Tohru Motobayashi v Official Receiver and Another
[2000] SGCA 59

Case Number : CA 51/2000

Decision Date : 31 October 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Michael Hwang SC, Daren Shiau and Desmond Ho (Allen & Gledhill) for the appellant; Sarjit Singh and Sunari bin Kateni (OAPT) for the first respondent; Leo Cheng Suan and Goh Wei Ling (Chu Chan Gan & Ooi) for the second respondent

Parties : Tohru Motobayashi — Official Receiver; Another

Civil Procedure – Appeals – Effect of "no order" – Whether appeal lies when "no order" made on an application for directions

Civil Procedure – Originating processes – Abuse of process – Foreign liquidator failing to intervene in previous proceedings and filing fresh originating summons in own name – Whether abuse of process

Civil Procedure – Rules of court – Whether Rules of Court apply where Company (Winding-up) Rules silent – Whether foreign liquidator could apply to be joined under O 15 r 6 – O 1 r 2(4) Rules of Court

Companies – Winding up – Foreign company registered in Singapore – Whether all Singapore creditors to be paid before remitting net amount to foreign liquidator – s 377(3)(c) Companies Act (Cap 50, 1994 Ed)

Civil Procedure – Estoppel – Cause of action estoppel – Identity of parties – Privity of interest – Whether privity of interest between foreign liquidator and Singapore liquidator

(delivering the judgment of the court): This appeal raises an important issue of construction of s 377(3)(c) of the Companies Act (Cap 50, 1994 Ed). The facts that give rise to this appeal are briefly these.

The facts

Okura & Co, Ltd (`Okura Japan`), a company incorporated in Japan and based in Tokyo, carried on the business of trading in machinery, steel and other commodities. It was adjudicated bankrupt by the Tokyo District Court on 21 August 1998. It owed huge amounts of debt totalling approximately [yen]252.8b to some 2,565 creditors. The appellant, Tohru Motobayashi, an attorney-at-law in Japan, was appointed the Trustee in Bankruptcy of Okura Japan.

Okura Japan is registered as a foreign company with the Registry of Companies in Singapore under the Companies Act, and has been so registered since 1973. Prior to its bankruptcy, it had been carrying on business at its branch in Singapore. For convenient reference, we shall refer to the branch of Okura Japan in Singapore as `Okura Singapore`. On 3 November 1998, Okura Japan filed a winding up petition in respect of Okura Singapore and a winding up order was made on 4 December 1998. The second respondent, Mr Ong Sin Huat of Ong Yong & Partners, was appointed the liquidator of Okura Singapore (`Singapore liquidator`).

The first creditors` meeting of Okura Singapore was held on 22 February 1999. The meeting was informed that Okura Singapore owed Okura Japan a total sum of S$9m and that Okura Japan owed

Okura Singapore a total of S$8m. The meeting was also informed that the appellant was prepared to allow the Singapore liquidator to distribute to creditors of Okura Singapore the net assets realised and received by the Singapore liquidator, if the Singapore liquidator treated Okura Japan as a net creditor of about S$1m. Okura Japan was also prepared to allow the creditors of Okura Singapore to recover and realise the foreign assets of Okura Japan which appeared in Okura Singapore`s books. The possible implications of s 377(3) of the Companies Act on such a proposal were noted, and the meeting gave in principle agreement to the appellant`s proposal, subject to the approval of the Singapore court and the working out of the details.

Subsequently, the appellant wrote a letter dated 6 May 1999 to the Singapore liquidator. The relevant part of the letter said:

> *2 As you are aware, Bank of Tokyo Mitsubishi, The Asahi Bank Ltd, Dai-Ichi Kangyo Bank Ltd, The Sakura Bank Ltd and The Fuji Bank Ltd are substantial creditors of Okura (Singapore), comprising more than 80% of the total debts of Okura (Singapore).*
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> *3 Some of these creditors, including Bank of Tokyo Mitsubishi, The Asahi Bank Ltd and The Fuji Bank Ltd, have filed Proofs of Debt with Okura (Singapore) and Okura (Japan), while some creditors have filed Proofs of Debt with Okura (Japan) only.*
>
> *4 We anticipate a problem with such filings of identical proofs in multiple jurisdiction, because:*
>
> *(a) the extent of such practice is unclear.*
>
> *(b) distribution in one jurisdiction may be at the expense of creditors of other jurisdiction.*
>
> *...*
>
> *7 Having carefully considered all the above mentioned factors, we would request that you make an application to the Singapore court for the following clarifications and order:*
>
> *(a) that you, as the liquidator of Okura (Singapore), a branch office of Okura (Japan), with no separate legal entity, do remit all the assets recovered and realised for Okura (Singapore), (after paying off the priority creditors and payments stipulated by the Singapore law, including liquidator fees on a time based basis) to the Trustee in Bankruptcy of Okura (Japan) for global distribution, so that we would be able to make distribution to all creditors, including creditors of Okura (Singapore) in accordance with Japanese law, provided that proof of claim should be filed to the Tokyo District Court by those Singapore creditors as soon as possible but no later than 21 May 1999.*
>
> *(b) that we, as Trustee in Bankruptcy of Okura (Singapore) will pursue all the foreign debtors of Okura (Singapore) as some of these foreign debtors are also debtors of Okura (Japan) and other Okura branch offices.*

