shall be two statements of the same fact exhibiting *inter se* an essential contradiction or discrepancy; the result of the application of the doctrine of estoppel is always that the earlier statement is to be taken as the truth, precluding an assertion of the later …
>
> It follows, that, in strictness, the burden is on the party setting up the estoppel of alleging and establishing this identity of subject-matter - that is to say, that his opponent is seeking to put in controversy and reagitate some question of law, or issue of fact, which is the very same question or issue which has already been the subject of a final decision between the same parties by a tribunal of competent jurisdiction.

[30] To settle what has actually been decided, one is entitled to examine the record, the reasons for judgment, if any, the pleadings and the evidence:

> It is often necessary to see what the evidence before the Court at the previous trial was in order to see what the precise facts were that cannot afterwards be disputed.

So, Lush J. in *Ord v. Ord,* [1923] 2 K.B. 432 at 442 (Div. Ct.).

[31] And in *Marginson v. Blackburn Borough Council,* [1939] 2 K.B. 426, [1939] 1 All E.R. 273 (C.A.), Slesser L.J. said [p. 277]:

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> In such a case, the question arises, what was the question of law or fact which was decided?

[32] Courts have always investigated this and a consent decree is no different from any other form of record.

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[33] In *Cloutte v. Storey,* [1911] 1 Ch. 18 (C.A.), the parties entered into a compromise and an action was brought against the trustees. It was argued that the agreement approved by the court on behalf of the infant barred an action by Cloutte alleging a defect in title. Neville J. and subsequently the Court of Appeal examined the settlement deed and considered the evidence. Farwell L.J. said (at pp. 33-34):

> It was argued that this was an agreement between all parties to recognize the present defendants' title, and that they gave consideration for it: this contention is in my opinion untenable: the agreement was entered into for an entirely different purpose, and the recital shows that the questions "now in dispute" only were the subject of settlement: the parties were bound to inform the Court of all material circumstances when asking for its sanction on behalf of the infant, but no one knew or suspected any possibility of dispute, on the grounds put forward in the present action, and the Court was therefore necessarily not informed thereof. It is not in accordance with principle or authority to construe deeds of compromise of ascertained specific questions so as to deprive any party thereto of any right not then in dispute and not in contemplation by any of the parties to such deed …

[34] In the present action it cannot be maintained that the present entered judgment must be taken in gross and that it is not permissible to examine the actual facts to see what was decided. What is ascertained from the material filed before the trial judge was that Nesbitt, at least, conceived itself bound to pay money to procure a dismissal of the action against it, and this it did. As there was not in issue in that action any question as to either the terms, duties or liabilities of Everett vis-a-vis Nesbitt, the court gave no consideration to it. Neither Nesbitt nor Everett requested such an adjudication and the judgment cannot bar a subsequent action by Nesbitt because there has never been a decision on the dispute existing between itself and Everett.

[35] It was argued that a necessary consequence of Nesbitt's proceeding with its action could well be the filing of inconsistent records, and in the same court, i.e., the Ewan action which showed the claim of Ewan dismissed, whereas the record in the action *Nesbitt v. Everett* would show the claim allowed. But that is not so. Not only was Everett before the court only as a defendant in the Ewan action, but also there were no third party

proceedings brought as between Nesbitt and Everett to put the matter in issue and a decision in the case at bar if successful would only show a claim for damages allowed as between Nesbitt and Everett, which is not inconsistent with the record in the Ewan claim.

[36] To Nesbitt's argument that the parties are different, or at least appear in different capacities, the respondents argue that in an issue estoppel the parties do not need to be the same, and they rely on three authorities to establish this. Nesbitt's course would thus amount to an abuse of process.

[37] The first case is *Demeter v. Br. Pac. Life Ins. Co.,* 48 O.R. (2d) 266, 8 C.C.L.I. 286, [1985] 1.L.R. 1-1862, 13 D.L.R. (4th) 318, 7 O.A.C. 143 (C.A.). There the plaintiff sued on life insurance policies covering the life of his wife after having been convicted of her murder. The Court of Appeal dismissed the action as an abuse of process saying it was clear from the record the plaintiff was seeking to relitigate the very issue that had been decided against him in his criminal trial. To use a civil action to initiate a collateral attack on a criminal conviction in the absence of fresh evidence or evidence of fraud or collusion amounts to an abuse of process. There is no similarity between that authority and the case at bar.

