IN THE ROYAL COURT

(SAMEDI DIVISION)

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20th May, 1991

Before: The Bailiff and
Jurats Vint and Orchard

Between:	Takilla Limited	PLAINTIFF
And:	Ernest Farley & Son Limited	FIRST DEFENDANT
	Clarence George Farley	SECOND DEFENDANT
	Keygrove Limited	THIRD DEFENDANT

Appeal by the Plaintiff, under Rule 15/2 of the Royal Court Rules, 1982, as amended, from the decision of the Judicial Greffier dated the 8th January, 1991, to grant the First Defendant's application to stike out the appellant's Order of Justice.

Advocate P.C. Sinel for the Plaintiff

Advocate B.E. Troy for the First Defendant

JUDGEMENT

BAILIFF: This is an appeal by the Plaintiff from a decision of the Judicial Greffier of the 8th January, 1991, on an application by the First Defendant under Rule 6/13 (b) and (d) to strike out the Plaintiff's claim.

The background to the Judicial Greffier's Judgement and thus to this appeal from it, is set out very fully in his Judgement and has been accepted by both parties as an accurate statement. I therefore read it as an agreed statement of the facts which led to the Judicial Greffier's decision. He divides his judgement into numbered paragraphs, starting with (a).

(a) On June 6th, 1979 the First Defendant sold the property known an "Eulah" to the Plaintiff, whilst retaining a site which formerly formed part thereof. Certain restrictive covenants were created in the contract in favour of the Plaintiff in restricting the First Defendant's use of the site which it retained. The relative restrictive covenant (hereinafter referred to as "the restrictive covenant" reads - "Que d'autant que ladite Société Bailleresse et Venderesse se propose et aura l'intention de bâtir, établir et construire sur ladite propriété qu'elle se réserve à l'Est de ladite propriété présentement baillée et vendue un groupe (ou groupes) des maisons de rapport (anglicisé "block(s) of flats") et appartenances tels bâtiment, établissement et construction seront achevés et completés conformément à et généralement en accord avec certain plan ou dessein préparé par Messrs. Taylor, Leapingwell and Horne et portant le numéro 326/12. Ledit plan et dessein est celui qui a été déjà soumis pour l'approbation du Comité des Etats de cette Ile dit "Island Development Committee". Etant stipulé entre lesdites parties que nul changement ou modification audit plan ou dessein est permis sans le consentement de ladite Société Preneuse et Acquéreuse, lequel consentement ne sera pas refusé sans raison valable".

(b) On the 23rd September, 1979 an action was commenced by the Plaintiff against the First Defendant seeking an injunction but the injunction was lifted on 25th September, 1979.

(c) On the 18th February, 1982 an action was commenced by the First Defendant against the Plaintiff and this was eventually disposed of in early 1984 with the Court

striking out the First Defendant's pleadings in that action.

(d) On the 20th December, 1984 the Plaintiff commenced a further action against the Defendant containing an injunction but this was withdrawn by agreement on the 10th June, 1985.

I interpolate here to say that none of those three clauses of the Greffier's judgement are relevant to this present action.

(e) Also on the 20th December, 1984 the Plaintiff commenced an action against the Defendant alleging a breach of the restrictive covenant and seeking the reduction in the height of a block of flats which had been built on the First Defendant's property. The Judgement of the Royal Court was given in relation to that case on the 2nd July, 1986 when the Royal Court found in favour of the Plaintiff in relation to the alleged breach of the restrictive covenant.

I interpolate again to add that the Royal Court ordered the First Defendant to remove part of the building of block 'A' of the flats.

(f) The matter came on Appeal before the Court of Appeal on the 25th July, 1988 and on 11th May, 1989 the Court of Appeal rendered it's reasoned Judgement and allowed the Appeal, thus overturning the Royal Court's Order in relation to the reduction in height of the block of flats. The Court of Appeal found that the restrictive covenant had been incorrectly interpreted by the Royal Court, that it was sufficiently clear and that it had not been breached.

(g) On 24th May, 1989, the present action was commenced by the Plaintiff. In that action the Plaintiff is seeking an Order for the rectification of the contract which was passed in 1979 by the substitution of different words for those in the restrictive covenant and that the block of flats should be reduced in height in the same way as was sought in the proceedings commenced on 20th December, 1984. The Plaintiff is also seeking an Order for damages against the First Defendant for mis-representation and/or breach of warranty and/or in negligence.

The action of the 20th December, 1984 I shall call the first action, the action of the 24th May, 1989 I shall call the second action.

The first action turned on the interpretation of a set of plans of buildings built to the east of the property of the Plaintiff Company. The Royal Court found for the Plaintiff and ordered the First Defendant to reduce the height of part of block 'A' of the flats adjacent to "Eulah".

