2007 WL 1601555 (Ont. S.C.J.), 2007 CarswellOnt 3478

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Digimatic Electronics Inc. v. API Alarm Inc.

Digimatic Electronics Inc., Plaintiff/Responding Party and API Alarm Inc., Defendant/Moving Party

Ontario Superior Court of Justice

Davis D.J.

Judgment: May 7, 2007
Docket: SC06-68872-00

Counsel: Mr. Dahn Batchelor (Agent) for Plaintiff / Responding Party

Mr. Jordan Farkas for Defendant / Moving Party

Subject: Civil Practice and Procedure

Civil practice and procedure --- Judgments and orders -- Res judicata and issue estoppel -- Res judicata -- Whether cause of action identical

Requirement to bring forward entire case at previous proceeding.

Cases considered by Davis D.J.:

> Angle v. Minister of National Revenue (1974), 1974 CarswellNat 375, 28 D.T.C. 6278, 1974 CarswellNat 375F, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 2 N.R. 397 (S.C.C.) -- referred to
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> Baziuk v. BDO Dunwoody Ward Mallette (1997), 1997 CarswellOnt 2507, 13 C.P.C. (4th) 156, 34 O.T.C. 53 (Ont. Gen. Div.) -- referred to
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> Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, (sub nom. Boucher v. Public Accountants Council for the Province of Ontario) 71 O.R. (3d) 291 (Ont. C.A.) -- referred to
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> Britannia Airways Ltd. v. Royal Bank (2005), 2005 CarswellOnt 1, 5 C.P.C. (6th) 262 (Ont. S.C.J. [Commercial List]) -- referred to
>
> Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th)

193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) -- considered

Doering v. Grandview (Town) (1975), (sub nom. Grandview (Town) v. Doering) [1976] 2 S.C.R. 621, 1975 CarswellMan 64, 1975 CarswellMan 87, (sub nom. Grandview (Town) v. Doering) [1976] 1 W.W.R. 388, (sub nom. Grandview (Town) v. Doering) 61 D.L.R. (3d) 455, 7 N.R. 299 (S.C.C.) -- referred to

Hall v. Hall (1958), 1958 CarswellAlta 78, 15 D.L.R. (2d) 638 (Alta. C.A.) -- considered

Henderson v. Henderson (1843), [1843-60] All E.R. Rep. 378, 3 Hare 100, 67 E.R. 313 (Eng. V.-C.) -- considered

Hennig v. Northern Heights (Sault) Ltd. (1980), 30 O.R. (2d) 346n (S.C.C.) -- referred to

Hennig v. Northern Heights (Sault) Ltd. (1980), 1980 CarswellOnt 399, 116 D.L.R. (3d) 496, 17 C.P.C. 173, 30 O.R. (2d) 346 (Ont. C.A.) -- considered

Hoystead v. Commissioner of Taxation (1925), [1925] All E.R. Rep. 56, [1926] 1 W.W.R. 286, [1926] A.C. 155, 1925 CarswellFor 5, 95 L.J.P.C. 79 (Australia P.C.) -- considered

Hunter v. Anderson (1997), 34 C.P.C. (4th) 307, 29 O.T.C. 95, 1997 CarswellOnt 920 (Ont. Gen. Div.) -- referred to

K. (L.) v. Children's Aid Society of Lanark (County) & Smiths Falls (Town) (1998), 19 C.P.C. (4th) 195, 1998 CarswellOnt 2034 (Ont. Gen. Div.) -- referred to

Las Vegas Strip Ltd. v. Toronto (City) (1996), 13 O.T.C. 308, 1996 CarswellOnt 3426, 34 M.P.L.R. (2d) 233, 38 C.R.R. (2d) 129, 30 O.R. (3d) 286 (Ont. Gen. Div.) -- referred to

Las Vegas Strip Ltd. v. Toronto (City) (1997), 32 O.R. (3d) 651, 99 O.A.C. 67, 1997 CarswellOnt 1279 (Ont. C.A.) -- referred to

Letang v. Cooper (1964), [1965] 1 Q.B. 232, [1964] 2 All E.R. 929, [1964] Lloyd's Rep. 339 (Eng. C.A.) -- considered

