Hendrawan Setiadi v OCBC Securities Pte Ltd and Others
[2001] SGHC 290

Case Number : Suit 866/2000, RA 151/2000

Decision Date : 01 October 2001

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Molly Lim SC and Philip Ling (Wong Tan & Molly Lim) for the plaintiff; Muthu Arusu and Mak Wei Munn (Allen & Gledhill) for the first defendant

Parties : Hendrawan Setiadi — OCBC Securities Pte Ltd

Civil Procedure – Pleadings – Striking out – Res judicata – Issue estoppel – Court refusing leave to discontinue earlier action and ordering claim to be struck out – Whether such order precludes plaintiff from commencing fresh action on same matter – O 21 r 3 Rules of Court

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Background

The plaintiff Hendrawan Setiadi is an Indonesian businessman. He was a client of the first defendant OCBC Securities Pte Ltd (`OCBC Securities`), a stockbroking company incorporated in Singapore.

At all material times, the second defendant Ng Haw Hua was a dealer`s representative and an associate director employed by OCBC Securities.

At all material times, the third defendant Tang Boon Hai was also a dealer`s representative employed by OCBC Securities.

The additional background information below is based on Mr Setiadi`s allegations.

Sometime in July 1995, Mr Setiadi opened an account with OCBC Securities and traded in securities through Mr Ng and Mr Tang. For the purpose of that account, Mr Setiadi deposited the sum of $5m. In respect of the trading under this account, about $4.13m was returned by OCBC Securities leaving a balance of about $587,000 (`Singapore transactions`).

Sometime in May 1996, at the request/advice of Mr Ng, Mr Setiadi deposited US$10m with OCBC Securities for investment in the shares of Megaworld Properties and Holdings Inc, a company in the Philippines (`Megaworld shares`).

Mr Setiadi`s case is that Mr Ng had represented to him that in return for his investment of US$10m, there would be a guaranteed gross return of 20% of that investment by OCBC Securities. In consideration of a guarantee being given to him by OCBC Securities, he agreed to invest about US$10m in Megaworld shares. The guarantee (`the guarantee`) was faxed over by Mr Ng to Mr Setiadi at his offices in Jakarta. Upon receipt of the guarantee, Mr Setiadi remitted the sum of US$10m which was then used to purchase Megaworld shares. The value of Megaworld shares subsequently plummeted and he suffered a loss.

To mitigate his loss, Mr Setiadi sold off the Megaworld shares. He then commenced an earlier action in Suit 559/98 (`the first action`) against OCBC Securities and Mr Ng to recover the losses suffered under the Singapore transactions and in respect of the Megaworld shares.

Under the Singapore transactions, Mr Setiadi claimed that the losses were suffered as a result of various unauthorised transactions effected by Mr Ng. Consequently, OCBC Securities was also vicariously liable to him for the losses.

In respect of the Megaworld shares, Mr Setiadi`s claim against OCBC Securities was based on the guarantee. Alternatively, his claim was that the terms in the guarantee were representations made by Mr Ng as a servant/agent of OCBC Securities to induce him to purchase the Megaworld shares which he did. As the representations were made fraudulently, he was entitled to rescind the contract or to claim damages for the loss suffered. As an alternative, he also claimed that his loss and damage was occasioned by the negligence of Mr Ng as servant/agent of OCBC Securities.

The writ in the first action was filed on 15 April 1998 and fixed for trial in November 1998 before Justice Rajendran.

On 12 November 1998 (`Day 1`), on the application of counsel for OCBC Securities and for Mr Setiadi, the hearing was adjourned to Monday, 16 November 1998 on the ground that parties needed some time to prepare the various trial bundles.

On 16 November 1998 (`Day 2`), the then counsel for Mr Setiadi in his opening statement informed the court that Mr Ng had still not been served with the writ. Mr Setiadi`s solicitors were still trying to serve Mr Ng with the writ and believed he was away in the Philippines.

On Day 2 of the hearing, counsel for OCBC Securities also applied for security for costs, further discovery, etc against Mr Setiadi.

On Day 4 of the trial, Mr Setiadi`s counsel applied to amend his statement of claim in respect of some of the Singapore transactions. The trial was then adjourned to 5 April 1999.

