30.1.98 J
Res judicata

OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 320/97

BETWEEN: GOLFCO LTD. Plaintiff

AND: GREEN THUMB NURSERY & LANDSCAPING LTD. and GODFREY DAWKINS Defendants

Appearances
For the plaintiff: Mr. Sykes of Collin, Broadhurst & Broadhurst
For the defendants: Ramon Alberga Q.C. instructed by Mr. Hellman of Quin & Hampson

BEFORE DOUGLAS J

JUDGMENT

By a summons filed on 24th July 1997 the defendants applied for an order that the following question or issue be tried as a preliminary issue before the service of a defence in this action, namely, whether the plaintiff company is estopped and/or precluded from bringing this action or alternatively whether this action should be struck out as an abuse of this Court. The plaintiff consented to this application, and the Court made a Consent Order dated 20th August 1997.

BACKGROUND

Cause No. 320/97, the subject of these proceedings was commenced on 22nd May 1997 by a company called Golfco Ltd. ("Golfco") against

Green Thumb Nursery & Landscaping Ltd. ("Green Thumb") and Godfrey Dawkins ("Mr. Dawkins").

In this action the plaintiff ("Golfco"), claims that in or about April 1993, as a result of discussions between Golfco and the defendants, Green Thumb and Mr. Dawkins, the parties to this action, entered into a Joint Venture Agreement. This provided, inter alia, that Green Thumb would pay rent to Golfco for the rental of one-half of the real property described as George Town Central, Block 13D parcel 37. In addition, it is pleaded that in May 1996, Green Thumb acquired the lands and premises described as George Town Central, Block 13B, Parcel 37, and that, pursuant to the Joint Venture Agreement, the plaintiff is entitled to this property as security.

In an earlier action Cause No. 245 of 1995 Dr. Brown claimed that Mr. Dawkins had fraudulently transferred the said parcel of land, to wit George Town Central Block 13B Parcel 37 into the name of Green Thumb. Mr. Dawkins and Green Thumb strongly denied this claim in their defence. Subsequently, by Consent Order dated 21st May 1996, it was provided that all further proceedings in Cause No. 245 of 1995 be stayed upon the terms set out in the Schedule to this Order. The Schedule was an Agreement dated 21st May 1996 signed by, or on behalf of, all the parties to the action. This Agreement stated that the parties were desirous of settling all claims arising out of the subject matter of the action on the terms set out thereunder. The said terms were expressed to be in consideration of the parties agreeing not to pursue the action to trial and in consideration of the

obligation between the parties as set out in the Agreement. One of the terms agreed, to be found at paragraph 1 of that document, was that in consider of Green Thumb agreeing to release all claims to ownership that it had in respect of Rum Point, Block 40A, Parcels 1 and 2, Dr. Brown agreed to release all claims to ownership, and rectification of the Register in respect of George Town Central, Block 13D, Parcel 37. A second Order dated 21st May 1996, also by consent, made a declaration at paragraph 1A that the Transfer of Land described as Registration Section George Town Central, Block 13D, Parcel 37 from Dr. Brown to Green Thumb was confirmed, and that Green Thumb remained the proprietor of that land subject to the charges thereon.

The initial thrust of the argument of learned Queen's Counsel for the defendants is directed at the relationship between Dr. Brown and Golfco, that they were in fact privies in that there was sufficient degree of identification between them to make it just that the decision to which one was party should be binding in proceedings to which the other is party. It is the defendant's contention that the plaintiff had an interest in the earlier proceedings and therefore had the opportunity to intervene in them. Instead, although aware of the proceedings, the plaintiff was content to stand by and see its battle fought by Dr. Brown in the same interest. In the circumstances, the plaintiff should be bound by the result, and not be allowed to reopen the case.

The main thrust of his argument is directed towards the doctrine res judicata That the plaintiff is estopped from bringing this present

action by virtue of the fact that an issue now raised formed part of the subject matter of a separate action, Cause No. 245 of 1995, and was covered by the two consent orders which were made to settle and determine that action. He further argues that Dr. Brown was the plaintiff while Mr. Dawkins and Green Thumb were defendants in that previous action, that Brown and Golfco are clearly privies and therefore the consent order (ibid) now precludes and/or estops Golfco as privy of Dr. Brown from bringing the proceedings which that company has now brought in Cause No. 320 of 1997. It is counsel's contention that the issue raised in this action could, and should have been raised in the previous action, but were not.