Maynard v. Maynard (1950), [1951] S.C.R. 346, 1950 CarswellOnt 128, [1951] 1 D.L.R. 241 (S.C.C.) -- referred to

McQuillan v. Native Inter-Tribal Housing Co-operative Inc. (1998), 42 O.R. (3d) 46, 1998 CarswellOnt 4172, 114 O.A.C. 303, 20 R.P.R. (3d) 198 (Ont. C.A.) -- considered

Minott v. O'Shanter Development Co. (1999), 117 O.A.C. 1, 42 O.R. (3d) 321, 168 D.L.R. (4th) 270, 1999 CarswellOnt 1, 99 C.L.L.C. 210-013, 40 C.C.E.L. (2d) 1 (Ont. C.A.) -- considered

Pembroke Planing Mill Co. v. Wagga Wagga Investments Ltd. (1999), 1999 CarswellOnt 527, 30 C.P.C. (4th) 179 (Ont. Gen. Div.) -- referred to

Read v. Brown (1888), 58 L.J.Q.B. 120, 5 T.L.R. 97, 22 Q.B.D. 128 (Eng. Q.B.) -- referred to

Thoday v. Thoday (1963), [1964] P. 181, [1964] 1 All E.R. 341, [1964] 2 W.L.R. 371 (Eng. C.A.) -- considered

Upper v. Upper (1932), [1933] O.R. 1, [1933] 1 D.L.R. 244 (Ont. C.A.) -- considered

Venneri v. Bascom (1996), 1996 CarswellOnt 827, 28 O.R. (3d) 281 (Ont. Gen. Div.) -- referred to

048436 N.B. Ltd. v. 059693 N.B. Ltd. (2006), 2006 NBQB 20, 2006 CarswellNB 14, 294 N.B.R. (2d) 139, 765 A.P.R. 139 (N.B. Q.B.) -- considered

420093 B.C. Ltd. v. Bank of Montreal (1995), 128 D.L.R. (4th) 488, 1995 CarswellAlta 439, 34 Alta. L.R. (3d) 269, [1996] 1 W.W.R. 561, 174 A.R. 214, 102 W.A.C. 214 (Alta. C.A.) -- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 21.01 -- referred to

Davis D.J.:

Nature of Motion:

1 The Defendant, API, is the Moving Party on a motion requesting the dismissal of the action pursuant, inter alia, to the doctrine of res judicata. An earlier case between these same two parties was commenced in the Toronto Small Claims Court under File No. T92163/04, wherein API was the plaintiff and Digimatic was named the defendant (the "Main Action"). The defence to the Main Action was filed March 4, 2004 (the "Defence"). Supplementary thereto, Digimatic filed a Defendant's Claim (the "Defendant's Claim") as against API, claiming "credits owed for cancelled contracts...". The Defendant's Claim relied upon statements made in the Defence, that clients had cancelled service contracts as a direct result of the failure by API to respond to alarms, and also claimed a setoff, (the Main Action and Defendant's Claim cumulatively referred to as the "Prior Proceedings")

2 Trial in the Prior Proceedings was held on September 26, 2005, and there was an adjudication on the merits; the court granted judgment to the plaintiff in the Main Action and dismissed the Defendant's Claim (the "Judgment"). Thereafter, minutes of settlement were executed between the parties, as of August 9, 2006, during the course of proceedings relating to the resolution of the Judgment.

3 The matter now before this court, SC06-68872-00 (the "Current Claim"), was initiated by the Plaintiff herein October 20, 2006, shortly after the minutes of settlement. It is now alleged "the defendant had it sales people phone and later go to the homes and businesses of the plaintiff's customers and talk them into abandoning the services of the plaintiff..as a result of the conduct of the defendant, the stealing of the plaintiff's customers, caused the plaintiff to lose, in a three year period, $9,400...."

Argument on Motion:

4 In support of this motion, the Moving Party indicates that the parties in the Prior Proceedings are identical in the Current Claim. The Defence and Defendant's Claim claimed credits based upon cancellations of contracts

"as a direct result of the plaintiff's [in the Main Action] failure to respond to alarms", being actions of the plaintiff [in the Main Action]. The Current Claim requests compensation for causing the abandonment of services..." the stealing of customers" by the Moving Party, again based upon actions of API [plaintiff in the Main Action].