At the hearing Mr. Callaghan, the beneficial owner of the Plaintiff was allowed, to give evidence about his interpretation of the plans erroneously, as the Court of Appeal found. Mr. Gillam was, at the relevant time a senior employee of the First Defendant, but he was not called. It was he, according to Mr. Callaghan, who showed him the plans. The Court of Appeal found that the Royal Court was in error in hearing Mr. Callaghan's evidence on this point and based its decision purely on the interpretation of the plans as they were. It gave its Judgement, on 11th May, 1989 and the second action was started on 24th May, 1989 and alleged negligence and/or misrepresentation by the First Defendant acting through Mr. Gillam. It thus seeks a modification of the restrictive clause so as to restrict the height of blocks 'A' and 'B', (or possibly only block 'A') to below certain sight lines which it is not necessary to go into in detail today.

Thus the plaintiff's objective remains the same as it was in the first action, namely to reduce the height of the adjacent buildings to what it considers it was induced to accept by the First Defendant or one of its employees.

The Court of Appeal was, however, at pains to point out the strict limits of its Judgement. In paragraph 5 of its Judgement it says this:

> "It is important to observe that the claim made by the Respondents was based simply upon the alleged breaches of clauses 3 and 6 of the contract of sale. They made no allegation that they had been induced by any

misrepresentation to enter into the contract, nor that the contract was affected in any way by misrepresentation or fraud. They made no plea of mistake, nor did they rely in their pleading upon the understanding, or misunderstanding of plan number 326/12 entertained by Mr. Callaghan. Accordingly, on the case as pleaded none of these matters has to be considered. The case does not involve any inquiry into what the Appellants may have said the plan meant or what the Respondents may have thought it meant".

That paragraph, in our view, is neither an invitation to the Plaintiff to try again nor an indication that the First Defendant should not be proceeded against upon a different ground of action.

Mr. Sinel submitted that the second action is, indeed, founded upon a different ground of action, but, he admits that the matters pleaded in it could have been included in the first action, but were not, due, as he said, to the inadvertance of the Plaintiff's then legal advisers.

Mr. Callaghan thought that it was in order for him to say how he interpreted the plans as a result of what Mr. Gillham had told him. The Court of Appeal found otherwise and that the Royal Court had been in error allowing this part of Mr. Callaghan's evidence to be received. It might have been otherwise had the first action been more completely drawn and more comprehensive in its allegations, but, in our opinion, the matters contained in the two actions are, indeed, distinct. As Mr. Sinel said, there is no rule of law that requires that if there are two causes of action, even relating to the same object, that those two causes of action need be heard and joined in one action, although an application to to join them together would, of course, be sensible. He bases his submission on the Privy Counsel case which, of course, is an important authority for this Court of Payana Rameena Saminathan -v- Pana Lana Palaniappa (1914) A.C.618. In that case the Civil Procedure Code of Ceylon provided that every action should include the

whole of the claim which the Plaintiff was entitled to make in respect of that action; that a Plaintiff cannot afterwards sue for part of a claim ommitted from an action or, without leave, for another remedy in the same cause or action.

In relation to the point raised by Mr. Sinel the Privy Counsel had this to say at page 624:

> "Their Lordships are of opinion that the learned District Judge took an erroneous view of the object and meaning of this section. It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions".

That is the point which Mr. Sinel was at pains to stress and we accept that there is much force in his argument.

Now, the application to strike out the second action was made under Rule 6/13 of our Rules of Court which is identical to Order 18/19 in the White Book, and it is therefore necessary for me now to refer to certain extracts from Order 18/119. The first is to be found at Order 18/19/3, headed "Exercise of powers under this rule":

> "It is only in plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley, M.R. in Hubbuck -v- Wilkinson (1899) 1 Q.B.86, p.91"... and further down....."The powers conferred by this rule will only be exercised where the case is clear beyond doubt (per Lindley L.J. in Kellaway -v- Bury (1892) 66 L.T.599, p.602). The Court must be satisfied that there is no reasonable cause of action".....Again at 18/19/4 "It has been said that the Court will not permit a plaintiff to be "driven from the judgement seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in Dyson -v- Att. Gen. (1911) 1 K.B. 410, p.419). On the other hand a stay or even dismissal of proceedings may "often be required by the very essence of justice to be done" (per Lord Blackburn in Metropolitan Bank -v- Pooley (1885) 10 App. Cas. 210. p.221) so as to prevent parties beiang harassed and put to expense by

> frivolous, vexatious or hopeless litigation (cited with approval by Lawton L.J. in Riches -v- Director of Public Prosecutions (1973) 1 W.L.R. 1019. p.1027".

I stop here for a moment to say that in relation to that passage Mr. Sinel has submitted that in no way is the Second Defendant being harassed and no particular expense has been incurred, except in relation to the previous action; in fact it has been the Plaintiff himself who has been put to expense as a result of losing in the Court of Appeal.

In effect, the Plaintiff originally said in the first action "you have built too high and my privacy has been affected. Go back to the proper plans". Although he succeeded in the first instance, he failed in the Court of Appeal. He now says "you have still built too high, although you have followed the plans as the Court has found and my privacy will still be invaded. You obtained my consent to the plans by negligence and/or misrepresentation and you should not be allowed to profit from this or the finding of the Court as to the interpretation of the plans". This is really the position in which we find ourselves and in which the learned Judicial Greffier found himself when the matter came before him.