On 31 May 1999, the Singapore liquidator applied to the High Court by way of Summons-in-Chambers 3525/99 (`SIC 3525/99`) seeking the following declarations:

> *(a) that the liquidator do remit all the assets recovered and realised for Okura & Co Ltd (Singapore branch), (after paying off the priority creditors and payments as set out under s 328 of the Companies Act (Cap 50, 1994 Ed) including liquidator fees on a time based basis) to the Trustee in Bankruptcy of Okura & Co (Japan) for global distribution to all the creditors of Okura & Co Ltd in accordance with the Law of Japan, and*
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> *(b) that the liquidator may allow the Trustee in Bankruptcy of Okura & Co (Japan) to pursue all the remaining foreign debtors of Okura & Co Ltd (Singapore branch).*

The application was heard on 29 July 1999 before Lim Teong Qwee JC. On prayer (b), the learned judicial commissioner made an order that the Singapore liquidator allow the appellant `to pursue all of the foreign debts, other than in respect of assets of the Company in Singapore`. He made no order in respect of prayer (a). The Singapore liquidator indicated that he understood the order to mean that he was to distribute to the Singapore creditors first, with any surplus to be sent to Japan for distribution.

The Singapore liquidator was requested by the appellant to appeal against the decision of the learned judicial commissioner. However, the Singapore liquidator declined to do so on the ground of the costs involved. The appellant then commenced proceedings in OS 210/2000 (`OS 210/2000`) on 11 February 2000 seeking the following declarations:

> *1 That, on its true construction, the effect of s 377(3)(c) of the Companies Act is that a liquidator of a foreign company appointed for Singapore by the court is required to pay the net amount of all sums recovered and realised in Singapore to the liquidator in the country where the foreign company was formed or incorporated after making payment of all preferred debts as defined in s 328 of the Companies Act.*
>
> *2 That Mr Ong Sin Huat (the liquidator appointed by the Singapore High Court as the Singapore liquidator of Okura & Co Ltd) is required to pay the net amount of all sums recovered and realised in Singapore to the plaintiff (the Japanese liquidator of Okura & Co Ltd) after making payment of all preferred debts as defined in s 328 of the Companies Act.*

Decision of the learned judge

The application was heard before Kan Ting Chiu J. The learned judge was of the opinion that when the Singapore liquidator decided not to appeal against the decision of Lim Teong Qwee JC, the appellant should have intervened by applying to be added as a party to the proceedings under O 15 r 6(2)(b)(ii) of the Rules of Court, and then appealed against the decision in his own name. Instead, he

had delayed taking any action for more than half a year, and now initiated proceedings in OS 210/2000. In these circumstances, the learned judge held that the application was an abuse of the process of the court, and dismissed the application without considering the merits. The learned judge further held that the appellant was barred from starting fresh proceedings by reason of the cause of action estoppel. [See [2000] 4 SLR 265.]

The appeal

Against the learned judge`s decision the appellant appeals. The appeal raises mainly three issues: first, whether the appellant`s application in OS 210/2000 initiated by the appellant was an abuse of process; second, whether the appellant was barred from making the application by reason of cause of action estoppel; and third, what the proper construction of s 377(3)(c) of the Companies Act should be.

Abuse of process

In his grounds of judgment, the learned judge recounted the events that led him to the conclusion that the application before him was an abuse of process. He found that the appellant was the `moving force` behind the Singapore liquidator`s application in SIC 3525/99 from the start; that he instructed the Singapore liquidator to make the application that was made; and that thereafter he was kept informed of the progress of the application by counsel. When the application failed, he was informed by the Singapore liquidator accordingly and was also informed that the latter would not appeal. The appellant could in those circumstances have applied to be joined in the proceedings under O 15 r 6(2)(b)(ii) of the Rules of Court, but he did not do so. Instead, the appellant took no action for more than half a year before filing the application in the present proceedings. The learned judge held that in the absence of the Companies (Winding-Up) Rules dealing with the point of joinder, the Rules of Court would apply. He said at [para] 26 of his grounds of judgment:

> *Order 1 r 2(4) should be read to mean that where there are winding-up rules touching on any aspect of winding-up proceedings, the Rules of Court do not apply. But where the winding-up rules are silent, the Rules of Court apply, eg as the winding-up rules do not refer to amendments of petitions and orders, the Rules of Court apply to them. Likewise, as the winding-up rules contain no provisions for the addition of parties, O 15 applies to joinder applications. If this were not the case, it would mean that no parties can be added in winding-up proceedings, or that such joinders are not regulated.*

Later, the learned judge came to the following conclusion at [para] 29 and 30:

> *29 I was not persuaded by the reasons put forward to justify the failure to intervene. The trustee should have intervened when he learnt of the liquidator`s decision not to appeal, and appealed in his own name.*
>
> *30 Instead, he did nothing for more than half a year, then took out the fresh proceedings. This was an abuse of process of court.*

Mr Michael Hwang for the appellant puts forward a four-prong argument against the learned judge`s

decision on this issue of abuse of process. First, he submits that O 1 r 2(4) of the Rules of Court explicitly provides that the Rules do not apply to proceedings relating to the winding up of companies, and consequently O 15 r 6(2)(b)(ii), on which the learned judge relied, has no application to the proceedings taken by the Singapore liquidator. Second, even if O 15 r 6 is applicable to winding up proceedings, the appellant did not have the locus standi to intervene on the ground that the application in SIC 3525/99 by the Singapore liquidator was one for directions under s 273(3) of the Companies Act and the right to make such an application is reserved solely for a liquidator of a company such as the Singapore liquidator. Third, even if the appellant had the locus standi to intervene, a direction given under s 273(3) of the Act is not an order from which an appeal lies. Fourth, even if the appellant could have intervened by way of a joinder, the failure to join in the application in SIC 3525/99 initiated by the Singapore liquidator and the subsequent application in OS 210/2000 by the appellant did not amount to an abuse of the process of the court.