5 Further, the Moving Party submits that this cause of action was known and available to the Plaintiff in the Current Claim at the time of the Prior Proceedings and could have been pleaded at that time. Specifically, counsel for the Moving Party refers to the affidavit of Anthony Checca, representative of the Responding Party, sworn January 17, 2007, filed in response to this motion, at paragraphs 4 & 5 (the "Affidavit"). Paragraph 4 of the Affidavit indicates that "after I issued my firm's first claim, I began learning that API Inc was soliciting my firm's customers for the purpose of getting those customers to pay their fees directly to API Inc., thereby cutting off any fees that would otherwise go to my company."

6 The deponent further attests, at paragraph 5 of the Affidavit, that "by the time my first claim was tried, I still didn't have enough information to proceed against API Inc and for this reason, I decided not add (sic) this aspect of my complaint to the first claim but instead to add it to a new claim." The position of the Moving Party suggests that the cause of action was already known but the evidence in support was still to be established and Mr. Checca intentionally held this argument back for future proceedings.

7 The Moving Party further submits that the Responding Party is merely raising a new legal position that is not a separate or distinct cause of action for ultimately Digimatic is, once again, simply claiming for monies owing as a result of lost customers. It was a cause of action that was available previous to the commencement of the Defendant's Claim and there is no evidence to suggest the Responding Party could not have ascertained the necessary supporting materials by reasonable diligence at a time before that trial. In addition, even if there was a separate cause of action raised, the matters and facts in the Current Claim could have been determined as part of the Prior Proceedings.

8 It is noted that there is no further or better information as to exactly when Mr. Checca became aware of the possible "stealing of customers", why he could not have drawn it into the Defendant's Claim prior to the trial of the Prior Proceedings, what steps he took to ascertain the necessary information and why it was not available to him previously but is only available now.

9 The Responding Party argues that the Defendant's Claim involved "the excess of credits owed for cancelled contracts..." and that "the cancellations were as a direct result of the Plaintiff's failure to respond to alarms". The Current Claim pleads API "had its sales people phone...the plaintiff's customers and talked them into abandoning the services of the plaintiff."

10 It indicates: "as a result of the conduct of the defendant, the stealing of the plaintiff's customers...." The Responding Party argues the issues in both claims are totally different; whereas the Defendant's Claim sought the excess of credits owed, in the Current Claim Digimatic is claiming for the theft of its customers by API. The Responding Party suggests the current cause of action did not exist when the Prior Proceedings was settled, cause of action estoppel therefore not being applicable. The court notes that this argument is contradicted by paragraph 5 of the Affidavit where Mr. Checca makes it clear that he decided with regards to the solicitation of customers by API "not to add this aspect of my complaint to the first claim but instead to add it to a new claim".

11 Mr. Checca did not have enough information on hand to add new particulars to amend the Defendant's Claim with respect to what he believed was the theft of his customers. The new evidence could not have been

discovered earlier with reasonable diligence as Mr. Checca did not learn the full extent of the loss of his business until after the conclusion and judgment in the Prior Proceedings. It was never part of the Prior Proceedings and the findings in that case did not deal with the allegations based upon the new evidence, the theft of customers of Digimatic, as the two actions involve different subjects, different particulars, different facts and therefore the infringement of two distinct rights. In such cases a plaintiff [the Responding Party] is not bound to raise all the alternative causes of action and a dismissal of one action is not a bar to a new action seeking relief on a different case which raises a new equity. Digimatic is pleading that where the rights are distinct, though arising out of the same state of fact, separate actions may be brought.