At the adjourned hearing on 5 April 1999, OCBC Securities` counsel applied for leave to amend the defence to include the point that the guarantee was fabricated. OCBC Securities claimed that based on its document expert`s report, the guarantee was a `cut and paste` job.

For that reason, the trial was then adjourned again and was fixed for hearing from 13 July 1999 to 26 July 1999.

In the course of the adjournment, Mr Setiadi engaged a document expert from Australia to deal with the issue as to whether the guarantee was a `cut and paste` job.

On 13 July 1999, Mr Setiadi was re-called to the stand for continued cross-examination. By then, he was represented by a new counsel, ie Ms Molly Lim SC, who also appeared before me.

On 16 July 1999, Ms Lim applied under O 21 r 3 for leave to discontinue the action. At that stage, the cross-examination of Mr Setiadi had not yet been completed.

It was alleged for Mr Setiadi that during the resumed trial of the first action on 13 July 1999, it had become clear that the evidence of Mr Ng was crucial. Before the amended defence of OCBC Securities, its pleaded case was a denial of any liability on the guarantee and they alleged that Mr Ng had no authority to issue the guarantee. Mr Setiadi`s then solicitors` inability to serve the writ on Mr Ng was therefore thought not to be crucial and his case could be proceeded with against OCBC Securities in the absence of Mr Ng.

After the defence was amended to include the point that the guarantee was fabricated and during the continuation of the trial from 13 July 1999, Mr Setiadi learnt from his own document expert that there were at least two different versions of the guarantee. The copy in the possession of OCBC Securities was different from that in the possession of Mr Setiadi.

Mr Setiadi alleged that it then became clear that the participation and evidence of Mr Ng was crucial.

It is important to bear in mind what transpired then before Rajendran J on 16 July 1999 in respect of the application on behalf of Mr Setiadi to discontinue the action. I set out below the notes as recorded by the judge:

> *16.7.99 (FRIDAY) (DAY 10)*
>
> *In Chambers.*
>
> *2.45pm*
>
> *Miss Lim:*
>
> *My instructions are to discontinue the action with costs to be taxed. I so apply.*
>
> *Shanmugam:*
>
> *I would ask for action to be discussed (**sic**) [dismissed] rather than leave to discontinue be given.*
>
> *Order 21, rule 3, is for leave. Under that rule court has discretion. My reasons for application are:*
>
> *(1) Most horrendous allegations made against OCBC. OCBC is a major institution in Singapore and prides itself on its reputation. In this context, it is important for world to know that allegations are frivolous. The best way to achieve this is to have action struck out.*
>
> *(2) Court has seen the plaintiff on stand. It does not fit within parameters of what we may see as acceptable behaviour in Singapore. If leave is granted, nothing to stop him from starting fresh action in Singapore or in Indonesia on some issues.*
>
> *If Court dismisses the action, then there would be serious difficulties in him commencing fresh proceedings in Singapore. He may not find difficulties in Indonesia but he will find any judgment entered difficult to enforce outside of Indonesia.*
>
> *(3) There is no prejudice to the plaintiff. What the plaintiff`s solicitor is saying is: "I can`t go on". That being so, ask that the court dismisses the claim.*

Miss Lim:

I ask for leave to discontinue. I spoke and obtained instructions from my client on that basis.

If court is inclined to dismiss the claim and not grant leave to discontinue, I would have to take further instructions as to whether I wish to pursue with this application for leave to discontinue.

On the rules, it is court`s discretion and I am asking court to exercise discretion in favour of my client.

Shanmugam:

What they really are saying is that the client may not be happy if court orders claim to be struck off.

Miss Lim:

I have a choice of withdrawing my application.

Shanmugam:

If she is withdrawing the application, then she should say so.

Court:

This is a case which I may well, in the exercise of my discretion, order that the claims be dismissed.

Miss Lim:

I have to take instructions.

Court:

Adjourned 10 minutes for Miss Lim to take instructions.

Intld: SR

Court resumes

4 pm

Miss Lim:

We are proceeding with our application for leave to discontinue against the 1st defendants. Leave it to court. Discontinuance is only against the 1st defendants and not 2nd defendant.

Shanmugam:

That makes it all the more imperative that the action against the 1st defendants be struck out.

Court:

(1) Leave to discontinue denied.

(2) Order that the plaintiff`s claim against the 1st defendants be struck out.

(3) Costs to be taxed and paid to the 1st defendants.

