

CANADA / JUDGMENT

579326 BC Ltd. v. Allen

2003 BCSC 163**COURT**

Supreme Court of British Columbia

DECIDED

30 January 2003

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Source record**2003BCSC0163**

Citation: 579326 BC Ltd. v. Allen & Others

Date: 20030130
2003 BCSC 163

Docket: SC08025
Registry: Prince George
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: 579326 BC LTD.
PLAINTIFF

AND: RODGER ALLEN DOING BUSINESS AS ALLEN CONTRACTING
AND THE SAID RODGER ALLEN
DEFENDANTS

AND: ROBERT LOUIS ALLEN, GEORGE BUHLER AND
ALBERT CORNELIUS WIEBE
DEFENDANTS BY COUNTERCLAIM

REASONS FOR JUDGMENT**OF THE****HONOURABLE MR. JUSTICE CHAMBERLIST****(IN CHAMBERS)****Counsel for the plaintiff:****S.K. Gudmundseth, Q.C.****Counsel for the defendants:****R.A. Foulston**

Date and Place of Hearing:

20 January 2003

Prince George, BC

- [1] On Monday, the 20th of January 2003, the defendants sought various orders in their notice of motion filed December 23, 2002. The most critical of the applications of the defendants includes an order for production of certain documents and an order that the defendant be at liberty to amend its pleadings to add four additional parties as defendants by counterclaim.
- [2] The plaintiff made a preliminary objection to the motion of the defendants submitting that the application had previously been made in December 2002, before Master Baker. At that time, the applications had been dismissed and no appeal having been taken from the decision of the master, the issue, the plaintiff submits, is now *res judicata* and seeks dismissal of the application on this basis. Because of time constraints, I decided to reserve my decision on the preliminary objection and did not hear the defendants' application on the merits.
- [3] The preliminary objection has compelled me to read the decision of Master Baker and to consider the reasons provided by him and the timing of that decision.
- [4] The application was heard November 25, 2002, approximately one week before the 15 day trial was to commence. The action had previously been set for trial in December of 2001 but was adjourned in November of that year, again at the request of the defendant.
- [5] From a reading of the learned master's decision, the applications were denied because it would ultimately require an adjournment of the trial set to commence December 2, 2002.
- [6] The learned master also considered the fact that the potential for the additional parties to be added in these proceedings had been known for some time. He discounted the importance of late disclosure of a solicitor's file on November 7, 2002, as being reason for the lateness in making the applications at that time. He was aware of the fact that the defendant had indicated the possibility of adding these parties in or about November 2001, when the first trial date was adjourned.
- [7] At paras. 10 and 11 of his decision, the learned master said this:

10 I am satisfied that the potential to add or reason for adding these parties and the potential claims against them are again not new, they're not of recent revelation, these parties have been out there on the horizon in some form or another for a very long time, and it is doubtless correct, as Mr. Foulston says, that the strength or solidity of the case against some or all of these parties was made more obvious by the disclosure of Mr. Wing's file on November the 7th. I don't accept that such strong disclosure was necessary before considering whether or not to add the parties. I am not satisfied that that step or decision was so delayed that it could not have been taken some time ago, and indeed I accept, as Mr. Gudmundseth has indicated this afternoon, that there was

discussion before the Court in November of 2001 about the advisability or potential for adding some or all of these parties.

11 This simply isn't a surprise and to take the view now that they should be added at this late date thereby necessitating an adjournment is, as I say, to me clearly prejudicial to the plaintiff and deprives the plaintiff of a trial date for the second time, and so I simply won't do that. If, on the other hand the defendant wishes to proceed against these parties I can't see why he cannot. He can join them and, yes, there may be a multiplicity of proceedings but that's his problem in the circumstances.

[8] The trial did not proceed on December 2nd because of the unavailability of a judge to hear the three week trial.

[9] Thus, the question is whether, in these circumstances, it can be said that the issue of adding the proposed parties and the other relief sought in the motion is *res judicata*.

THE RES JUDICATA ARGUMENT

[10] The plaintiff submits that the defendants have not put forth any new evidence and that the prejudice to the plaintiff remains the same. The plaintiff submits that, notwithstanding that the application was an interlocutory motion, it is nevertheless a final decision in the sense that it has not been appealed and as a result it has become binding on all parties to the application.

In this submission, the plaintiff relies on this excerpt from *Tung Wise Co. v. Park Georgia Realty Ltd.*, [1994] B.C.J. No. 47, DRS 94-07653, Vancouver Registry No. C927820 and C931107, where Smith J. said this at paras. 7 and 8:

7 In *Philippon v. Levi-Lloyd*, [1990] B.C.J. No. 2128 (9 October, 1990) Vancouver 880667 (B.C.S.C.), Mr. Justice Murphy ruled on the issue of whether a decision on an interlocutory application in another action estopped the plaintiff from seeking similar relief in the action before him. The action before Mr. Justice Murphy had been brought pursuant to the Family Relations Act, R.S.B.C. 1979, c. 121. The plaintiff sought a declaration that the defendant held certain shares and assets of a corporation in trust for herself and the plaintiff jointly and an order for damages against the defendant for selling those assets in breach of the trust. In the other action against the defendant and the corporation, the plaintiff sought a declaration that the defendant held the shares in the corporation in trust for herself and the plaintiff jointly. As a sale of the assets of the corporation was pending, the plaintiff brought an application in the trust action for an order enjoining the defendants from assigning or disposing of any assets of the corporate defendant. Mr. Justice Gow dismissed the application for an interlocutory injunction and in his reasons for doing so decided that the plaintiff had not raised a serious question to be tried as to whether a trust existed.