Legal Analysis:

12 The Doctrine of Res Judicata: Cause of Action Estoppel:

13 The doctrine of res judicata prevents relitigation of matters that have already been determined by a court of competent jurisdiction. There are two branches of this doctrine: cause of action estoppel and issue estoppel. Both branches are founded on the twin principles that the same party shall not be harassed twice for the same complaint and that there is societal value in the finality and conclusiveness of judicial decisions. *Res judicata* is defined by the court as a form of estoppel with two species -- cause of action estoppel and issue estoppel: *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.) at 267. The principle was stated by the Ontario Court of Appeal in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.), 1999 CanLII 3686 as follows:

> ...res judicata itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding. No question of cause of action estoppel arises in this case.... The overall goal of the doctrine of *res judicata*, and therefore of both cause of action estoppel and issue estoppel, is judicial finality. The doctrine prevents an encore, and reflects the law's refusal to tolerate needless litigation.

14 The classic definition of a cause of action was stated by Diplock L.J. in *Letang v. Cooper*, [1964] 2 All E.R. 929 (Eng. C.A.) at 934, as follows:

> A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

15 The concept of "cause of action" means the whole cause of action, in other words, whatever the plaintiff must prove to entitle it to recover. This includes every fact, *not every piece of evidence [emphasis added]*: Lord Esher, in *Read v. Brown* (1888), 22 Q.B.D. 128 (Eng. Q.B.) at 131 . A total set of facts, which, if proven by the Plaintiff, will entitle him to the remedy he seeks against the defendant.

16 Spencer Bower and Turner, The Doctrine of Res Judicata, (2nd ed., 1969) at pages 18 and 19 outlines the necessary constituents of estoppel per rem judicatam, and at page 149:

> The term "cause of action estoppel", which may first have been used by Diplock L.J. in *Thoday v. Thoday*, [1964] 1 All E.R. 341 signifies the estoppel which arises between parties by reason of a judgment given in favour of one and against the other with respect to the cause of action set up in the first proceedings. It is the simplest estoppel per rem judicatam; res judicata in its most essential form. Its op-

> eration prevents a party to an action from asserting or denying as against the other party the existence of a cause of action the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties or their privies. The very existence of the cause of action in the second proceeding has in such a case actually been the subject of a precise adjudication between the parties or their privies in the first proceeding, and it must be taken to have been decided, Yea or Nay, once and for all, Interest res publicae sit finis litium.

17 However, to be understood properly this passage must be read with the following passage at pages 150-151:

> Cause of action estoppel is applicable solely to the case where the same cause of action is alleged in successive proceedings. It is a reciprocal estoppel, and operates both as an estoppel per rem judicatam and conversely by way of merger. The maxim transit in rem judicatam prevents a successful plaintiff from re-asserting in a second proceeding the cause of action which he has already made the subject of a judgment in the first. This is the operation of the doctrine of merger. On the other hand the maxim interest rei publicae sit finis litium, denies the unsuccessful defendant the opportunity of relitigating a case which he has already lost. This is estoppel per rem judicatam. (And the case of plaintiff and defendant may be reversed when the opposite circumstances obtain.) But where one cause of action has been the subject of final adjudication between parties, those determinations of particular issues which are its essential foundation, without which it could not stand, may be used as the basis of issue estoppels between the same parties when another cause of action altogether is set up.

18 Cause of action estoppel prevents not only the same cause of action from being relitigated again, but also bars claims which properly belonged to the subject matter of previous litigation. It is well settled that parties to litigation are obliged to bring forward their whole case and no party is permitted to relitigate a matter on the basis of a new theory or view of the case. See, for example, *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 (Eng. V.-C.) and *Maynard v. Maynard* (1950), [1951] S.C.R. 346 (S.C.C.), 1950 CanLII 3. The principle appears in *Henderson*, supra, at 100:

> 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 that 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.

19 That statement makes the application of res judicata broad enough to include not only the facts and issues actually decided, but those which should have been before the Court. That broad interpretation of res judicata is explained in *Hall v. Hall* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.) as follows:

> Res judicata in its narrow sense refers to the thing actually and directly in dispute which has been adjudicated upon by a Court of competent jurisdiction. In its wider sense it also covers points which the

> parties might reasonably have put before the Court. But it is limited, in this wider aspect, to such matters as arise within one cause of action.

20 The broad scope of res judicata is not so broad, however, as to extend to every, dispute that may exist between the parties. It will only extend to those matters which arise out of the same cause of action and should have been put before the Court at the time the action was heard.