[38] The second authority is *Nigro v. Agnew-Surpass Shoe Stores Ltd.; Shankman v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215, 3 C.P.C. 194, 82 D.L.R. (3d) 302 (H.C.), a decision of Weatherston J. As a result of a fire in a shopping centre a previous action was brought by the owner against a number of defendants. In that action the defendant tenant Agnew-Surpass was found liable in negligence and the claims against the remaining defendants were dismissed. In this action, the plaintiffs - all tenants of the shopping centre - brought actions against Agnew-Surpass all but one of the same defendants in the previous action, claiming damages arising out of the same fire. Third party proceedings were brought against the owner. Upon the plaintiffs' motion to strike out those portions of the statement of defence of Agnew-Surpass denying liability, and upon motion of the other defendants for an order striking out the statements of claim as against them, and upon motion by the owner third party to dismiss the proceedings against it, it was held all applications should be granted. The headnote says:

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> Although there was not an identity of parties so as to permit the applicants to rely on the principle of *res judicata,* they could rely on an estoppel, based on the prior judgment, for which there need not be identity of subject-matter and parties. It ought not be open to any of the defendants and the third party to have the same issue retried as among themselves as they had had their day in Court. The plaintiffs, having brought this motion, had identified themselves with the plaintiff in the first action, and it was accordingly not open to them to blame any defendants other than the defendant A.S. Ltd.

The basis of the judgment is issue estoppel. The court said (at p. 304):

> All the applicants allege that the issue as to liability is *res judicata.* That is only one branch of the law of estoppel. In its narrowest sense it means that a particular cause of action has been held not to exist or to have become merged in a judgment of the Court. In that sense, there must be an identity of parties and that does not exist here. There is not truly an identity of the issues to be tried because the several plaintiffs have suffered separate losses. That, however, is not a real problem in these motions because it is common ground that the losses suffered by the several plaintiffs had the same origin.

And all motions were granted.

[39] The third case is *Grewal v. Small* (1985), 69 B.C.L.R. 121 (three actions), a decision of Macdonell J. The headnote reads:

> In multiple proceedings arising out of a multi-vehicle accident a consent order was granted in the first action dismissing the action of the truck driver against the "first car". This order was stated to be of the same effect as a judgment pronounced at a trial of the proceedings on the merits. As a codefendant with the freight carrier company in two other actions commenced by the "second car" the truck driver, along with the freight carrier company, third partied the "first car". The "first car" applied to have the third party notice struck out on the grounds that the issues between them were res judicata, the consent order having the effect of being a judgment as if pronounced at trial. Counsel for the truck driver argued that the fact that the freight carrier company was a party in these proceedings where it had not been in the first action distinguished this case.

[40] The court struck out the third party notice, notwithstanding the fact that the parties were not identical. The court held that a plea of res judicata was available to defeat the third party proceedings. The court said in effect that the liability of the freight company could only be vicarious because of the actions of its driver. The driver and the first car had already litigated their differences. The facts were the same and the result had been the dismissal of the action. The matter could not be relitigated as between them.

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[41] The *Agnew-Surpass* and the *Grewal* cases do not apply here for two reasons. The first is that in each case - as in *Wood v. Luscombe,* [1966] 1 Q.B. 169, [1965] 3 W.L.R. 998, [1964] 3 All E.R. 972 - the res, the thing actually and directly in dispute, had already been adjudicated upon by a competent court and the same evidence was involved.

[42] The second is that the parties in those cases were not really different, but in one way or another were privies to an estoppel.

[43] Spencer Bower and Turner comment on this concept at pp. 209-10. It is put neatly:

> There is a dearth of authority as to who are privies so as to be bound by a *res judicata.* Privies include any person who succeeds to the rights or liabilities of the party upon his death or insolvency or who is otherwise identified with his or her estate or interest; but it is essential that he who is later to be held estopped must have had some kind of interest in the previous litigation or its subject matter.

And in their other work on The Law Relating to Estoppel by Representation, 2nd ed. (1966), p. 116 et seq. the authors comment at some length on the cases of principal and agent, privies in title and other fact patterns.

[44] In *Agnew-Surpass,* while the tenants' damage may have been different, they identified themselves with the landlord who had previously sued. In *Grewal* the freight company was caught vicariously solely because it was identified with the negligence of its servant driver.

[45] In the result, none of the cases cited support the respondents' position.

[46] I therefore think the trial judge erred in law and I would allow the appeal.

Appeal allowed.

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