We are unable to accept some of these arguments. First, counsel is in error in contending that the application in SIC 3525/99 taken out by the Singapore liquidator was one for directions pursuant to s 273(3) of the Companies Act. That section provides:

> *(3) The liquidator may apply to Court for directions in relation to any particular matter arising under the winding up.*

From the declarations sought in SIC 3525/99, it seems clear to us that what the Singapore liquidator asked for was not so much a direction under s 273(3), but a declaration or an order which would enable him to make a payment or payments under s 377(3)(c) of the Companies Act. Indeed, the summons-in-chambers itself expressly stated that the application was made pursuant to section 377(3)(c) of the Companies Act.

Secondly, we do not accept the argument that an appeal does not lie from the order made by Lim Tiong Qwee JC on the ground that that was only a direction given on an application for directions under s 273(3) of the Companies Act. Counsel relies on **Re Blackbird Pies (Management) Pty Ltd (No 2)** [1970] Qd R 33. In that case, the applicant, the bank, sought leave of the court to commence an action against the company in liquidation to recover the proceeds of sale of certain plant and equipment which had been sold by the liquidator of the company. The application was resisted mainly on the ground that previous to the application the liquidator had applied to the court for advice and direction as to whether the proceeds of sale were payable to the bank as the grantee of a bill of sale of the plant and machinery which was executed in favour of the bank. That application was made under s 237(3) of the Companies Act 1961 (which is similar to s 273(3) of our Companies Act). At the hearing for advice and direction, both the liquidator and the bank were represented and the court there advised that the proceeds belonged to the company: see **Re Blackbird Pies (Management) Pty Ltd** [1969] Qd R 387. At the hearing of the application for leave to commence the action, it was contended that the decision on the advice and direction created an estoppel between the parties. That contention was rejected by Hanger J, who held (at p 35) that the earlier application was only made for advice and direction under s 237(3) of the Companies Act, and that the subsection did not enable the court to make `binding orders on persons in the nature of judgments`.

In this case, the position is quite different. The Singapore liquidator by the SIC 3525/99 applied for the declarations which we have set out in [para] 8 above. In our opinion, even if the application was one for `directions`, the order made by Lim Teong Qwee JC is one from which clearly an appeal lies. On that application, the learned judicial commissioner first made `no order` on the first declaration sought in the application, which, if granted, would have permitted the Singapore liquidator to remit

the net amount realised from the assets he recovered to the appellant for a global distribution. The effect of `no order` is that the learned judicial commissioner declined to grant the declaration sought. In other words, he disallowed the application for the declaration sought, and there is no reason why an appeal does not lie from this part of the order. The learned judicial commissioner next granted an order substantially in terms of what was sought in the second prayer of the application. Whatever might be the nature of the application that was made, in our opinion, the order made by the learned judicial commissioner was clearly appealable.

Turning to counsel`s other arguments, we agree with him that it was not open to the appellant to apply to be joined as a party under O 15 r 6 in the manner envisaged by the learned judge. The Singapore liquidator`s application in SIC 3525/99 was a proceeding relating to the winding up of a company, and it is explicitly stated in O 1 r 2(4) of the Rules of Court that the Rules `shall not have effect in relation` to, among others, `proceedings relating to the winding up of companies`. Order 1 r 2(5) only permits an extension of any Rules of Court to such proceedings, if the extension is provided for in any written rule. There is no such provision for an extension of the Rules of Court in the Companies (Winding-Up) Rules. This is in contrast to r 2(1) of the Women`s Charter (Matrimonial Proceedings) Rules, which provides:

> *Subject to the provisions of these Rules and of any written law, the Rules of Court (Cap 322, R 5) shall apply with the necessary modifications to the practice and procedure in any proceedings under Part X of the Act to which these Rules relate.*

The mutually exclusive operation of the Companies (Winding-Up) Rules and the Rules of Court has been recognised by the Court of Appeal in **Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd** [1991] SLR 122 at 131H. With the greatest respect, the learned judge erred in holding that where the Company (Winding-Up) Rules are silent, the Rules of Court apply.

In our opinion, even if the appellant could have intervened by applying to be joined as a party, his failure to do so at that time and his subsequent application in OS 210/2000 did not amount to an abuse of the process of the court. The appellant was not a party to the application initiated by the Singapore liquidator in SIC 3525/99. The learned judge said that the appellant was the `prime mover` in the application. That may be true in the sense that he it was who requested the Singapore liquidator to make the application. However, the Singapore liquidator was appointed by the court in Singapore in the liquidation of Okura Singapore and is not, and has never been, an agent of the appellant. He is not accountable to the appellant. When he was requested by the appellant to make the application, he was certainly at liberty to decline to accede to the request, but having considered the request with the benefit of his own legal advice, he agreed to make the application. In so doing, he acted independently on his own.