8 In concluding that Mr. Justice Gow's decision estopped the plaintiff from seeking a declaration of trust and damages in the Family Relations Act proceeding, Mr. Justice Murphy said, at pp. 7 and 8:

In *The Law of Evidence in Civil Cases*, J. Sopinka & S. Lederman (1974) at p. 366 the following appears:

The constituent elements of estoppel by res judicata were enumerated by Aikins J. in *Re Bullen*:

- (i) that the alleged judicial decision was what in law is deemed such;
- (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;
- (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
- (iv) that the judicial decision was final;
- (v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
- (vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive in rem.

[11] In that case, the plaintiff had commenced action against several defendants. The defendant/applicant had sought production of the plaintiff's solicitors' file for inspection and copying and for an order that they be at liberty to examine the solicitors and agent of the plaintiff. An application in precisely the same terms had earlier been brought by another defendant in the action with whom the plaintiff had settled. The previous application had been dismissed on the basis that solicitor-client privilege applied. Smith J. held that res judicata applied because the issue had already been determined in the action. Thus, in that case, a finding of fact crucial to the issue of disclosure and discovery had been made that solicitor-client privilege applied.

[12] The plaintiff in support of its opposition to the rehearing of the defendants' motion also relies on the decision of *Diamond v. Western Realty Co.*, [1924] S.C.R. 308, referred to in para. 8 of the reasons of Smith J. in *Tung*, supra.

[13] I am of the view that the cases provided to me do not address the bases of the rules pertaining to res judicata or issue estoppel.

[14] In *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) (B.C.C.A.) 249 at page 251 Davey C.J.B.C. speaking for the court stated:

It seems to me that, that being so, the doctrine of res judicata applies. I refer to the judgment of Vice-Chancellor Wigram in *Henderson v. Henderson* (1843), 3 Har 100, 67 E.R. 313, and quote the passage at pp. 114-5:

In trying this question, I believe I state the rule of the Court correctly, when I say that, 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.

The case of *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155, [1926] 1 W.W.R. 286, a judgment of Lord Shaw, is also in point, although perhaps the comments that I am about to read did not arise directly under a plea of *res judicata* - there was a plea of estoppel there - but at p. 165 Lord Shaw said this:

Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.

I add that that second observation is particularly appropriate here. The learned Law Lord continued [at pp. 165-6]:

If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

It seems to me that the only difference between the first action and the second action here is a different concept which plaintiff's counsel sought to apply to the circumstances in the first action, that is, that there was a relationship not of debtor and creditor or of contractor and contractee but of duties which the defendant owed to the plaintiff arising under the contracts which had been relied upon in the first case of partner or of agent.

[15] From this dicta it can be seen that concept of *res judicata* or issue estoppel applies where a point fundamental to the issue between the parties has been decided in prior litigation between the same parties. In *Tung*, the issue of solicitor-client privilege was fundamental to the issue of discoverability and production. Solicitor-client privilege is a substantive right.

- [16] It seems to me that the concepts of res judicata and issue estoppel apply, principally, to issues of substance arising between the parties which ought to be ruled upon, or, which ought to have been brought forward as part of the subject matter of the litigation between them.
- [17] In the case at bar, the fact that the defence wants certain relief which was hitherto refused does not, in my view, come within the purview of res judicata or issue estoppel.
- [18] The applications are procedural in nature. The substance of the issues raised before Master Baker were made at a time when a trial date would likely be lost if the relief were granted. That is not the factual matrix that exists today.
- [19] In Tung, the determination made was that in a previous hearing a solicitor-client relationship existed which was found to be binding on the applicant because of the application of res judicata. That finding between the parties was binding on them and ought not to be litigated. It was not merely procedural but involved a finding of a substantive issue.
- [20] The applications before me are, I find, purely procedural. They are made pursuant to procedural provisions contained in the Rules of Court. The application to add parties is a procedural provision generally used to avoid multiplicity of actions and the undesirable opportunity for inconsistent findings of fact. The Rules of Court ought not to be seen as creating substantive rights. As such, no substantive rights can be developed or obtained by the Rules regarding addition of parties which would be oppressive to the concept of a single trial on the merits, all other concerns being equal.
- [21] In *Penderville Apts. Dev. Partnership v. Cressey Development Corp.* (1990), 43 B.C.L.R. (2d) 57 (B.C.C.A.), the court indicated that there were no absolute and untrammelled rights under the Rules; rather, the rights are procedural and as such the court has overriding power to prevent its procedure from having an oppressive affect.
- [22] I find, therefore, that the preliminary objection to me hearing the defendants' motion fails.
- [23] The motion will be heard by me as soon as practicable. I would think that Mr. Gudmundseth could attend by video conference or telephone. I would ask that counsel contact the trial coordinator to set a date for the continuation of this matter.

"E.G. Chamberlist, J."

The Honourable Mr. Justice E.G. Chamberlist

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/03/01/2003bcsc0163.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/579326-bc-ltd-v-allen-2003>

Prepared on 26 October 2026 · Esheria