18 pages.

ROYAL COURT 5

8th January, 1991

Before the Judicial Greffier

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| BETWEEN | Takilla Limited | PLAINTIFF |
| AND | Ernest Farley & Son Limited | FIRST DEFENDANT |
| AND | Clarence George Farley | SECOND DEFENDANT |
| AND | Keygrove Limited | THIRD DEFENDANT |

**SUMMARY**

Application by the First Defendant under Rules 6/13(b) and (d) for the Plaintiff's claim against the First Defendant to be struck out.

Advocate B.E. Troy for the First Defendant

Advocate P.C. Sinel for the Plaintiff

**JUDGMENT**

JUDICIAL GREFFIER:

I shall first set out briefly the history of proceedings in relation to this matter.

(a) On June 6th, 1979 the First Defendant sold the property known as 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 and restricting the First Defendant's use of the site which it retained. The relevant 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 une groupe (ou groupes) de 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 dessin preparé par "Messrs. Taylor, Leapingwell and Horne" et portant le numéro 326/12. Ledit plan et dessin 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 nuls changements ou modifications audit plan ou dessin est permis sans le consentement de ladite Société Preneuse et Acquereuse, lequel consentement ne sera pas refusé sans raison valable."

(b) On 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 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.

(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 Judgment of the Royal Court was given in relation to that case on 2nd July, 1986 and the Royal Court found in favour of the Plaintiff in relation to the alleged breach of the restrictive covenant.

(f) The matter came on Appeal before the Court of Appeal on 25th July, 1988 and on 11th May, 1989 the Court of Appeal rendered it's reasoned Judgment and alloved 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 present summons is brought by the First Defendant upon the basis that the Plaintiff is seeking to bring a further action upon substantially the same facts as were litigated in relation to the action commenced on 20th December, 1984.

Although the Plaintiff is clearly seeking substantially the same remedy in relation to the Order for the reduction in height of the flats, the Plaintiff's advocate argued that this was essentially a different case. The first case was for the enforcement of the covenant as originally worded in the 1979 contract and this second action is for rectification of the contract in order that the restrictive covenant may be amended to mean that which the Plaintiff has always thought that it meant. The Plaintiff backs this up by claiming mis-representation on the part of the First Defendant as to the meaning of the covenant breach of warranty and negligence.

Although the summons was brought under two sections I propose to deal mainly with the application under Rule 6/13(d) because it was apparent to me that the action could only be said to be scandalous or vexatious if it were found to be an abuse of the process of the Court. Thus the issue before me was the question as to whether the action against the First Defendant was an abuse of the process of the Court. Rule 6/13 is of course in almost identical terms to Order 18 Rule 19 and therefore the Supreme Court Practice 1991 or White Book is an acceptable authority thereon. Section 18/19/17 of the White Book contains various examples of an abuse of process and I shall quote a number thereof from page 339 as follows:

(a) It is an abuse of the process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata.

(b) 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 (Yat Tung Investment Co. Limited -v- Dao Heng Bank Limited [1975] A.C. 581) but the failure of the Plaintiff in the first action to join a third person as a Defendant in that action under Order 15, Rule 6, is not such an abuse of process and the plaintiff is therefore entitled to bring a second action against that person as a defendant, even though it is contended that the issue in the second action had been adjudicated and determined in the first action (Gleeson -v- J. Wippell & Co. Ltd., [1977] 1 W.L.R. 510; [1977] 3 All E.R. 54). See also Henderson -v- Henderson (1843) 3 Hare 100. This doctrine does not apply where there has been a mere procedural defect and the Court has never gone into the merits, though both parties were before it.

I also quote from section 18/19/18 from the fifth paragraph on page 340 of the 1991 White Book -

So, if a party seeks to raise anew a question which has already been decided between the same parties by a Court of competent jurisdiction, this fact may be brought before the Court by affidavit, and the statement of claim, though good on the face of it, may be struck out and the action dismissed; even though a plea of res judicata might not strictly be an answer to the action; it is enough if substantially the same point has been decided in a prior proceeding.

Advocate Troy also brought to my attention sections in paragraph 434 on page 322 of volume 37 of Halsbury's Laws of England Fourth Edition which I now quote:-

"An abuse of the process of the Court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it(6)." The note 6 referred to in the section reads as follows:-

"Examples which have been held to be an abuse of process are re-litigating a question, even though the matter is not strictly res judicata (Stephenson -v- Garnett; Spring Grove Services Limited -v- Deane), raising in subsequent proceedings matters which were and should have been raised in earlier proceedings (Yat Tung Investment Company Limited -v- Dao Heng Bank Limited, distinguished in Gleeson -v J. Wippell & Co. Limited)", etc.