In these circumstances, when the Singapore liquidator did not succeed in obtaining the declaration sought in SIC 3525/99, the appellant could, assuming that the learned judge was right, intervene by applying to join as a party and pursue the appeal in his name. He did not do that. However, that was not the only course open to him. He was at liberty to take out an application, as he did, for a proper construction of s 377(3)(c) of the Companies Act. Merely opting for this course is not, in our opinion, an abuse of the process of the court.

The question of abuse of the process of the court was discussed by this court at some length in the case of **Ching Mun Fong v Liu Chit Cho & Anor** [2000] 1 SLR 517 . The facts there were quite complicated. For our purpose, they were briefly these. Two persons, Tan and Liu, were involved in a

joint venture to purchase a plot of land. Tan procured his daughter, Collin, and Liu procured his wife, Lim, to enter into an agreement to purchase jointly the land, but the land was eventually purchased by a family company of Tan, and their joint venture did not materialise. Liu nonetheless alleged that he or his wife, Lim, had an interest in the land which was sold to Tan at an agreed price and that pursuant to his agreement with Tan the latter paid, or caused one of his companies to pay, Liu a certain sum as part payment of the purchase price. It was not disputed that the sum was paid to Liu. Subsequently, Tan procured one of his family companies, Fook Gee, to sue Liu for the recovery of the sum as a loan, and Liu caused his wife to institute a suit against Tan claiming the balance of the purchase price. The action for the loan failed, as the court found that there was no evidence of the loan having been made by Fook Gee to Liu. The claim against Tan by Lim succeeded and judgment was entered for the balance of the purchase price. On appeal, the dismissal of the claim for the loan was affirmed, but Tan`s appeal against the judgment for the balance of the purchase price succeeded on the ground that Lim had not proved that she had acquired any interest in the land concerned. In the wake of this decision, Tan`s personal representative, Chin, brought an action against Liu to recover the amount paid to Liu and this court held that the bringing of the action was not an abuse of the process of the court. The court said at [para] 27:

> *In the case at hand, Tan was a party in Suit 4149/84 initiated by Lim, and the appellant, his executrix, is now bound by the determination of this court in that action. However, Liu was not a party in that action, and purely with the parties as they were in that action as instituted by Lim, Tan could not have counterclaimed against Liu for the return of the moneys. It is true that Tan could have done so by joining Liu as a third party in that action; and that he did not do. But, in our opinion, his failure to do so did not make the present action an abuse of the process of the court.*

In the judgment, the court also referred to several similar or analogous cases where fresh proceedings instituted to recover damages which were the same subject-matters of claim in earlier actions but between different parties were held not to be an abuse of court process. In particular, we find the case of **Gleeson v J Wippell & Co Ltd** [1977] 1 WLR 510 most helpful. There, the plaintiff, the designer of a particular collar-attached shirt used by clergy, sued a company, Denne, for infringement of her copyright in her drawings, the essence of her claim being that Denne had copied a shirt supplied by another company, Wippell. In those proceedings the plaintiff did not sue Wippell. Her claim against Denne failed. She later brought fresh proceedings against Wippell claiming infringement of her copyright in relation to the same shirt. Wippell took out an application to strike out her claim on the ground that, since it had been held in the earlier action that Wippell`s shirt was not an infringement of her copyright, it was frivolous and vexatious and an abuse of the process of the court for the plaintiff to seek to litigate all over again what had already been decided against her. The application was dismissed. One of the arguments raised before the court was that the plaintiff ought to have joined Wippell in the action against Denne under the English RSC, O 15 r 6(2)(b)(ii) (which is similar to O 15 r 6(2)(b)(ii) of our Rules of Court), as it was so plain that Wippell was `at the heart and core of the case`, and that as she had failed to do so, she ought not be permitted to sue Wippell. This argument was rejected by Megarry V-C who said at pp 517-518:

> *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 r 6 (2) (b) (ii) a court would or would not add parties. ... Nevertheless, one cannot decide cases*

> *in a vacuum, and without regard to other cases which differ in their facts but fall within the same principle. I can well see the justice of refusing to permit a plaintiff who has failed to take an obvious point against the defendant to have a second bite at the cherry by suing the defendant a second time in order to take that point. What I cannot see is the justice of refusing to permit a plaintiff to sue a person at all because the plaintiff failed to join him as a defendant in other proceedings against another person. Such a failure may provide material for cross-examination in the second proceedings, and it may also sound in costs, especially if the second proceedings have the same result as the first; but the drastic step of striking out the proceedings is quite another matter.*

Another case that illustrates the point is **Ng Chee Chong v Toh Kouw** [1999] 4 SLR 45 , also a decision of this court. There, the appellants contracted to sell the flat to the respondents, but the respondents subsequently reneged. The appellants brought an action claiming the deposit and obtained summary judgment for the amount. Subsequently, they brought another action against the respondents claiming a loss of profits occasioned by the breach of contract on the part of the respondents. It was accepted by both the court below and this court that the cause of action founded on the accrued right to deposit was distinct from that arising from the wrongful repudiation of contract and thus the two suits involved two separate causes of action. The court held that the bringing of the second suit was not an abuse of the court process.

