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28 JUNE 2021

Issue Estoppel — No Inequity in Equity

*United Overseas Bank*¹ is another chapter in the long, ongoing dispute reported in *Heveaplast Marketing*² and *See Leong Chye*.³

The dispute

Heveaplast Marketing Sdn Bhd (**Heveaplast Marketing**) entered into an agreement to purchase a piece of land from two individuals who represented themselves as registered owners. Heveaplast Marketing obtained a fixed loan from the Bank to finance the acquisition, after which it charged the land to the Bank as security. The directors of Heveaplast Marketing and another related company, Heveaplast (M) Sdn Bhd (**HMSB**), also agreed to guarantee and indemnify the Bank for the fixed loan.

Heveaplast Marketing later sold the land to Kum Hoi Engineering Sdn Bhd (**Kum Hoi**). Before the sale could be completed, the true owners of the land, See Leong Chye and See Ewe Lin (**See brothers**), discovered and stopped the sale. The See brothers said they did not sell the land and sued.

Before the High Court, the See brothers successfully set aside the sale to Heveaplast Marketing as well as the charge registered in favour of the Bank. The Court of Appeal reversed the High Court's decision in setting aside the charge. The Federal Court affirmed the Court of Appeal's decision. The Federal Court's decision was set aside and the appeal was ordered to be reheard.

The Bank subsequently enforced the guarantees. The Guarantors argued the Bank should have initiated third party proceedings in the earlier litigation against the Guarantors. Having failed to do so, the Bank's action should be struck out on the grounds of *res judicata* or *issue estoppel*.

¹ *United Overseas Bank (M) Bhd v Heveaplast (M) Sdn Bhd & Ors* [2021] MLJU 299

² *Heveaplast Marketing Sdn Bhd v See Leong Chye @ Sze Leong Chye & 3 Others and other appeals* [2016] MLJU 835 (CA)

³ *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd and another appeal* [2019] 1 MLJ 25 (FC)

High Court

The defence, at the outset of the judgment, was rejected. The court's opening remarks in its judgment said:

"The application of the doctrine of res judicata or issue estoppel to a non-party ought to be done with much care and circumspection so that the application of equitable doctrine does not result in inequity or injustice in a particular case."

The defendants argued that issue estoppel applied because the Guarantors have "*privity of interest*" to the earlier action, citing Dzaiddin SCJ's decision in *Kluang Wood Products*.⁴ This argument was rejected.

The High Court held *res judicata* did not operate against the Bank for not suing the Guarantors in the earlier actions because the facts and issues were materially different. The issues in the earlier action concerned whether the land was genuinely sold by the See brothers to Heveaplant Marketing and the consequence arising thereof. Issues concerning the Guarantees did not arise in the earlier actions. Further, the Bank's suit against the Guarantors was premised on their liability under the terms of Guarantees. The Guarantors, like in *Lifomax Woodbuild*,⁵ were liable as principal debtor and on demand by the Bank. The court found there were "*no special circumstances*" to "*render it just or equitable to extend the doctrine of res judicata to persons who were not privies to the See brothers' litigations. They were also not privies*".

More importantly, the court cautioned against applying the issue estoppel in cases where there was an antecedent or separate litigation. Tee Geok Hock JC said the application of issue estoppel "*... should be circumscribed by the main policy and underlying purpose thereof without them to the extent or manner contradicting the confines of the express provisions of the Rules of Court 2012*". For example, the court was of the view issue estoppel does not apply where:

- (a) the court ordered separate trials or a stay of proceedings pending trial of another proceeding;
- (b) the court declined to allow joinder of parties or joinder of causes of action on the ground of convenience or in order to avoid the joinder from embarrassing or delaying the expeditious and economical of an action or proceeding;

⁴ *Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor* [1999] 1 CLJ 1

⁵ *Lifomax Woodbuild Sdn Bhd v Ng Yee Teck* [2017] 1 LNS 528

- (c) a new cause of action which has not yet accrued as at the date of the commencement of the action or counterclaim; and
- (d) a party's subsequent suit was based on a cause of action that it could bring in the earlier action by way of an amendment "... *because the Court wants to proceed with the full trial without further delay*".

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Published by the Banking & Insolvency Practice

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