Now, the leading case, which has been cited on many occasions and has been accepted as an authority, is that ofHenderson -v- Henderson (1843) 3 Hare 100 which in turn has been considered in the Privy Council case of Yat Tung Investments Co, Ltd., -v- Dao Heng Bank Ltd. 1975, A.C. p.581. In that case, Henderson was considered and accepted at p.590 in the Judgement of Their Lordships delivered by Lord Kilbrandon. He was dealing there with the question of res judicata which is very much in point in this case:

> "The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullin J. that

the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969".....Those matters, of course, are not relevant to this case, but he continues.....

....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 matters which might have been brought forward as part of the subject in contest, but which were 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 judgement,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.

The shutting out of a "subject of litigation" - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule".

Now, that passage and some other authorities were cited by Slade L.J. in the case of Cooper -v- Resch, (20th March, 1987) Court of Appeal (Civil Division) Unreported. The learned Lord Justice says this at page 7 of the transcript of the Judgement:

"...In my judgement, the principle which the court must apply in this situation is that referred to by Lord Diplock in Hunter -v- Chief Constable of the West Midlands Police (1982) AC 529, (1981) 3 All ER 727. In the course of his speech at page 542 he said this:

"But the principle applicable is, in my view, simply and clearly stated in those passages from the judgement of AL Smith LJ in Stephenson -v- Garnett (1898) 1 QB 677, 680-681

and the speech of Lord Halsbury LC in Reichel -v- Magrath (1889) 14 App Cas 665, 668 which are cited by Goff LJ in his judgement in the instant case. I need only repeat an extract from the passage which he cites from the judgement of AL Smith LJ:

'...the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court.'

The passage from Lord Halsbury's speech deserves repetition here in full:

'...I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'"

Earlier in the same speech at page 541 Lord Diplock said this:

"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

Now, in the present case, two comments spring to mind. First, in this Court's opinion, the question is not identical, for the reasons advanced earlier by Mr. Sinel and which I have already mentioned. Secondly, the Plaintiff, it is true did have a full opportunity of presenting his present claim in the first action. But as against this I should like to cite some words of this Court with the Deputy Bailiff presiding, in the case of Channel Islands and International Law Trust Co. Ltd., (in its capacity as Trustee of the Halifax Trust) First Plaintiff and Others -v- Geoffrey Pike First Defendant and others. In relation to the case I have mentioned, Henderson -v- Henderson, the learned Court had this to say at page 20 of the Deputy Bailiff's judgement:

The Vice-Chancellor's phrase, in Henderson -v- Henderson "every point which properly belonged to the subject of litigation" was expanded in "Greenhalgh -v- Mallard (1947) 2 All E.R. 255, 257, by Somervell, L.J.:-

"...res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but...it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them".

And at the bottom of the page.

"In Dallal -v- Bank Mellat (1986) 1 Q.B. 441, at p. 454, Hobhouse J., having reviewed, inter alia, Henderson -v- Henderson, Yat Tung Investment Co. Ltd. -v- Dao Heng Bank Ltd., and Greenhalgh -v- Mallard, referred to "to clearly identifiable criteria":-

"The first is that there must have been a previous adjudication by 'a court of competent jurisdiction', and, secondly, there must not be 'special circumstances' which make it unjust or inappropriate to apply the principle".

Even if we accept that there had been a previous ajudication by The Court of Appeal, we find that it would be unjust in this particular case, and indeed inappropriate to apply the principle, and accordingly the appeal is allowed.

AUTHORITIES

Royal Court Rules 1982 Rule 6/13

R.S.C. (1991 Ed'n): O,18,r.19

Odger's Principles of Pleading and Practice, pages 187 - 189.

Brett -v- Brett (1968) 2 JJ 883

Bake -v- French (1906) Ch 428

Re A Debtor (No 472 of 1950) (1958) 1 All ER 581

Randolph -v- Tuck and others (1961) 1 All ER 814

Brunsden -v- Humphrey (1884) QBD 141

Words and Phrases Legally Defined (3rd Edition) Volume 1, p. 232-4 and Volume 2 p.487

Reid Hewitt & Company -v- Joseph (1918) AC 717

Haystead -v- Commissioner of Taxes (1926) AC 155

Greenhalgh -v- Mallard (1947) 2 All ER 255

Yat Tung Investment Company, Ltd -v- Dao Heng Bank, Ltd (1975) A.C.581

Henderson -v- Henderson (1843) 3 Hare 100

Payana Rameena Saminathan -v- Pana Palaniappa (1914) A.C.618

Channel Islands and International Law Trust Company Limited & Ors -v- Pike & Ors (30th January, 1990) Jersey Unreported

Cooper -v- Resch (20th March, 1987) Court of Appeal (Civil Division) Unreported @ p.7.