It should be borne in mind that a dismissal or a striking out of a claim on the ground of abuse of process effectively means `the shutting out of a matter not previously pronounced on expressly in the earlier litigation from determination of the court` (per Gibson J in **Lawlor v Gray** [1984] 3 All ER 345, 352), and such power should only be exercised after a scrupulous examination of all the circumstances, bearing in mind always the overriding consideration of working justice in the case. Lord Upjohn in **Carl Zeiss Stiftung v Rayner and Keeler** [1967] 1 AC 853, 954 said:

> *All estoppels are not odious but must be applied so as to work justice and not injustice and I think that the principle of issue estoppel must be allied to the circumstance of the subsequent case with this overriding consideration in mind.*

Cause of action estoppel

The second ground relied upon by the learned judge in dismissing the application was the cause of action estoppel. The learned judge said at [para] 31 and 32:

> *31 The trustee was also estopped from taking out the fresh proceedings. In the House of Lords` decision in **Arnold & Ors v National Westminster Bank plc** [1991] 2 AC 93, 104; [1991] 3 All ER 41, 45, where Lord Keith of Kinkel held that:*
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> *`Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.`*

> *32 The trustee had instructed the liquidator to seek a declaration on the construction of s 328. The liquidator had done at his bidding, and the court had ruled against him after hearing his counsel and the Official Receiver. As he did not appeal against the decision he was estopped from attempting to have the issue decided again, and his action was an abuse of process of court.*

The general principle of estoppel per rem judicatam is clear, and its requirements are `that the earlier judgment relied on must have been a final judgment, and that there must be identity of parties and of subject matter in the former and in the present litigation`: per Lord Reid in ***Carl Zeiss*** (supra) at pp 909-910. Reverting to the present case, we think that it is clear that the order made by Lim Tiong Qwee JC was a final order and that the subject matters before him and in these proceedings are substantially identical. The only question is whether there is an identity of parties. On this Lord Reid had this to say in ***Carl Zeiss*** at p 910:

> *[T]here is no doubt that the requirement of identity of parties is satisfied if there is privity between a party to the former litigation and a party to the present litigation ... It has always been said that there must be privity of blood, title or interest: here it would have to be privity of interest. That can arise in many ways, but it seems to me to be essential that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject-matter. I have found no English case to the contrary.*

Now, the Singapore liquidator and the appellant are clearly not the same parties. The only question is whether there is any privity between them. The only privity for consideration here is whether there is a privity of interest. In this respect, it is necessary to consider the relationship between the two parties. The Singapore liquidator was appointed by the court and is accountable to the court and not the appellant. Neither is he paid by the appellant. His payment comes from the administration of the local liquidation. He is not an agent of the appellant. It is true that he acceded to the request of the appellant in making the application, but he did so on his own account and not as an agent for the appellant and the latter was in no way responsible for what he did or did not do. It should be borne in mind that Okura & Co Ltd was a multinational entity and its insolvency unavoidably is cross-border in nature, and necessitates some degree of co-ordination and co-operation between the Singapore liquidator and the appellant in the recovery and realization of assets of the company in the different jurisdictions. The Singapore liquidator`s application in SIC 3525/99 for an order under s 377(3)(c) of the Companies Act was part of this co-operation process, and it was necessary, even from the point of view of the Singapore liquidator, to ascertain whether the arrangement that he and the appellant were contemplating was allowed under Singapore law. Agreeing to co-operate with the appellant in that manner does not render him privy to the appellant. In our opinion, the relationship between appellant and Singapore liquidator does not give rise to any privity of interest between them.

The appellant was of course interested in the outcome of the application in SIC 3525/99 made by the Singapore liquidator. However, privity for this purpose is not established merely by having some interest in the outcome of the litigation. In **Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 3)** [1970] 1 Ch 506, 541, Buckley J said:

> *It is not everyone who has some interest in the outcome of litigation that is to be regarded as privy to some party to that litigation for the purpose of the doctrine of res judicata: see, for example,* ***Mercantile Investment & General***

> ***Trust Co v River Plate Trust, Loan & Agency Co*** *[1894] 1 Ch 578. I have been referred to no authority which indicates at all clearly what kind of interest in earlier litigation relied upon as constituting a res judicata is sufficient to render someone, who was not a party and is not a successor in title to a party to that litigation, privy to a party for the purposes of the doctrine.*

The question of privity of interest was also raised and discussed in ***Gleeson v J Wippell & Co Ltd*** (supra). Megarry V-C said at p 515:

> *[I]t seems to me that the substratum of the doctrine [of res judicata] is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third part. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be 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 in proceedings to which the other is party. It is in that sense that I would regard the phrase `privity of interest.` Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa.*

Reverting to the case before him, the learned Vice-Chancellor held that there was no privity between Denne and Wippell, and the plaintiff was not precluded from suing Wippell. His Lordship said at p 516:

> *I cannot see any ground for holding that Wippell is in privity of interest with Denne, or that they are linked in such a way as to make any doctrine of res judicata applicable. There was a trade relationship between the two, in the course of which Denne, at Wippell`s request, copied a Wippell shirt: but that is all. If the plaintiff had succeeded against Denne, there would, in my judgment, have been no ground whatever for saying that Wippell should be bound by the decision against Denne.*

In our judgment, there is no privity of interest between the appellant and the Singapore liquidator, and the cause of action estoppel has no application. Consequently the appellant is not precluded from making the application in OS 210/2000.