21 John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Markham: LexisNexis Canada Inc., 1999) at 1078, describes cause of action estoppel in the following way:

> ... a plaintiff asserting a cause of action must claim all possible relief in respect thereto, and prevents any second attempt to invoke the aid of the courts in the same cause. It is sometimes called 'merger' because the plaintiff's cause of action becomes 'merged' in the judgment. The judgment actually operates as a comprehensive declaration of the rights of *all* parties in respect of the matters in issue. As a result, the rule applies equally to a defendant who must put forward all defences which will defeat the plaintiff's action; the defendant who does not will be barred from raising them subsequently. It prevents the contradiction of that which was determined in the previous litigation, by prohibiting the re-litigation of issues already actually addressed. This principle prevents the fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.

22 Thus, in addition to preventing fragmented litigation, cause of action estoppel prevents a party from attempting to relitigate a case by advancing a new legal theory in support of a claim based on essentially the same facts or combinations of facts: *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Ont. Gen. Div.), aff'd 1997 CanLII 3841, (1997), 32 O.R. (3d) 651 (Ont. C.A.). In other words, a party cannot recast the claim arising out of the same facts using a different legal description without bumping up against the doctrine of cause of action estoppel and, if the parties or privies requirement is met, it will operate to bar the second action: *Britannia Airways Ltd. v. Royal Bank*, [2005] O.J. No. 2 (Ont. S.C.J. [Commercial List]) at para. 18.

23 A prior judicial decision will not raise an estoppel by res judicata, either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and the subject-matter; (ii) the decision was, or involved, a determination of the same issues or cause of action as that sought to be controverted or advanced in the present litigation, the subject matter of subsequent proceedings must be the same as the subject matter of the prior proceeding (the "identity of subject matter requirement"); and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies (the "mutuality requirement"): *420093 B.C. Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4th) 488 (Alta. C.A.) at 494 .

24 Clearly the parties to the Prior Proceedings are the same persons as the parties to the Current Claim, and the Judgment was by a court of competent jurisdiction that rendered a final decision. The following definition found in Black's Law Dictionary, (6th ed., abridged, 1991) 588 correctly describes what is meant by a judgment on the merits:

> Merits, judgment on. One rendered after argument and investigation, and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or formal or merely technical or procedural point, or by default and without trial. A decision that was rendered on the basis of the evidence and facts introduced. Normally, a judgment based solely on some procedural

> error is not a judgment on the merits. The latter kind of judgment is often referred to as a "dismissal without prejudice." A party who has received a judgment on the merits cannot bring the same suit again. A party whose case has been dismissed without prejudice can bring the same suit again so long as the procedural errors are corrected (i.e., cured) in the later action.

25 The second requirement for res judicata to apply is that the same cause of action be raised. Cause of action estoppel applies not only to subsequent claims based on matters specifically decided in the prior action but also to every claim which could properly have been raised in those proceedings: Maynard, supra. The court in Maynard also adopted the following excerpt in the judgment of the Judicial Committee in *Hoystead v. Commissioner of Taxation* (1925), [1926] A.C. 155 (Australia P.C.) at p. 165, at p. 359:

> 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. 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.

26 This raises the issue of what causes of action were capable of being properly advanced during the Prior Proceedings. In the decision of the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) (CanLII), Binnie J. reiterated the preconditions of the operation of issue estoppel as pronounced by Dickson J. (as he then was) in *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at para. 20, he said:

> ... The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel). ... Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it.

27 The Prior Proceedings proceeded to trial and resulted in the Judgment, dismissing the Defendant's Claim. Digimatic then commenced a second action arising out of the same facts but based on a different legal theory of recovery. This is the situation discussed in paragraph 190 in The Doctrine of Res Judicata, supra, quoted earlier. It is clear from the decision in *Thoday v. Thoday* (1963), [1964] 1 All E.R. 341 (Eng. C.A.), relied on by the authors of the treatise to support their description of "cause of action estoppel" and from paragraph 192 at pages 150-1, that the authors, in describing "cause of action estoppel", are identifying a situation where the first action had proceeded to trial and, therefore, had resulted in a judgment after the merits of the case had been determined at trial, the result of the trial precluding the plaintiff from relitigating the same facts by way of a second action.