Learned counsel for the plaintiff demurred and argued that there could be no estoppel. While admitting that the plaintiff and Dr. Brown were privies, he argued that this does not matter at law. The only reason why the first action Cause No. 245/95 became necessary was due to Dr. Brown investigating all his other land holdings and discovered the transfer. There was no judicial determination as to why the document had been forged. All the properties were owned by Dr. Brown and as there was a sale pending it was necessary to address the issue as efficiently as possible. This was not a matter that just dealt with the interests of Dr. Brown and Golfco, there were other properties involved in the transfer of land. The plaintiff also contends that this present action deals with a different interest, that of a joint venture agreement between Golfo and Dawkins and has nothing to do with such issues as conspiracy, allegations of fraud and unregistered transfers of land, all of which the first action was about. In that

action the pleadings put to issue only that which concerned the validity of the transfer of land, Golfco had never been the proprietor of any of them. The Consent Order which followed is merely an agreement, not adjudicated upon by a Court on its merits. It is an agreement between the parties some of whom were not named as defendants or plaintiffs but merely referred to us "the party of the first part" and who are not party to the present litigation.

No one disputes that from the nature of the agreement the parties were mainly concerned with the proper transfer of land. What is now to be determined is whether there are common issues in both actions giving rise to the defendants' plea of res judicata.

Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd (1975) AC 581 at 589-91 and Henderson v. Henderson (1843-1860) ALL. E.R. 378 at 381-82 are the leading authorities for the doctrine of res judicata. This doctrine was best expounded in the Henderson case (ibid) by Wigram V.C. when he stated -

> "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 in 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 on 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."

In the above the circumstances such a party is estopped from proceeding with the subsequent action.

THE LAW

The principles of estoppel as it relates to this matter is contained in Halsbury's Laws of England 4th Edition Vol. 16 at para. 953 is inter alia as follows -

Estoppel by record or quasi by record, also known as estoppel per rem judicatam, arises where an issue of fact has been judicially determined in a final manner between the parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the same parties (this is sometimes known as cause of action estoppel); where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the same parties (this is sometimes known as issued estoppel); a judgment which would be final if it resulted from judicial decision after a contest is not prevented from being so by the fact that it was obtained by consent or by default, or as the result of admissions, provided the party against whom it is set

up was under no liability, but the efficacy of a judgment so obtained is somewhat strictly limited.

Simply stated, the basic principle of estoppel is that where a final judicial decision has been pronounced by a count of competent jurisdiction neither the parties in that litigation nor their privies can bring another action against the same person for the same cause. (See **Spencer and Turners** Treatise of the Doctrine of Res Judicata.) Having accepted that Dr. Brown and Golfco are privies, the next issue to be determined is whether the consent order constituted a mere agreement and not a final judgment of the Court. The plaintiff argues that what transpired was not an adjudication but a Contract. In this regard the Courts attention is drawn to the Schedule of the consent order exhibited at 91 in bundle of exhibits. The relevant words being the "Agreement is made by the Court." The plaintiff's interpretation of this is that there is no consent order made by the Court in Cause No. 245 of 1997, as the document constitutes a mere contractual arrangement between the parties, or alternatively, that the form of the consent is to be construed as a contract. Counsel then takes that argument even further by submitting that the principle of estoppel cannot apply to a contractual arrangement, and consequently cannot be invoked to bar Cause No. 320 of 1997 from proceeding.

I find this contention unacceptable. The agreement is incorporated as part of the order in the form of a Schedule to the order. The Schedule is made a term of the order, and all its terms are therefore

terms of the consent order made by the court on 21st May 1996. As the wording of the order makes clear, the terms of the agreement were part of the order and embodied therein.