Both counsel also brought to my attention paragraph 1526 on page 1026 of volume 16 of the fourth edition of Halsbury's Laws of England which I quote:-

"ESTOPPEL AND RES JUDICATA. The most usual manner in which questions of estoppel have arisen on Judgments inter partes has been where the defendant in an action raised a defence of res judicata, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of estoppel. In order to support that defence it was necessary to show that the subject matter in dispute was the

same (namely that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit), that it came in question before a court of competent jurisdiction, and that the result was conclusive so as to bind every other court.

The leading statement of law in relation to this matter is that contained in an often cited passage from Vice-Chancellor Wigram's Judgment in Henderson -v- Henderson reported in 3 Hare's Reports at page 114 in which Vice-Chancellor Wigram said this:-

"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, in which the parties, exercising reasonable diligence, might have brought forward at the time." That passage has been quoted with approval in a number of cases including the following:-

(1) Cooper -v- Resch Court of Appeal (Civil Division) 20th March 1987 at page 8;

(2) Cooper -v- Resch 1987 to 1988 JLR at page 431; and

(3) Yat Tung Investments Co. Limited -v- Dao Heng Bank Limited a Privy Council case on appeal from the full Court of the Supreme Court of Hong Kong at page 590.

I turn now to the Yat Tung case. This was a case in which a bank had loaned money to a Company, Yat Tung, which had purchased a property from it. Yat Tung subsequently defaulted on the payments of interest on the mortgage and the bank exercised it's right of sale thereunder and sold the property to a Third Party. Yat Tung then brought an action against the bank claiming that the original sale of the property to it by the bank was a sham; that the property had been conveyed to it as trustee for the bank and that the mortgage was accordingly a nullity. The Court dismissed this claim. One month after that Judgment Yat Tung brought a further action against the bank claiming that the sale by the bank of the property was void or voidable as fraudulent in that the bank and the Third Party "were in fact essentially one certain interest and/or alternatively acting in concert with a common design calculated to obtain the property at a low price and to extinguish the Plaintiff's interest therein." The Judge held that the allegation of fraud and the avoidability of the sale by the bank to the Third Party were matters which were available for litigation in the first action and ordered that the statement of claim be struck out. That order was affirmed by the full Court of Hong Kong. On appeal to the Judicial Committee:- Held, dismissing the

appeal, that there was no reason why a defence impugning the bona fides of the sale by the bank to the Third Party could not have been pleaded as a counterclaim to the counterclaim in the first action; that, accordingly, the doctrine of res judicata in its wider sense applied and it would be an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. I quote now from various sections of that Judgment as follows:-

(1) From the second paragraph on page 588, "Having said so much by way of explanatory introduction, it becomes possible to go straight to the clear and valuable statement made by MacMullin J. in the Full Court of the real substance of the present appeal. "The real issue to be decided is whether it be true to say that the allegation of fraud and the voidability of the sale to Choi Kee (the Third Party) were matters available for litigation in 969 (the first action) and that Mr. Lai chose not to rely on them and whether they are to be regarded as res judicata in the sense that they ought to have been so litigated."

(2) From the final paragraph on page 589, "The second question depends on the application of a doctrine of estoppel, namely res judicata. There Lordships agree with the view expressed by MacMullin 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, (the first action)

any formal repudiation of pleas raised by the appellant in no. 534 (the second action). Nor was Choi Kee (the Third Party), a party to number 534, a party to number 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in early proceedings." The Court then went on to quote the section from Henderson -v- Henderson. The Court then continued, "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. For example, if it had been suggested that when the counterclaim in number 969 came to be answered Mr. Lai was unavare, and could not reasonably have been expected to be avare, of the circumstances attending the sale to Choi Kee, it may be that the present plea against him would not have been maintainable. But no such averment has been made. The Vice-Chancellor's phrase "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". Again a phrase used by Lord Shaw of Dunfermline in delivering the opinion of the board in Hoystead -v- Commissioner of Taxation [1926] A.C. 155, 171, "the present point was one which, if taken, went to the root of the matter on the prior occasion", appears precisely apposite to the failure, in answer to the counterclaim in no. 969, to raise the matters founded on in no. 534 which, if then substantiated, would have been then decisive."