Merits of the application

The application on the merits was not considered below. Rather than to remit the application to the High Court for consideration, we have decided to consider it. The application does not involve any finding of fact for which a trial is necessary, and in so far as the relevant facts are concerned, they are clearly before us and there is no dispute in relation to them. The issue is solely one of statutory interpretation, and in the circumstances remitting it to the High Court for determination would

unnecessarily increase the costs and occasion some delay to the parties involved.

Mr Sarjit Singh appearing on behalf of the Official Receiver takes a preliminary objection and argues that once the Singapore liquidator has been appointed, the appellant ceased to be the liquidator, and therefore he has no locus standi to make an application to court for an order under s 377(3)(c) of the Companies Act. It is true that the appellant has ceased to act as the liquidator of Okura Singapore since the appointment of the Singapore liquidator. The fact remains, however, that he is the liquidator of the company, Okura & Co Ltd, in Japan, and Japan is the principal jurisdiction in the liquidation of the company. The appellant as the liquidator has taken out an originating summons seeking the court`s determination on the proper construction of s 377(3)(c) of the Companies Act, a provision in which he is an interested party, as the construction of s 377(3)(c) would determine the amount of monies that he as the liquidator of Okura Japan will receive from the Singapore liquidator. In our judgment, the appellant has the locus standi to make this application.

Interpretation of s 377(3) (c)

At the heart of this appeal is the interpretation of para (c) of s 377(3) of the Companies Act. These provisions are as follows:

377	(3)	A liquidator of a foreign company appointed for Singapore by the Court or a person exercising the powers and functions of such a liquidator -	
		(a)	...
		(b)	subject to subsection (7), shall not, without obtaining an order of the Court, pay out any creditor to the exclusion of any other creditor of the foreign company;

		(c)	shall, unless otherwise ordered by the Court, only recover and realise the assets of the foreign company in Singapore and shall, subject to paragraph (b) and subsection (7), pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company.

Both paras (b) and (c) are subject to sub-s (7) which is as follows:

> *Section 328 shall apply to a foreign company wound up or dissolved pursuant to this section as if for references to a company there were substituted references to a foreign company.*

Section 328 sets out a list of preferential debts which are to be paid in priority to all other unsecured debts in the liquidation of a company. That section applies to a company incorporated in Singapore. But, by reason of subs-s (7), s 328 applies equally to a foreign company which is being wound up or dissolved.

From a plain reading of s 377(3)(c), the following, at least, are clear. First, a liquidator of a foreign

company appointed for Singapore by the court shall only recover and realise the assets of the foreign company in Singapore, unless otherwise ordered by the court. Second, such a liquidator of the foreign company can only pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated (`the foreign liquidator`), after paying off the preferential debts listed in s 328.

What is not clear and is in controversy before us is whether the liquidator of a foreign company appointed for Singapore by the court, after recovering and realizing all the assets of the foreign company in Singapore, and after paying off the preferential debts as listed in s 328, is required under s 377(3)(c) -

(i) to pay the net amount to the liquidator of the foreign company, or

(ii) to pay the net amount to the liquidator of the foreign company only after he has paid off all the debts and liabilities incurred in Singapore by the foreign company.

Mr Michael Hwang for the appellant and Mr Leo Cheng Suan for the Singapore liquidator contend for the former view, while Mr Sarjit Singh, appearing for the Official Receiver, advocates the latter.

At this juncture it is convenient to refer to the decision of Dunn J of the Supreme Court of Queensland in ***Re Air Express Foods Pty Ltd (in liq)*** 2 ACLR 523. There, the company in question was incorporated in Papua-New Guinea. The Supreme Court of Queensland ordered that the company be wound up as an unregistered foreign company and appointed liquidators for Queensland for the winding up. Later, a winding up order was also made by the Supreme Court of the then Territory of Papua-New Guinea and a liquidator was appointed in that country. The Queensland liquidators had realised a substantial sum of money from the assets of the company in Australia, and took out an application for an order under s 352(3) of the Companies Act 1961-1975 (Queensland) which, so far as relevant, provides as follows:

> *(3) A liquidator of a foreign company appointed for the State by the Court or a person exercising the powers and functions of such a liquidator -*
>
> *(a) ...*
>
> *(b) shall not, without obtaining an Order of the Court, pay out any creditor to the exclusion of any other creditor of the foreign company;*
>
> *(c) shall, unless otherwise ordered by the Court, only recover and realise the assets of the foreign company in the State and shall pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated.*

Dunn J held that after paying off all the preferential debts and the costs of winding up, the Queensland liquidators were to transmit the balance of the money held by them to the liquidator of the company in its place of incorporation, namely Papua-New Guinea.