Mr Setiadi alleged that after the order of 16 July 1999 (`the order`), he tried to locate Mr Ng. When Mr Ng was located, Mr Setiadi commenced the present action in October 2000 (`the second action`). He also added Mr Tang as a party to the second action.

Mr Ng entered an appearance to the writ on 29 March 2001 and the writ was served on OCBC Securities on 16 April 2001. If Mr Ng could not be located, the second action would not have been proceeded with since nothing had changed from the date of the order.

OCBC Securities then applied for Mr Setiadi`s claim in the second action to be struck out.

On 18 July 2001, the deputy registrar struck out the second action.

Mr Setiadi appealed and on 22 August 2001, I dismissed his appeal.

Mr Setiadi has appealed against my decision.

Arguments

Mr Muthu Arusu for OCBC Securities based his submission on res judicata, in its original and extended form as enunciated in **Henderson v Henderson** [1843-60] All ER Rep 378 and abuse of the process of the court.

Ms Lim accepted that Mr Setiadi`s claim against OCBC Securities in the second action is the same as the claim in the first action, save for an additional claim for negligence against OCBC Securities directly rather than vicariously as in the first action.

Ms Lim stressed that the judge had not dismissed the claim in the first action but had instead ordered

that it be struck out.

She sought to rely on a passage in the judgment of Kirby P in **Linprint v Hexham Textiles** [1991] 23 NSWLR 508 at 520. However, that passage was based on a clear distinction in the Victorian County Court Rules between orders of `dismissal` and `striking out`. Furthermore, Ms Lim did not suggest that there was such a clear distinction under the Singapore Rules of Court.

Ms Lim submitted that the judge could have imposed an express term to the effect that Mr Setiadi was precluded from commencing a fresh action but the judge did not. Accordingly, Mr Setiadi was not so precluded.

While it was true that the judge did not impose such a term expressly, the question was whether that was the meaning of the order in any event. Having regard to Ms Lim`s attempt to discontinue the first action and the insistence by Mr Shanmugam SC, who appeared for OCBC Securities, that the action or claim be dismissed/struck out, and the submissions before the judge, there was no doubt in my mind that the order made was to preclude any fresh action by Mr Setiadi against OCBC Securities.

Ms Lim also submitted that if the intention was to shut out Mr Setiadi from commencing a fresh action, then he would have withdrawn his application to discontinue the action.

However, the judge`s notes show clearly that Ms Lim did not have any doubt then that that was what Mr Shanmugam was insisting on. Indeed, she herself said she had the choice of withdrawing the application if such an order was to be made. After the judge intimated that he might well make such an order, she then said that she would take instructions. The matter was then adjourned.

Subsequently, Ms Lim returned and said she was proceeding with the application to discontinue. She also pointed out that the discontinuance was only as regards the claim against OCBC Securities and not against Mr Ng whereupon Mr Shanmugam said that this made it all the more imperative that the first action be struck out.

In those circumstances, the judge denied leave to discontinue the action and ordered that the claim against OCBC Securities be struck out.

It really was not open to Ms Lim to argue that Mr Setiadi would have withdrawn his application to discontinue if he might be precluded from commencing a fresh action against OCBC Securities.

Ms Lim also submitted that because Mr Shanmugam had submitted that there would be no prejudice to Mr Setiadi, Mr Setiadi was led to believe that he would not be precluded from commencing a fresh action against OCBC Securities.

I was of the view that Ms Lim`s reliance on the argument of no prejudice was an attempt to take the argument out of context. Seen in the context of what had transpired, there was no doubt in her mind and Mr Setiadi`s mind that if the claim was dismissed or struck out, as opposed to being discontinued, he would be precluded from commencing a fresh action against OCBC Securities.

Ms Lim`s next argument was that no irreparable harm was caused to OCBC Securities if Mr Setiadi was allowed to proceed with his present claim as OCBC Securities could even apply for costs on a full indemnity basis if Mr Setiadi fails in the present claim.

I was of the view that this was a disingenuous argument. The point is that OCBC Securities would have to defend a claim which it was not obliged to defend as Mr Setiadi was precluded from making

the claim against it.

Ms Lim then argued that the judge would prohibit Mr Setiadi from commencing a fresh action only if it was `just to do so`, relying on `as it thinks just` in O 21 r 3, and it was not just to do so.