The case of Chanel Ltd v. F.W. Woolworth & Co. Ltd. & others reported at (1981) 1 ALL E.R. page 742 has been cited as an authority on this issue. In this case the Court had made an order that it was not merely a contractual situation between the parties. The Court refused to review its order because there were no changed circumstances which warranted this being done. It did not refuse to review or alter its order because of the fact that the parties had made a contract. The defendants have submitted that the consent order, or rather the undertaking associated with it, was only to bind the defendants until judgment or further order in the meantime. The plaintiffs contend that their motion was stood over until the trial in consideration of the undertaking, and that the defendants are contractually bound by it until the trial unless grounds are adduced for rescinding or modifying it, which would be effective grounds for rescinding or modifying q contract. Buckley L.J said -

> "In my judgment an order or an undertaking to the court expressed to be until further order, by implication gives a right to the party bound by the order or undertaking to apply to the court to have the order or undertaking discharged or modified if good grounds for doing so are shown. Such an application is not an application to set aside or modify any contract implicit in the order or undertaking.

> It is an application in accordance with such contract, being an exercise of a right reserved by the contract to the party bound by the terms of the order or undertaking.

What seems to have somehow confused the plaintiff in this present action is that what we have here is a contract implicit in the consent order. Regardless of how we look at it, it is an order made by the Court with the consent of the parties. The authorities show that a judgment or order made by consent is as effective an estoppel between the parties as where the Court exercises its mind on a contested case. See In. Re South American Company (1875) 1 Ch. 37 in which Lord Herschell L.C. said -

> "The truth is, a judgment by consent is intended to put a stop to litigation between the parties, just as much as is a judgment which results from a decision of the Court after the matter has been fought out to the end."

Also in Palmer and another v. Durnford Ford (a firm) and another (1992) 2 ALL. E.R. at 122, it was held that the order made by consent "that there be judgment for the defendants in the plaintiffs' action against the manufacturer and the repairer," was a final decision of the Court giving rise to a plea of res judicata, notwithstanding that the Court had not pronounced on the merits of the plaintiffs' claims, since the order left nothing to be determined or ascertained thereafter in order to render it effective, and if the plaintiffs

attempted to resurrect the claims against the manufacturer and the repairer they could be met by a successful plea of res judicata.

As we will see, the principle as stated in the Henderson case (supra) that you are required to bring forward you whole case, and that if you do not do so in the first proceedings, you are estopped from doing so in a subsequent proceeding either by you, or your privy, applies as much to proceedings which are the subject of a consent order as it does to proceedings in which formal adjudication has been made.

Having established that the consent order is as effective an estoppel as a judgment by the court, we now need to determine if, or how the principle as stated in the Henderson case applied to any of the issues contained in the consent orders disposing of Cause No. 245 of 1995, and whether they now preclude and/or estop Golfco as a privy of Dr. Brown from bringing these proceedings.

One of the subject matters of Cause No. 245 of 1995 was the issue whether there was a proper transfer of George Town land described as George Town Central, Block 13D Parcel 37. Clause 1 of the agreement embodied in the consent order of 21 May 1996 provides as follows -

It is hereby agreed as follows -

> "In consideration of Green Thumb agreeing to release all claims to ownership it has in respect of Rum Point Block 40A, Parcels 1 and

2, Dr. Brown hereby agrees to release all claims to ownership and rectification of the Register in respect of the George Town property."

There is no dispute as to whether the land referred to above is George Town Central Block 13D Parcel 37.

I have before me the Statement of Claim in Cause No. 320 of 1997 which does not at all support the plaintiff's contention that the pleadings in Cause No. 320 of 1997 raise no factual or legal issue relating to the ownership or directorship of Green Thumb. Paragraph 75 of the Statement of Claim (ibid) states, inter alia, as follows -

> "In or about April of 1993 as a result of discussion entered between Dawkins and Brown, a Joint Venture Agreement was entered into between Dawkins, Green Thumb and Golfco. The material terms of the Joint Venture Agreement included, inter inter alia, the following clause:-
>
> j. The Joint Venture would pay rent to Golfco for the rental of one half of the real property described as George Town Central, Block 13D, Parcel 37.

Contrary to the plaintiff's submission the issue of the ownership of the property described as George Town Central Block 13D Parcel 37 has been raised in both Cause No. 245 of 1995 and the present action.

The matter goes even further. Witness statements filed in Cause No. 245 of 1995 also aver to certain similarities in the subject matter of both actions. One Gregory Gilbert of Sacramento, California deponed

that during conversations with Dawkins it was stated to him that Dr. Brown was one-half owner of the company Green Thumb as well as a landlord to the company and this was confirmed by Dr. Brown Dawkins recalls at paragraph 8 of this affidavit as follows -

> "In 1993 I entered partnership agreement with Dr. Brown to make him a 50/50 partner in Green Thumb. We made a verbal agreement and later drew up a written agreement. Dr. Brown kept the original agreement and I did not keep a copy."