It should be noted that para (c) of s 352(3) of the Australian Companies Act 1961-1975, which was the key provision in that case, is different from para (c) of s 377(3) of our Companies Act. For convenient reference, we repeat below para (c), and the difference between the two lies in the

presence of the additional words in our s 377(3)(c), which we set out in italics:

> *(c) shall, unless otherwise ordered by the Court, only recover and realise the assets of the foreign company in Singapore and shall,* ***subject to paragraph (b) and subsection (7),*** *pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated* ***after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company*** *.*

For convenient reference, we shall refer to the words in italics as `additional words`. In view of the presence of these additional words, the decision of Dunn J is not of much assistance to us in the construction of para (c) of s 377(3).

Mr Michael Hwang argues that the phrase `any debts and satisfying any liabilities` must be taken to refer only to preferential debts defined in s 328 on the ground that s 377(3)(c) is subject not only to s 377(7) which requires payment first of the preferential debts, but also to s 377(3)(b), which applies the principle of equality of distribution. It follows that a locally appointed liquidator shall not, without obtaining an order of the court, pay out any creditor (not being a preferred creditor under s 328) to the exclusion of any other creditor of the foreign company. Consequently, the liquidator of the foreign company for Singapore appointed by the court must remit all monies remaining, after payment of preferential debts, to the liquidator of the foreign company.

Mr Sarjit Singh, on the other hand, argues that the presence of these additional words, and in particular the concluding words, `any debts and ... liabilities incurred in Singapore ...` must be taken to refer to debts and liabilities incurred by the foreign company in Singapore. The effect of the additional words is that the liquidator of the foreign company for Singapore appointed by the court must do more than just pay the preferential creditors; he must pay all debts and liabilities incurred in Singapore before he can remit the net amount realised to the foreign liquidator.

Clearly, on the literal interpretation of s 377(3)(c), the presence of the additional words gives rise to the contradiction between -

(i) on the one hand, the requirement that the liquidator must not pay any creditor (not being a preferred creditor falling within s 328) of a foreign company to the exclusion of any other creditor, and this is mandated by para (b), to which para (c) is expressly subject, and

(ii) on the other hand, the requirement that by reason of the concluding words, namely: `after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company`, the liquidator, after paying the preferred debts falling within s 328, has to pay off all the debts and liabilities incurred in Singapore, before he pays the net amount to the foreign liquidator.

It is necessary to look at the legislative history of this section. The original text of our Companies Act followed closely the Companies Act 1965 of Malaysia which was derived from the Australian Companies legislation. The Malaysian Companies Act 1965, when it was enacted, had the relevant section, then s 340(3)(c) in the following terms:

> *(3) A liquidator of a foreign company appointed for Malaysia by the Court or a person exercising the powers and functions of such a liquidator -*

(a) ...

(b) shall, not without obtaining an order of the Court, pay out any creditor to the exclusion of any other creditor of the foreign company; and

(c) realise the assets of the foreign company in Malaysia and shall pay the net amount so recovered and realized to the liquidator of that foreign company for the place where it was formed or incorporated.

Section 340(3)(c) therefore followed exactly in all material respects the corresponding Australian provision, and did not have the additional words. This provision (with necessary modifications) was initially adopted in Singapore and appeared as cl 340(3)(c) in the Companies Bill. The explanatory note to cl 340(3) contained, inter alia, the following statement:

The liquidator is prohibited from paying out any creditor to the exclusion of any creditor of a foreign company and is required to pay the amount recovered and realised to the liquidator of the foreign company in the place where it was formed or incorporated.

This statement provided a clear explanation to the provision of cl 340(3)(c) as it then stood, and was consistent with the intent behind that clause. The Companies Bill after the second reading was referred to a Select Committee, and after the Committee had deliberated, various amendments were made to the Bill and one of the amendments made was the insertion of the additional words to cl 340(3)(c). When the Bill as amended was presented to Parliament at the third reading, cl 340(3)(c) appeared in an amended form with the additional words. The Minister for Law and National Development, Mr EW Barker, made the following statement with reference to cl 340(3):

Mr Speaker, Sir, the amendments as have been made by the Select Committee, while they have gone a long way to refine the Bill, do not substantially alter the character of the Bill. One Part of the Bill, Part XIII, relating to reciprocal provisions with Malaysia, which authorises the Minister to make arrangements with Malaysia for their extension to Singapore of winding-up orders made in Malaysia and for the extension to Malaysia of winding-up orders made in Singapore, has been deleted. Deletion of this Part is considered necessary as cl 340 of the Bill, which is similar to s 340 of the Malaysian Companies Act, with necessary modifications agreed to between Singapore and Malaysia, should meet the reciprocal requirements.

The `necessary modifications agreed to between Singapore and Malaysia` were the insertion of the additional words in para (c) of s 340(3). The Companies Act was passed by Parliament on 23 December 1967 and came into force on 29 December 1967, and as enacted, s 340(3)(c) contained the additional words, and is the present s 377(3)(c). It is therefore clear to us that s 340(3)(c) as enacted was a deliberate departure from s 340(3)(c) of the Malaysian Companies Act 1965, which was the Australian position. Unfortunately, there was no clear explanation as to the purpose for the presence of the additional words in our s 340(3)(c), and in particular the concluding words `after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company`.