I also examined various other cases including the Gleeson -v- Wippell case. This case provides some limitation to the principles set out in the Yat Tung case. However, it relates to a case in which a further action was brought by a Plaintiff against a different Defendant. The Court held that although the Plaintiff had lost the first action she was not estopped from raising in a second action the issue which had been finally determined as between her and the Defendant in the first action. The Gleeson case is not really applicable in relation to the facts of this summons as the same parties were party to both actions in this case.

Advocate Sinel brought my attention to the case of Hoystead -v- Commissioner of Taxation [1926] A.C. 155 which is a decision of the Privy Council on Appeal from the High Court of Australia. In that case the Court held that the Commissioner of Taxation was estopped by virtue of a previous Judgment from contending that certain trustees were not entitled to certain deductions for a subsequent year when that point had been decided in relation to previous proceedings for a previous

year. This was a case of issue Estoppel rather than a case of an attempt to re-try the same matter. In the case of Brunston -v- Humphrey [1884] Q.B.D. 141 it was held in the Court of Appeal that damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; therefore the recovery in an action of compensation for the damage to the goods was no bar to an action subsequently commenced for the injury to the person. Again the circumstances in that case can be distinguished in this case inasmuch that the substantial relief sought by way of an order that the height of the building be reduced remains the same. Although there is also a claim for rectification and damages both of those are very closely linked with the original action.

Advocate Sinel also cited the case of Payana Reena Saminathan -v- Pana Lana Palaniappa [1914] A.C. 618. That was also a decision of the Privy Council on Appeal on this occasion from the Supreme Court of Ceylon. In that case an action had been brought to recover money allegedly due upon promissory notes. However, the action had failed as alterations had been made to the notes. Subsequently, a further action was brought for the underlying debt. Although section 34 of the Ceylon Civil Procedure Code, 1889, provided that every action should include the whole of the claim which the Plaintiff was entitled to make in respect of the cause of action, the Privy Council held that although the claims of the two actions arose out of the same transaction, they were in respect of different causes of action, and that consequently the second action was not brought contrary to that code and could be

maintained. Advocate Sinel said that by analogy in this case the original action was like the action for the promissory notes and the new action claiming rectification of the contract and damages was like the action on the underlying debt.

I turn now to the facts in this case. In paragraph 5 of the Judgment of the Court of Appeal dated 11th May, 1989 the Court of Appeal stated - "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 enquiry into what the Appellants may have said the plan meant or what the Respondents may have thought it meant."

In paragraphs 20-23 of the same Judgment the evidence given by Mr. Callaghan, the beneficial owner of the Plaintiff in this action, at the trial was outlined. That evidence included details of Mr. Callaghan's understanding of the meaning of plan 326/12 and the statement that he had been misled by the First Defendant's representative, Mr. Gillham, in relation to the meaning and effect of the plan.

In paragraph 49 of the same Judgment the Court of Appeal stated -
"In our judgment the Royal Court fell into error in concentrating on Mr. Callaghan's interpretation of plan 326/12 rather than the intention of the parties revealed by the intrinsic terms of the document. It was a consequence of this that they entertained extrinsic evidence of the parties' intention without proper consideration of its admissibility."

Paragraph 55 stated - "Reading the plan as a whole involves putting these indefinite indications of the South Elevation beside the clear and measurable outlines of the Cross section and the Elevation to La Ruelle Vaucluse. When this is done, there can in our view be no doubt that the plan's representation about the height of the western block is contained in the two latter drawings, not in the South Elevation."

The Court of Appeal then went on to say that the plan was not inherently ambiguous and that for this reason extrinsic evidence of the parties' intentions was neither necessary reasonable nor admissible.

It is clear from the Judgment of the Court of Appeal that the issue of the interpretation of the plan was before the Royal Court in the pleadings and that the issues of misrepresentation and mistake were raised in the evidence of Mr. Callaghan although not pleaded. Furthermore the Court of Appeal found that as the plan was not ambiguous matters of interpretation were irrelevant and inadmissible.

The issue before me, comes down to these questions:

(a) in the words of Vice-Chancellor Wigram in Henderson -v- Henderson, are the matters nov raised in this action matters which might have been brought forward as part of the subject in contest in the previous action but which were not brought forward, only because the Plaintiff has, from negligence, inadvertence or even accident, omitted part of its case

(b) From the same Judgment, are the matters now raised points which properly belonged to the previous subject of litigation, and which the Plaintiff, exercising reasonable diligence, might have brought forward at the time?