28 The principles of res judicata appear within the decision of the Court of Appeal in *McQuillan v. Native Inter-Tribal Housing Co-operative Inc.* (1998), 42 O.R. (3d) 46 (Ont. C.A.) where Charron J.A. said at p. 50:

> The respondent does not contend that the cause of action is the same in both applications. Indeed, it is not. The respondent relies rather on a wider principle, often treated as covered by the plea of res judicata. The doctrine of res judicata, in its wider application, prevents a person from relying on a claim or defence which he or she had the opportunity of putting before the court in the earlier proceedings but failed to do so. This principle was adopted by the Supreme Court of Canada in *Maynard v. Maynard*,

[1951] S.C.R. 346 at pp. 358-59, [1951] 1 D.L.R. 241 (citing the often-quoted words of Wigram V.C. in *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100 (Eng. V.C.)). I *do not view it as necessary for the application of the principle of res judicata that each and every specific factual matter must be raised. It appears to me to be sufficient if the fundamental issues or claims are addressed, or could have been addressed*. For example, it is not in my view necessary that each and every individual licence that might be in issue has to be mentioned if the court is asked to address the fundamental contention regarding the licences as a whole. I draw this conclusion from the general rule regarding the principle of res judicata which is stated in Spencer Bower, Tuner and Handley, The Doctrine of Res Judicata, 3rd edition, Butterworths, 1996 at para. 184 as follows:

> Where the decision set up as a res judicata necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, even though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms: but, beyond these limits, there can be no such thing as a res judicata by implication.
>
> [emphasis added]

29 Parties are not to raise matters which might and ought to have been brought forward in the earlier proceedings, but were not: see *Hennig v. Northern Heights (Sault) Ltd.* (1980), 30 O.R. (2d) 346, 116 D.L.R. (3d) 496 (Ont. C.A.); leave to appeal to S.C.C. refused December 1, 1980 [(1980), 30 O.R. (2d) 346n (S.C.C.)]. In *Hennig* at pp. 354-5 the court stated:

> Mr. Mills next submitted that, if it should be considered that all of the requisite elements for the application of res judicata exist with respect to the counterclaim, the doctrine should not apply because of "special circumstances"....In so far as this passage is relied upon as authority for not applying res judicata in "special circumstances": or "special cases", I think that it makes it reasonably clear that the exception is potentially applicable only with regard to the extended application of res judicata, i.e., to matters or points which might and should have been brought forward in the earlier proceeding, but which were not. I can quite appreciate the reason for some flexibility with respect to the "might have" kind of issue, but apart from the implicit reasoning in *Braithwaite v. Haugh* (1978), 19 O.R. (2d) 288, 84 D.L.R. (3d) 590, which I shall discuss, I am unaware of any authority countenancing the exception where what is involved in the second proceeding is the identical claim as that in the first, advanced on the basis of the same evidence and legal theory. It was with respect to a situation such as this that Lord Denning M.R. in *Fidelitas Shipping Co., Ltd. v. V/O Exportchleb*, [1965] 2 All E.R. 4 at p. 8, said that there is a "strict rule of law that he cannot bring another action against the same party for the same cause: Transit in rem judicatam ..." (emphasis added). (In *Lockyer v. Ferryman et al.* (1877), 2 App. Cas. 519 at p. 528, Lord Selborne put the matter this way: "When there is res judicata, the original cause of action is gone, and can only be restored by getting rid of the res judicata.") Lord Denning then went on to say that, with respect to issue estoppel and estoppel relating to points within an issue, respectively, res judicata is a "general rule" and "not an inflexible rule", which can be departed from in "special circumstances". Cross on Evidence, 5th ed. (1979), at p. 333, questions Lord Denning's suggestion that the extended form of res judicata may apply to issue estoppel.

30 Cause of action estoppel applies not only to points on which the court has pronounced but to every point which properly belonged to the subject of the litigation. In the Ontario Court of Appeal decision in *Upper v. Upper* (1932), [1933] O.R. 1 (Ont. C.A.) the court noted:

> 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 trial.