It may be of interest to note that Malaysia amended s 340(3)(c) of the Malaysian Companies Act, but

that amendment, among others, was made only in 1985 by the Companies (Amendment) Act 1985, and the amended version of para (c) is as follows:

> *shall, unless otherwise ordered by the Court only recover and realize the assets of the foreign company in Malaysia and shall,* ***subject to subsection*** *(7), pay the net amount so recovered and realized to the liquidator of that foreign company for the place where it was formed or incorporated* ***after paying any debts and satisfying any liabilities incurred in Malaysia by the foreign company****. [Emphasis is added]*

The amendment consisted of the addition of the words which we have highlighted in italics. This amendment, if we may respectfully say so, makes crystal clear the sense and intention of this section. As amended, para (c) requires the liquidator for the foreign company, after paying the preferential debts, to pay off the debts and liabilities incurred in Malaysia before paying the net amount which he had realised to the foreign liquidator. This meaning is clearly borne out by para 64 of the Explanatory Statement to the Companies (Amendment) Bill. There, para 64 which explained the purpose of the amendment of s 340 said as follows:

> ***Clause 63 seeks*** *to amend s 340 to require the liquidator for a foreign company in Malaysia to satisfy the liabilities incurred by that foreign company in Malaysia out of proceeds from the realisation of the assets of the company in Malaysia before making payments to the liquidator of the company for the place where it was incorporated.*

Having regard to the legislative history of s 340, now s 377, it seems to us that a meaning has to be given to the additional words in s 377(3)(c). We are therefore unable to agree with Mr Michael Hwang and Mr Leo that the concluding words `any debts and ... liabilities incurred ...` mean the preferential debts referred to in sub-s (7) and listed in s 328. We do not agree that they have that meaning, because, if that is the meaning, these words would be otiose. In the context, they can only mean what they say: the debts and liabilities incurred by the foreign company in Singapore (aside from the preferential debts). The only problem is that, if that is the meaning, it seems at first blush to contradict the preceding phrase, `subject to paragraph (b)` of that section.

We consider first para (b). It encompasses the principle of equality of payment to the creditors. But that principle as contained in that paragraph is not absolute. That paragraph expressly provides some flexibility; it confers a power on the court, in appropriate circumstances, to order otherwise. Thus, the liquidator may pay certain creditors to the prejudice of other creditors of a foreign company, if he obtains an order from the court allowing him to do so. This built-in flexibility provides, for instance, for situations where there are doubts as to whether the remission of the net amount to the foreign liquidator would result in any distribution to the creditors.

Bearing this in mind, we now turn to construe s 377(3)(c). First, we think that the phrase `subject to paragraph (b) and subsection (7)` was added by way of clarification. In our opinion, even without the presence of this phrase in para (c), the liquidator is obliged to observe the provisions of para (b) and sub-s (7). That would have been the effect, if the paragraph had been drafted as originally proposed in the Bill, ie following the original wording in s 340(3)(c) of the Malaysian Companies Act 1965. That was the effect given to s 352(3)(c) of the Australian Companies Act 1961-1975 by Dunn J in ***Re Air Express Food*** (supra), and para (c) there was identical with para (c) of s 340(3) of the Malaysian Companies Act. Secondly, we think that the concluding words, `any debts and ... liabilities ...` qualify

the obligation of the liquidator under para (b) with the intent that while the liquidator is obliged to observe the obligation in para (b) in the administration of the liquidation of the company in Singapore, before he remits the net amount realised from the assets he recovered to the foreign liquidator, he must pay off first the preferred debts as defined in s 328 ***and thereafter*** the `debts and ... liabilities incurred in Singapore ...`. In our opinion, the effect of the additional words is that the liquidator, having recovered and realized the assets of the foreign company in liquidation in Singapore, and having the funds in his hands, is mandated to observe para (b) and to pay off the preferred debts as defined in s 328, but before he remits the net amount to the foreign liquidator, he is obliged to pay the debts and liabilities incurred by the company in Singapore. At that point in time, the Singapore creditors will have to be paid first. We are of the opinion that this construction gives effect to the intent of the section.

Conclusion

In the result, we allow the appeal and set aside the order below. We now turn to the declarations sought in the application before us. For the reasons given above, we are unable to make the declarations asked for. However, we make the following declarations. First, on the true construction of s 377(3)(c) of the Companies Act, the liquidator of a foreign company appointed for Singapore by the court is required under that section to pay the net amount of all moneys recovered and realised in Singapore to the liquidator in the country where the foreign company was formed, only after paying (i) all the preferential debts as defined in s 328 of the Companies Act, and thereafter (ii) all the debts and liabilities incurred in Singapore by the foreign company. Secondly, Mr Ong Sin Huat, the liquidator appointed for Singapore by the court is required under s 377(3)(c) to pay the net amount of all sums recovered and realised in Singapore to the appellant, the Japanese liquidator of Okura & Co Ltd, only after paying (i) all the preferential debts as defined in s 328 of the Companies Act, and thereafter (ii) all the debts and liabilities incurred in Singapore. We order that the costs of the appeal and below of all parties are to be paid out of the assets of Okura Singapore, and taxed on an indemnity basis, as agreed to between the appellant and the second respondent. The deposit in court, with interest, if any, is to be refunded to the appellant or his solicitors.

Outcome:

Appeal allowed.