(c) From the Yat Tung case are the matters now alleged matters which were available for litigation in the previous action?

(d) From the same case, was there any reason why the current matters could not have been pleaded in the first action?

(e) From the same case, could and should the matters now raised have been litigated in the earlier proceedings?

I find that the answers to all of these questions are yes.

Advocate Sinel urged that the Plaintiff could not have known that it was necessary to plead a claim for rectification of the contract, misrepresentation, mistake and breach of warranty as alternates because it thought that the plan was clear and was misled by the First

Defendant in its understanding of the plan. However, it is clear that the Plaintiff sought to bring in matters of misrepresentation and mistake through the evidence given by its beneficial owner. It sought to do this in order to strengthen the case for Mr. Callaghan's understanding of the interpretation of the clause. However, it should have been apparent, in my view, that if that understanding was wrong, the alternatives would be necessary and the Defendant's pleadings and the bringing by the Defendant of the action commenced in February 1982 for a declaration that the clause was too vague and therefore unenforceable, should have put the Plaintiff on notice that the Court might well come to a different interpretation of the clause to that of the Plaintiff. Advocate Sinel also alleged that the Plaintiff could not have known that it was necessary for it to amend its pleading at the trial because the trial appeared to be going in its direction and that it had no opportunity to seek to amend on Appeal. However, it appears to me that the onus must always be on a Plaintiff to plead in the alternative all its possible lines of argument so that if any line of argument fails it may have the prospect of success on other lines of argument. To find otherwise would be an open invitation to Plaintiffs to litigate one possibility at a time and then to bring further actions one at a time in relation to the alternatives. I also find it quite extraordinary that after ten years had elapsed from the passing of the contract, the Plaintiff should seek to re-write the wording of the restrictive covenant. In my view this is a classic case of a Plaintiff seeking to have two bites at the same cherry. The present action is in my view, an attempt to undermine the previous Judgment of the Court of Appeal through a collateral attack. The maxims, "interest republicae

ut sit finis litium" (it is in the public interest that there should be an end of litigation) and "nemo debet bis vexari pro una et eadam causa" (no man should be proceeded against twice for the same cause) appear to me to apply in this case and indeed are the basis for the principles both of striking out for an abuse of process of the Court and of Estoppel which I have outlined above.

However, there remains one further question which needs to be asked. That question is "are there any special circumstances in this case which would allow me to over-ride the application of the normal rule as set out in Henderson -v- Henderson?"

Such special circumstances are mentioned in the Yat Tung case on page 590 in section E.

Although I have carefully considered Advocate Sinel's submissions I am unable to find any exceptional circumstances in this case which would allow me to depart from the normal rule. Although the matters now pleaded are not res judicata in the strict sense they fall within the wider concept set out in Henderson -v- Henderson, the Yat Tung case and Greenhalgh -v- Mallard.

This matter has troubled the Courts in one way or another for the past eleven years and it is, in my view, high time that the issues between the Plaintiff and the First Defendant were laid to rest.

Accordingly, I find that the part of the action brought against the First Defendant is an abuse of process of the Court and I have struck

out under Rule 6/13(d) all the allegations in the Order of Justice against the First Defendant and dismissed the action as against the First Defendant. I also order that the Plaintiff pay the taxed costs of the First Defendant of and incidental to the action including taxed costs in relation to the present summons.

## AUTHORITIES

Royal Court Rules, 1982: 6/13.

RSC ('91 Ed'n): 018/19/17,18

4 Halsbury 37,p.322; para 434
16,p.1026; para1526

Henderson-v-Henderson (1843) 3 Hare 100

Cooper-v-Resch (1987/88) JLR 428

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

Greenhalgh-v-Mallard (1947) 2 AllER 255,257

Gleeson-v-Wippell and Company, Ltd. (1977) 1 WLR 510

Hoystead-v-Commissioner of Taxation (1926) AC 155

Brunston-v-Humphrey (1884) Q.B.D. 141

Payana Rameena Saminathan-v-Pana Lana Palaniappa (1914) AC 618

Farley-v-Takilla, Ltd. (11th May, 1989) Jersey Unreported C of A.

Channel Islands & Int'l Law Trust & Ors-v-Pike & Ors (20th July, 1989) Jersey Unreported.

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

Dallal-v-Bank Mellat (1986) 1 AllER 239