Again, this was not the point. Whether it was just to do so or not was for the judge to decide. He had made the order. If Mr Setiadi was not satisfied, he should have appealed against the order. He did not.

I also did not agree with Ms Lim that to accept the contentions for OCBC Securities would be tantamount to interfering with the judge`s order as I have concluded that the order means what OCBC Securities contends and not what Mr Setiadi contends.

In ***Linprint v Hexham Textiles*** (supra), Linprint Pty Ltd (`Linprint`) had sued Hexham Textiles Pty Ltd (`Hexham`) in the Supreme Court of Victoria. In its defence, Hexham included a counterclaim. Subsequently, the action was ordered to be tried in the County Court of Victoria.

On 22 July 1982, the case came on for trial before Murdoch CCJ. Hexham applied for an adjournment and the case was adjourned to 26 July 1982.

On 26 July 1982, another application for an adjournment was made on behalf of Hexham. The application was refused and the case was adjourned to the next day to be heard after the conclusion of a part-heard case. Counsel for Hexham then announced that he was withdrawing from the case.

On the next day, 27 July 1982, the case was heard. There was no appearance for Hexham. Linprint proceeded to present its claim, after which judgment for a sum was entered for it. The counterclaim was dismissed.

More than six months later, Hexham brought an action against Linprint in the Supreme Court of New South Wales. The statement of claim was equivalent to the counterclaim previously filed by Hexham.

Linprint pleaded, inter alia, issue estoppel and res judicata.

Linprint applied for these issues to be dealt with as a separate question pursuant to the Supreme Court Rules 1970 Pt 31. The question came before Loveday J who answered it adversely to Linprint.

Linprint then appealed to the Court of Appeal of New South Wales.

The argument before the Court of Appeal took an entirely different course from that adopted by Hexham before Loveday J. Before the judge, Hexham had based its arguments upon a construction of the County Court Rules in Victoria but conceded before the Court of Appeal that the argument based on such Rules could not be relied upon. Instead Hexham, as the respondent, argued that it had never had a hearing on the merits of its counterclaim.

The Court of Appeal decided that Hexham was precluded from making a fresh claim, Kirby P deciding on both the grounds of res judicata and issue estoppel.

At p 519, he said:

> *In England, however, in litigation between private litigants the courts have not been in doubt. At least so far as the doctrine of issue estoppel is concerned, it*

has been held in the English Court of Appeal that a party which has put forward a positive case to a court and then at trial declines to proceed, will not be permitted later to pursue the same case and this, ***even though there has been no determination on the matter "on the merits****". In* ***Khan v Golechha International Ltd*** *[1980] 1 WLR 1482[1980] 2 All ER 259, the Court of Appeal held that a party was estopped from asserting the contrary of what had been raised in earlier proceedings and there conceded by counsel then appearing for that party ... [Emphasis is added.]*

At p 520, he said:

The English Court of Appeal applied the decision in ***Khan*** *in* ***SCF Finance Co Ltd v Masri (No 3)*** *[1987] QB 1028 at 1048. Whilst the decisions are not binding on this Court, the reasoning in them is persuasive. Whilst that reasoning is confined to the application of the law of issue estoppel (where a matter has not been specifically judicially determined) it applies with even greater force where the issue has been so determined and is thus res judicata. It should be remembered that res judicata has lately been described as "cause of action estoppel": see, eg,* ***Thoday v Thoday*** *[1964] P 181 at 197 per Diplock LJ; and see also Lord Wilberforce in* ***Carl Zeiss (No 2)*** *(at 966). The genus dealt with by these two branches of law is the same. The public policy upon which each rests is that of the finality of judicial determinations in respect of which a litigant should not be vexed for a second time. If the reasoning in* ***Khan*** *and* ***SCF Finance*** *are applied to the present case, there can likewise be but one answer to the rhetorical question.*

"Would it not be a case of the [appellant] company being vexed a second time in relation to an issue which it was open to the plaintiff to have determined in the previous proceedings?"

That answer is that it would. If, as it is contended, the respondent did not have a trial "on the merits" this was solely by virtue of its own conduct. It instructed its counsel to withdraw. Once the adjournment was refused, no endeavour was made (for example by subpoena of witnesses, the evidence of experts or otherwise) to prove the respondent`s case. It was simply abandoned. The respondent walked away from it ...

