CJ / 21.4.97
Res judicata

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

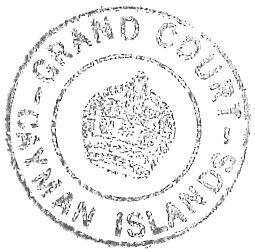
CAUSE NO. 134 OF 1996

BETWEEN: THE PROPRIETORS OF STRATA PLAN NO. 171 PLAINTIFF

AND: CAYMAN DOORS LTD. DEFENDANT

For the Plaintiff: Ms. C. Bridges
For the Defendant: Mr. J. Uzzell

BEFORE DOUGLAS J.



R U L I N G

This is an application by the plaintiff for an order that the defendant's summons dated 27th February 1997 be struck out and/or dismissed under the inherent jurisdiction of the Court. Of the three grounds pleaded only grounds 1 (a) and 1 (c) were argued. They are that -

1(a) It is an abuse of the process of the court or

1(c) The matter raised by the defendant in his second summons and applications dated 22nd February 1997 to set aside the Default Judgment dated 7th June 1996 could and should have

been put forward by him on or before the hearing of the first application to set aside the Default Judgment heard before the Honourable Chief Justice on 2nd December.

Grounds 1 (b) and 2 of the application were not pursued. By this hearing ground 3 (a) has been complied with, and ground 3 (b) will only become applicable should this summons be dismissed.

It was not disputed that in the case of an abuse of process the court has the power under its inherent jurisdiction to stay or dismiss an action or to give judgment or impose terms as it thinks fit. Although, as submitted, the power is discretionary and must be exercised with great circumspection, this court will do so in accordance with the rules and principles governing the doctrine of estoppel which is the law applicable in this matter.

Before going into the merits of this application a brief chronicle of the pleadings will suffice.

On 7th June 1996 the plaintiff obtained a Default Judgment requiring the defendant to pay certain sums of money claimed in respect of arrears of strata fees.

On 24th July 1996 the plaintiff issued a Writ of Fieri Facias and Praecipe for Writ of Fieri Facias.

By a summons dated 8th October 1996 the defendant sought to set aside

the Default Judgment and Writ of Fieri Facies, and further sought leave to file a defence. This summons was heard on 2nd December 1996 at which time the defendant's application was dismissed.

On 27th February the defendant issued a second summons to set aside the Default Judgment and for leave to file a defence. The wording of this summons and that heard by the Chief Justice in December were identical. The defendant appears to be making this application twice in the same matter. This has given rise to the plaintiff's plea that the latter summons is an abuse of the process of the court. It is the defendant's contention that these applications differ, and that the difference is contained in the affidavit supporting the application. This affidavit reveals that the proposed application is based on the merits of the defence and not on the ground of the non service of the writ as was argued in the December hearing. Hence the second ground of the plaintiff's application, to wit, that the subject matter of the defendant's application should have been put forward by him at the hearing of the first application to set aside the Default Judgment.

Indeed both grounds put forward by the plaintiff raise the plea of res judicata, i.e. that the matter has already been adjudicated upon by a competent court of law and accordingly the defendant is estopped from re-opening the issue. Both parties have based their submissions on the doctrine of estoppel. However the difference lies in the approach each has adopted in applying the doctrine.

As far as the first ground of the plaintiff's application is

concerned, that of an abuse of the process of the court, it is submitted by the defendant that the hearing of the 2nd December 1996, being an interlocutory one, the principle contained at para 1010, Vol. 16 of Halsburys' Laws of England 4th Edition applies. This is as follow -

> That in order to give rise to an estoppel, the record must be that of a judgment which is final in substance, if not in form, namely not merely interlocutory.

This rule was reiterated by Lord Reid in Carl Zeiss Stiftung v. Rayner and Keeler Ltd et al (No. 2) (1966) 2 AER 555 when he said "the earlier judgment relied upon must have been a final one." Indeed it is the defendant's contention that the December judgment was both interlocutory in substance and in form, and that there was no finality to it. Therefore the plea of res judicata does not apply.

At the risk of appearing pedantic I will at this point endeavour to explain what constitutes an interlocutory hearing and the application of res judicata thereto.

The word interlocutory is derived from two Latin words whose literal translation is "speaking in between". It now denotes an intermediate judgment which does not finally determine or complete an action. In other words such proceedings deal with subsidiary and other matters which are not decisive of the suit. It is primarily in relation to such hearings that the category of estoppel, now known as "issue estoppel" is applied.

In the **Carl Zeiss** case (ibid). Lord Guest had this to say -

> "Within recent years the principle has developed so as to extend to what is now described as issue estoppel, that is to say where in a judicial decision between the same parties some issue which was in controversy between the parties and was incidental to the main decision has been decided, then that may create an estoppel per rem judicatam."