This not only goes to the issue of privies but also raises the question of the ownership of Green Thumb and George Town Central Block 13D Parcel 37, issues that constitute the basis of Golfco's claim in Cause 320 of 1997. It must be accepted that if the matter goes to trial, the ownership of the land would once again have to be determined. Counsel for the plaintiff is bold enough to submit that the issues in a case are determined purely by the pleadings and not by the witness statements. He contends that witness statements are merely to assist the parties to the litigation so that there is some way to determine what evidence should be introduced at trial, and that what is contained in them may or may not be raised at the trial as an issue. This is certainly not the law. Issues raised in a case are not solely determined by the pleadings. Witness statements invariably raise issues which are introduced at the trial. Furthermore witness statements in Cause No. 245 of 1995 were exchanged by virtue of the order made by the Court.

The position regarding such statements is stated in SCP order 38/2A/7 and is as follows -

> "The overriding features of the written statements of the witness which may be served pursuant to the direction of the Court under para. (2) are -
> (1) that they are intended for use at the trial itself; and
> (2) that they relate to issues of fact to be adduced at the trial.

A perusal of the Witness Statement in Cause No. 245 of 1995 reveals that they raise specific issues,inter alia, whether Dr. Brown or his privy had a valid claim in law in equity as against Green Thumb. (i) to the George Town property (ibid) and with respect thereto; (ii) to an ownership interest in Green Thumb. The Statement of Claim in Cause No. 320 of 1997 is founded on the Joint Venture Agreement between Dr. Brown, Mr. Dawkins and Green Thumb. As we have already seen it is the defendants' submission that all this is covered by the two consent orders in Cause 245 of 1995 which settled the action. Alternatively they plead that it could and should have been raised in that action.

It is accepted by both parties that the plaintiff's claim in the first action could have been amended to include the claims made in Cause No. 320 of 1997. It is not denied at the time of filing this action the terms of the Joint Venture Agreement were known to Dr. Brown, and therefore to the plaintiff, his privy. One can understand Dr. Brown's desire to get a specific resolution to his Cause No. 245 of 1995,

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having sued several defendants, some of whom had no connection to Green Thumb or the Joint Venture Agreement. This however is not a valid reason for not amending the pleadings. He could have done this by reserving the right to have the amendments heard at a later date. I find that in failing to act in this manner he failed to exercise due diligence.

Of particular interest is the local authority cited by the plainitff of Cayman Arms (1982) Ltd v. English Shoppe case reported at (1990-91) CILR p. 299. The plaintiff submitted that the issues could have been brought before the court in the first issue but were not. If the court held that it was not estopped from so doing in the second action. As Harre J. (as he then was) explained -

> "The plaintiff has made it clear that he was not admitting the allegations of breach of covenant. There was no failure to raise issues which could have been raised. Decision on the issue was postponed and the case decided on the issue of the validity of the notice of forfeiture. The application was in fact analogous to the trial of a preliminary point of law."

Another authority cited by the plaintiff is New Brunswick Railway co. v. British & French Trust Corporation Ltd. (1938) 4 ALL E.R. 747. This case is not at all analogous to the present matter. The Brunswick case was concerned with a judgment by default which only acts an estoppel in respect of the matter directly decided, and the Court should, as far as possible, only make declarations as to the construction of documents

which the matter has been argued by counsel on each side. The plaintiff in the present action as Dr. Brown's privy is in a very different position. At the time Dr. Brown filed Cause No. 245 of 1995 he was aware of the existence of the joint agreement, and that issues relating to the document had not only been raised in his Writ, but also in the Witness Statement. He was at that time in a position to bring his claim regarding the joint venture.

In citing this authority the plaintiff clearly relies on the dictum of Lord Upjohn in Carl Zeis - Stiftung v. Rayner & Keller Ltd. (1966) 2 All.E.R.at 572 when he said -

> "There may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be unjust to hold him precluded from raising that issue in subsequent litigation... 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 applied to the circumstances of the subsequent case with this overriding consideration in mind."