At p 521, he continued:

Issue estoppel: a wider principle:

If, contrary to the foregoing conclusions, a proper interpretation of the proceedings in the County Court of Victoria is that there was no judicial adjudication of the matters involved in the counter-claim by virtue of the withdrawal of the respondent, and therefore that res judicata does not apply, the same result nonetheless follows from the application of the law of issue estoppel. The issues which the respondent now wishes to litigate in the Supreme Court of this State were either (a) necessarily inherent in the issues raised by the counter-claim and defence in the County Court of Victoria or (b) so intimately connected with those issues that the Court would require that the party to the litigation should have pleaded them in such a way as to have them resolved in the Victorian proceedings. It would have been unreasonable not to have pleaded them in those proceedings and, to the extent that they were not

pleaded, they should not now be allowed to be pleaded again.

Another member of the Court of Appeal Clarke JA said, at p 525:

> *The second question which then arises is whether that order founds a plea of res judicata. According to counsel for the respondent it does not for there had been no hearing of the counter-claim and in these circumstances, the dismissal should be regarded as having the same effect as a discontinuance. I cannot accept this proposition for the rules prescribe procedures which must be followed in order to enable a party to discontinue. Unless a party complies with those procedures it cannot be said to have discontinued nor is it entitled to the benefits, if any, which flow from such discontinuance. The case must, therefore, be judged solely upon the basis that the counter-claim was dismissed for want of appearance of the counter-claimant at the trial.*

At p 526, Clarke JA said:

> *I take it that these authorities establish that if a plaintiff withdraws from the trial and an order is made in its absence dismissing its claim then that order will, unless set aside or successfully appealed from, ground a later plea of res judicata in the event that a later attempt is made to litigate the same case. The position is no different than that which arises under a default judgment.*

On the facts before me, the order was made in the presence of counsel for Mr Setiadi after some argument on the nature of the order to be made and after she had taken instructions from him with full knowledge of the possible consequence of his application.

In my view, the principle of res judicata and issue estoppel would apply a fortiori.

The judgment in ***Linprint*** (supra) and the two English cases cited therein also dispose of Ms Lim`s other argument that there can be no issue estoppel unless there is a decision on the merits of the case.

As for the argument that Mr Setiadi`s fresh claim was an abuse of the process of the court, Ms Lim submitted that this was not so because mere re-litigation, in circumstances falling short of cause of action estoppel or issue estoppel, did not necessarily give rise to such an abuse.

The short answer to that was that the circumstances before me did give rise to res judicata and issue estoppel.

The two cases which Ms Lim cited to support her argument were **Bradford & Bingley Building Society v Seddon (Hancock & Ors, t/a Hancocks (a firm), third parties)** [1999] 4 All ER 217 and **Ching Mun Fong (executrix of the estate of Tan Geok Tee, decd) v Liu Cho Chit** [2000] 1 SLR 517 .

However, the facts in those two cases and in the case before me were different. In those two cases, the party who was relying on res judicata or issue estoppel was not a party in the earlier proceedings.

Accordingly, if Mr Tang, as the third defendant in the second action, was raising the issue of res judicata or issue estoppel against Mr Setiadi, Mr Tang would probably not succeed because he was not even a party in the first action.

Likewise, Mr Ng would probably also not succeed on such an argument for a different reason, ie the claim against him was not struck out.

Ms Lim also submitted that an order made pursuant to an application under O 21 r 3 is similar to one made under O 13 r 9 and is not capable of giving rise to res judicata. She cited **Mullen v Conoco** [1998] QB 382.

However, again, the facts in ***Mullen*** were different from those before me.

In that case, Conoco Ltd sued Mr Mullen in the High Court for the price of petrol delivered to him and obtained judgment in default of defence. Mr Mullen applied to set aside the judgment under O 13 r 9 RSC on the grounds that the petrol supply agreement between Conoco Ltd and him was so one-sided, unfair and unreasonable as to be unenforceable against him. His application was dismissed by the deputy master.

Two months later, he issued a county court summons against Conoco Ltd for trading losses arising out of the enforcement of an improper and unreasonable supply agreement.

Conoco Ltd then applied to strike out the claim. One of their grounds was cause of action or issue estoppel.

The application was heard by a district judge who struck out the claim for damages but allowed an implicit claim for rescission of the agreement to stand.