Findings:

31 I accept the argument that if some new fact becomes known that was not known at the time of the Prior Proceedings (and that ought *not* to have been known), which totally changes the aspect of the case, the Current Claim would be permissible; *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.), 1975 CanLII 16 at para. 10-11. Ultimately, however, I agree with the position of the Moving Party that the requirements of cause of action estoppel have been met.

32 The Current Claim, the theft of customers by API, is not distinct from the issues presented in the Prior Proceedings, the alienation of Digimatic's clients/accounts by API. It is a cause of action that was capable of being properly advanced during the Prior Proceedings. Notwithstanding his full evidentiary basis was not fully known, Mr. Checca confirmed that he suspected API was soliciting business from Digimatic in advance of the Defendant's Claim; he simply did not know how many customers were involved and now refers to the process as "stealing...customers". Mr. Checca provides no explanation why he could not have ascertained the evidence by reasonable diligence at the time of the Prior Proceedings.

33 The Plaintiff, Responding Party, was obliged to have previously brought forward its whole case and is not permitted to relitigate a matter on the basis of a new theory, new legal argument or view of the matter but on essentially the same facts and cause of action. The court finds the Current Claim is merely a new legal argument but it is not a new cause of action; it is essentially an action for monies owing as a result of lost clients and was an action that was admittedly within the contemplation of the Plaintiff [Responding Party] prior to the Judgment. It would not be unjust to apply res judicata in these circumstances.

Appropriateness of Determination of Res Judicata by Motion:

34 The Responding Party submits that "as it was not the best practice to determine res judicata on an interlocutory objection to the pleading, summary judgment could not be granted on the basis of res judicata." [paragraph 9 factum of Responding Party]. In support of this proposition, Digimatic relies upon the New Brunswick Court of Queen's Bench, Trial Division, *048436 N.B. Ltd. v. 059693 N.B. Ltd.* (2006), [2004] N.B.J. No. 9 (N.B. Q.B.). In that decision, the court refused to grant summary judgment relying upon a New Brunswick Court of Appeal decision that indicated "it is not the best practice to determine res judicata on an interlocutory objection to the pleading."

35 In fact, a determination of res judicata through the process of a motion is in accordance with the Ontario Rules of Practice, under Rule 21.01, adopted by analogy in this forum. It is simply a determination prior to trial of a question of law raised by a pleading in an action where the determination of that issue may dispose of the action; the court may make an order accordingly. See as an example: *Pembroke Planing Mill Co. v. Wagga Wagga Investments Ltd.* (1999), 30 C.P.C. (4th) 179 (Ont. Gen. Div.); *K. (L.) v. Children's Aid Society of*

Lanark (County) & Smiths Falls (Town) (1998), 19 C.P.C. (4th) 195 (Ont. Gen. Div.); *Venneri v. Bascom* (1996), 28 O.R. (3d) 281 (Ont. Gen. Div.); *Baziuk v. BDO Dunwoody Ward Mallette* (1997), 13 C.P.C. (4th) 156 (Ont. Gen. Div.). While such motion was not always successful on its merits, such as in *Hunter v. Anderson* (1997), 34 C.P.C. (4th) 307 (Ont. Gen. Div.), nevertheless there was no issue before the court as to the suitability of a motion as a vehicle to allow for a finding on the argument.

Decision on the motion:

36 For the foregoing reasons, the motion is hereby granted. The court orders that the Current Claim cannot proceed and must be barred by the application of estoppel per rem judicatum as submitted by the Moving Party.

Costs:

37 Costs normally follow the event. It is important that parties to litigation understand that the risks of losing at trial include the risk of having to pay what could be a significant costs award to the opposing side. On the other hand, one must remember that the overall objective in fixing costs is to fix an amount that is fair and reasonable *to the unsuccessful party* rather than an amount fixed by the actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para 26. In this latter regard, the Defendant [Moving Party] was represented at the motion by counsel and written submissions were presented. There will be an order of costs in favour of the Moving Party in the amount of $250.00 to be paid within 45 days of the date of this Judgment failing which there will be a judgment granted in favour of the Moving Party as against the Responding Party for that same amount.

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