The defendant has relied heavily on the old doctrine of cause of action estoppel. It is now clear that there are two species of estoppel per res judicatam, namely (i) "cause of action estoppel" and (ii) "issue estoppel". (See Phipson on Evidence Thirteenth Edition at 28-46). There has been, through the years, some inconsistency as to the application of res judicata to estoppel. Some courts have equated it with cause of action estoppel as did Lord Reid in Carl (ibid) Zeiss. Others have classified "cause of action estoppel" and "issue estoppel" as two branches of res judicata. This has led to the degree of conflict which has manifested itself in this hearing. One party relying on the older doctrine whereas the other on the new and more widely used "issue estoppel" which is merely an extension of the original.

Much has been said and written in an attempt to distinguish issue estoppel from cause of action estoppel, a distinction which is fundamental to this application. I can find no better explanation of the distinction between these two branches of the doctrine than that

enunciated by Lord Denning M.R. in Fidelitas Shipping v. V/O Exportchleb. (1965) 2 ALL E.R. 8 and 9.

His Lordship said -

> "The law as I understand it, is this:
> if one party brings an action against another for a particular cause and judgment is given on it, 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; But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issues cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ....."

The failure to distinguish between these two classes of estoppel can be seen in the second limb of the defence. Here the defendant contends that no estoppel has arisen as the only issue before the court at the interlocutory hearing on 2nd December was that of the non service of the writ, and that the issue of the merits of his case never arose. This is substantiated by the wording of the order which stated, inter alia.

(1) that the respondent's application to set aside the

Default Judgment and Writ of Fieri Facias by reason of irregularity namely non-services of Specially Endorsed Writ of Summons and Default Judgment is dismissed.

(2) that the defendant's application for leave to file a defence and for the costs of the application is dismissed.

In support of this contention the defendant has relied on paragraph 1004 of Halsbury (ibid) which simply states that no estoppel arises as to matters which were not in issue in the proceedings, the record of which is relied upon. The courts attention was also drawn to this rule as applied in the case of **Brunswick Railway Co. v. British and French Trust Corporation Ltd.** 1938 AER 747 in which it was held that "a defendant is only estopped from setting up (in a subsequent action) a defence which was necessary and with complete precision decided by the previous judgment."

There are two observations which I am constrained to make regarding this submission. Firstly, as the above bracketed qualification indicates, this rule is confined to subsequent actions,i.e. one following and related to a previous one, and has no application so far as an interlocutory hearing is concerned. Secondly, it can only apply where a plaintiff has two heads of claim and recovers judgment for only one, full relief not being open on the other. This does not apply in the present matter. There were never two issues before the court. The only issue before the learned Chief Justice on 2nd December was whether the Default Judgment and Writ of Fieri Facias

should be set aside, there was no other issue. The defendant may have had available several grounds in support of that application, but a ground cannot be considered an issue. He chose to argue just one ground, that of non service. Clearly the other ground which he now seeks to put forward, that of the merits of his case, was available to him at that time. In fact it was one most pertinent to his application. Lord Denning, in his judgment in the Fidelitas case (ibid) cited the principle expressed by Wigram V.C. in the **Henderson v. Henderson** (1843) 3 here at p. 114 when he said -

> "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 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 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."

This principle of res judicata as it applies to issue estoppel was re-

stated in Yat Tung Investment Co. v. Dao Heng Bank Ltd. 1975 A.C. 581 in a judgment delivered by Lord Kilbrandon. His Lordship cited the following words of Somervell L.J. in Greenholgh v. Mellard (1947) 2 All E.R. 255, 257.

> ".... 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."

In my opinion the above enunciation states precisely the position regarding the defendant's summons of 27th February, the subject of his application.

In view of the law as stated, I cannot but find that the Chief Justice's ruling of 2nd December 1996 constitutes an estoppel per rem judicatam to the defendant's summons of 27th February. The defendant is accordingly estopped from bringing before the court any matter or issue which ought to have been brought forward at the December hearing. He had every opportunity to do so and accordingly the proposed application would constitute an abuse of the process of the court.

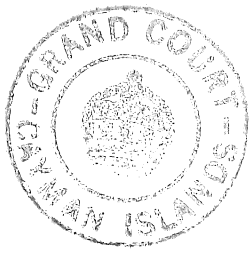
In closing I draw on the observation of Order 13 Rule 9/6 of the

Supreme Court Practice. better known as the "White Book" which is as follow -

> "The defendant need not disclose the nature of his defence in his affidavit, but it is often prudent for him to do so, in case he is unable to persuade the court that the judgment is irregular and wishes to rely, in the alternative, on a submission that the judgment, although regular, should be set aside on the grounds that he has a meritorious defence."

This is the course that ought to have been adopted by the defendant in his application of 2nd December. I am therefore ordering that the defendants's summons of 27th February be struck out.

Costs to the plaintiff.



K. Douglas
Judge of the Grand Court

Dated 21st April, 1997