On appeal to Judge Urquhart, the claim in both respects was struck out.

Mr Mullen then appealed to the Court of Appeal which concluded that an application under O 13 r 9 to set aside a default judgment involved a discretionary jurisdiction. If the court`s power was exercised on a discretionary basis, eg for delay, then it was difficult to say that any issue had been decided by the court.

Evans LJ said, at p 391E, that the question was whether the earlier ruling in Conoco`s High Court action, which he considered to be an interlocutory one, was so clear and so specific as regards a particular defence of Mr Mullen and were there no special factors so that an estoppel may arise.

On those facts and bearing in mind that Mr Mullen was not represented prior to the default judgment obtained in the High Court, Evans LJ allowed Mr Mullen`s appeal in respect of Conoco`s application to strike out.

However, the Court of Appeal did not say that a decision based on O 13 r 9 could never constitute an estoppel. Indeed this possibility was accepted by Evans LJ at p 391D.

Moreover, the Court of Appeal also did not say that a decision based on the exercise of a discretion under any of the rules of court would never amount to res judicata or issue estoppel. Obviously each case must depend on its facts.

Additional claim by Mr Setiadi

As for the additional claim by Mr Setiadi against OCBC Securities on the ground that OCBC Securities was directly, as opposed to vicariously, liable for negligence, Mr Setiadi appeared to be precluded from maintaining the claim under the extended doctrine of res judicata as propounded in the oft-cited judgment of Wigram VC in ***Henderson v Henderson*** (supra at pp 381-382):

> *... 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 (**sic**) 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 probably belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. [Emphasis is added.]*

However, Ms Lim submitted that the rule in ***Henderson*** has been explained by Goulding J in **Jelson (Estates) v Harvey** [1984] 1 All ER 12 at 16 where he said:

> *That seems to me a misconception of the doctrine put forward in such cases as **Henderson v Henderson** [1843] 3 Hare 100[1843-60] All ER Rep 378 and **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581. Where there is litigation of a certain question or issue before the court resulting in a final or substantial order which decides it, then it is well established that it is too late (save in exceptional cases) for a party to adduce in subsequent litigation against the same opponent, or one privy to him, a fact that might well have been brought forward on the previous occasion. That doctrine, however, does not apply where there is a mere procedural defect and the court has never gone into the merits, though both parties were before it.*

I noted that the facts in ***Jelson*** were quite different from those before me.

In that case, a plaintiff had obtained interlocutory injunctions restraining the defendant from doing certain acts on the plaintiff`s land. The plaintiff then applied by a notice of motion seeking the defendant`s committal for alleged disobedience of the order. The notice of motion did not set out on its face the grounds of the plaintiff`s application as required by the English Rules of the Supreme Court and accordingly the motion was dismissed for irregularity without the hearing of evidence or the consideration of merits.

The plaintiff then filed a fresh motion. The defendant contended, by analogy with criminal proceedings, that he was entitled to the defence of autrefois acquit.

Hence, the procedural defect that Goulding J was referring to was the defect in the notice of motion.

Mr Setiadi`s application to discontinue the first action against OCBC Securities could not be said to be a mere procedural defect.

In so far as Goulding J had suggested that the court must have gone into the merits before res judicata can apply, that is not the law as I have elaborated above.

The additional claim against OCBC Securities was so intimately connected with the claim against it in the first action that it should have been pleaded then.

As for the alleged reason for discontinuing the first action, I did not accept the reason.

In April 1999, Mr Setiadi and his then counsel knew that OCBC Securities were relying on the argument that the guarantee had been fabricated. They must have realised by then that Mr Ng`s evidence was crucial.

It was not necessary to wait until Mr Setiadi`s expert had advised that there were different versions of the guarantee to realise that Mr Ng`s evidence was crucial. Besides, on 16 July 1999, Ms Lim did not even apply for an adjournment to try and locate Mr Ng before applying for leave to discontinue.

The fact that Mr Setiadi would pay costs if he lost in the second action or that Mr Setiadi would otherwise be shut out was also not a special circumstance. Otherwise, the extended doctrine of res judicata would be rendered nugatory.

In summary, there was no special circumstance to allow Mr Setiadi to re-litigate against OCBC Securities even in respect of his additional claim.

Outcome:

Appeal dismissed.