Here Lord Upjohn in referring to litigants who have a good reason for not raising an issue in the first action. This in no way denigrates the principle enunciated in Henderson (supra). It is not difficult to see why the doctrine of estoppel did not apply. In Carl Zeis (supra) the plaintiff had successfully contested the defendants's claim to a right of forfeiture on the ground of a invalid notice. It was held

that it was then under no obligation to challenge that claim on additional or different ground and accordingly it could not be subject to an estoppel merely because it had not sought to determine the question of an alleged breach. The doctrine of res judicata had no application in these circumstances and the plaintiff was not barred by the earlier judgment in its favour from denying that it was ever in breach of the lease.

The present matter is of a different nature. It has been already noted that at the time of the consent order, the plaintiff was fully aware of the issues raised in the Witness Statement and their relevance to the Joint Enterprise Agreement. Accordingly the principle enunciated in Henderson v. Henderson (supra) applies.

It is now necessary to have a look and another authority on which the plaintiff relies. This is the case of Bank of Butterfield (Cayman) Ltd v. N. Crang (1992-93) CILR 409 in which Smellie J. in giving judgment for the defendant said inter alia:- "The Court must be careful not to bar a defence which did not necessarily involve identical issues decided previously." However the case is easily distinguished from the present one in that it was a default judgment situation and the court was only exercising a supervisory function. Most importantly the issue for which estoppel was claimed was not an issue in the ealier proceeding.

The defence, with a great degree of confidence, cites the case of Lawlor v. Gray (1984) 3 ALL. E.R. 345 in which the plaintiff was not

estopped from bringing in a claim in breach of contract after sucessfully bringing a claim in debt. It was held that for the purposes of estoppel a claim in debt arising under a contract and a claim for damages for breach of contract were different causes of action. Accordingly, the plaintiff's writ seeking damages for breach of the agreement contained a different cause of action from the Chancery and Order 14 proceedings, which concerned the defendant's obligation under the agreement to repay the debt owing to the plaintiff. Furthermore, the subject of the litigation arising under the writ was a claim for damages for breach of contract had never been the subject of litigation in any of the previous actions, since at the time of the previous actions no claim for interests had been made by the Revenue and therefore no claim for damages for breach of contract had arisen. Accordingly, the defence based on estoppel failed. This is understandable as it was recognised that Lawlor, the plaintiff, may not have been able to bring his claim for damages at the time of the first action. He could not have presented a claim for interest until after the demand was made, and this was only made because of the defendant's misconduct in not paying the plaintiff promptly. The Revenue did not ask for the interest until all the instalments had been paid.

In these circumstances the Court refused to apply to the equitable doctrine of estoppel in favour of a defendant whose own misconduct had given rise to the second action. This is the true basis of this decision which has no application here.

I find that in this matter before me Dr. Brown and the plaintiff being privies, the former ought to have raised the issue of the Joint Venture Agreement in the previous action, notwithstanding the fact that it may have been necessary to reserve the right to have it heard at a later time. Accordingly I find that Golfco is estopped per rem judicatam from proceeding with this action.

I now come to the defendant's complaint that this action consitutes an abuse of process. For this purpose I refer once again to the case of Yat Tung (supra) in which it was held that it is an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. I have already determined that that the issue regarding the land, George Town Central Block 13D Parcel 37, ought not to have been raised in this action. The consent order brought to an end any proceedings regarding this land. In Halstead (Donald) v. Attorney General of Antigua and Barbuda, reported at (1995) 50 WIR p. 98 another action in which a claim was brought following a consent order, it was held, in dismissing the appeal, that the institution of the claim after obtaining the consent order was an abuse of process even if the appellant might not strictly have been estopped per rem judicatam from instituting it; further, the appellant's rights of action, and causes of action (arising from the former criminal proceedings against him) had been merged in the consent order ("transit in rem judicatam") and had ceased to exist; the claim was also an abuse of process as being a breach of an order of the Court and as the consent order had created a promissory estoppel.

I find that the plaintiff is not only precluded from bringing this action by reason of res judicata, but that it should be struck out as an abuse of this Court.

Costs to be taxed or agreed.

Kipling Douglas

Judge of the Grand Court

30 th January 1998