NOVEMBER 2020

UPDATE

Res Judicata and Privity - Torchlight GP Limited v Millinium Asset Services Pty Limited et al

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In a hearing for strike-out applications, the Grand Court (the **Court**) has provided useful guidance on *res judicata* and the law on privity.

Background

The Plaintiff, Torchlight Fund LP, brought claims against Millinium Asset Service Pty Ltd and others, the 1st to 3rd Defendants (the **MAS Parties**) alleging conspiracy and other economic torts (the **Conspiracy Proceedings**).

The Plaintiff was the Respondent in prior winding-up proceedings (the **Petition Proceedings**), in which the former 5th and 7th Defendants were co-petitioners, along with Aurora Funds Management Limited (together **the Petitioners**). The Petition Proceedings lasted for 41 days and were settled prior to a judgment being delivered. Despite this, the Judge handed down his judgment[1] (the **Petition Judgment**).

The Plaintiff sought to use the Petition Judgment to strike-out the defence of the MAS Parties in the Conspiracy Proceedings, on the basis that it seeks to re-litigate the issues already determined. The Plaintiff argued that, on the broad principle of *res judicata*, the MAS Parties were estopped and to continue to allow them to plead their defence would represent an abuse of process.

The MAS Parties objected on the basis (i) that where a dispute has been settled prior to the handing down of judgment, the judgment does not constitute *res judicata* and accordingly issue estoppel does not arise; and (ii) in any event, the MAS Parties were non-parties to the Petition Proceedings and not bound as privies.

The Decision

Res Judicata

The MAS Parties argued that for issue estoppel to apply, a case actually had to be decided. By issuing the Petition Judgment after settlement, the Judge had decided nothing; all issues of fact and law had been resolved and were therefore not capable of being decided. That this was undoubtedly the case could be seen from the concluding passages of the Petition Judgment which set out orders that the Court '*would have made had it not made an order by consent withdrawing the Petition.*'

The Court considered this submission and, whilst not accepting it in such stark terms, found that the Plaintiff's position that a "judgment is a judgment", regardless of any settlement, did not constitute a coherent answer.

[1] *Torchlight GP Limited-v-Millinium Asset Services Pty Limited, FSD 103/2015 (RMJ),* (25 September 2018, unreported).

What was required was an analysis of what had actually been decided. In undertaking this analysis, the Court found that a compromise had been reached. That compromise represented the end of the dispute and any issue or subject matter that may have formed the subject matter of the original dispute was buried beneath the surface of the compromise[2]. In such circumstances, the Petition Judgment could not have adjudicated on any factual or legal issues. It followed that the decision did not constitute *res judicata* and was not capable of founding estoppel arguments. Accordingly, the Plaintiff's application for strike-out failed. Whether the Petition Judgment could have any persuasive effect was left for another day.

In literary form, the Court concluded that the Plaintiff's submission was spurred on by '*vaulting ambition which o'erleaps itself and falls on th'other side*'[3].

Privies

Having concluded that the Petition Judgment could not be relied upon to strike-out the defence, the issue of privity of interest – i.e. whether the MAS Parties were privies of those who had brought the Petition Proceedings - fell away. However, given the scope of the argument, the Court recorded its conclusions.

The MAS Parties sought to argue that the Court should look to Australia and adopt its more restrictive test on privies. However, the Court found that the more flexible English test was to be preferred.

The categories of privy are blood, title and interest. In the present case, only interest was relied upon. The term has never been precisely defined and the Court decided to adopt the broadest formulation of the test, namely whether '*having due regard to the subject matter of the dispute, there [is] a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding on proceedings to which the other is a party*[4]'. The Court tempered this test by reference to English authorities which warned that the exception to the general rule that a person will not be bound by the outcome of proceedings of which he is not a party, is a narrow one. Applying this test to the facts, the Court found that it was not just to treat the MAS Parties as privies. In coming to this decision the Court also confirmed the essential pre-condition that for any party to be bound by a decision, the prior determination must relate to the same issues which arise in the subsequent proceedings. The Court doubted whether that could be said to be the case here.

Conclusion

This judgment is another in a series of decisions arising from the unusual circumstances around the handing down of the Petition Judgment. It is helpful as a reminder of the consequences and effect of a settlement which not only resolves the manner in which the dispute is resolved, but also buries the factual and legal issues that go with it. In respect of privity of interest, given there is little Cayman authority on the issue, it is a useful pointer as to the direction the Court will take and perhaps an indication of a squeamishness of Judges both in England and in Cayman in making non-parties a '*privy to the plot*'[5].

Mourant acted for the MAS Parties.

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[2] Quoting *Foskett on Compromise*, 9th edition, at 6.01-6.02, 6.05.

[3] Macbeth Act 1 Scene 7.

[4] *Gleeson v Wippell* [1977] 1 WLR 510 at 514-515.

[5] The Two Gentlemen of Verona Act III Scene 1.

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