IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMNMON LAW

SUIT NO. C.L. B 128 OF 1998

BETWEEN	SYLVESTER OWEN BRUCE	PLAINTIFFS
A N D	De ANN TRESA BRUCE	
A N D	CLARENDON LIME COMPANY LTD	DEFENDANT
A N D	GENERAL COMPRESSORS SERVICES LTD	THIRD PARTY

SUIT NO. C.L. A. 62 OF 1998

BETWEEN	LUCINDA ALLISON	
	MICHAEL WHITE	PLAINTIFF
A N D	CLARENDON LIME COMPANY LTD.	DEFENDANT
A N D	GENERAL COMPRESSOR SERVICES LTD.	THIRD PARTY

SUIT NO. C.L. R. 016 OF 1998

BETWEEN	LEROY KING	PLAINTIFFS
	BEATRICE WHITE	
A N D	CLARENDON LIME COMPANY LTD.	DEFENDANT
A N D	GENERAL COMPRESSOR SERVICES LTD.	THIRD PARTY

IN CHAMBERS

HEARD: JUNE 27, JULY 12, JULY 19, 2002

Michael Thomas for Applicant.

Ransford Braham for Third Party, instructed by Livingston, Alexander and Levy

Mrs. Risden-Foster for Third Party, instructed by Livingston, Alexander and Levy.

DAYE, J (Ag.)

On the 14th June, 1999 third party proceedings were issued on General Compressor Service Ltd., a licensed blaster, by Clarendon Lime Company Ltd, the defendant in this action, who was engaged in mining operation at a site known as Teak Pen Quarry, Denbigh District in the parish of Clarendon.

On the 7th May 2002 the defendants issued a Summons dated the 3rd May for an Order that the defence of the third party be struck out on the grounds that it did not disclose a reasonable defence as required by section 238 of the Judicata (Civil Procedure) Law. I heard this summons and dismissed it with cost to the third party and granted leave to appeal. As a result I now give my written reasons for the decision above.

The circumstances which gave rise to the application of the defendant to strike out the third party defence are narrated below. On the 7th October, 1999 Courtney Orr J. (deceased) in Chambers made certain orders and gave some directions to the defendants and the third party. He directed firstly that the defendant file and serve Statement of Claim upon the Third Party within twenty-one days of his order. Secondly, he directed that the third party file and serve

their defence on the defendant within 21 days of the service of the Statement of Claim. Eventually in compliance with the direction of the court, the defendant on the 7th August, 2001 filed and served its statement on the third party. Further they contend that no damage was done to the plaintiff's property at all. On the 14th October, 1998 this defence was struck out by the court on the ground that it did not disclose a reasonable defense pursuant to sec 238 of the Judicature (Civil Procedure Code) Law. It is this same ground that the defendant now uses to attempt to strike out the third party's defence. In addition to striking out the defendant's defence on the same day the court entered an interlocutory judgment for the plaintiff with damages to be assessed. On the 13th July, 2001 at the end of a trial of assessment of damages between the plaintiff and the defendant damages were awarded against the defendant in the sum of $818,372.02 with interest.

Only after interlocutory judgment was entered against the defendant was a third party notice to General Compressor Services Ltd., issued. The attorneys for the third party, contend that they were not a party to the trial or assessment of damages and they were not served notice of these proceedings and hence would not be bound by a judgment to which they were not a party, and were not given an opportunity to defend.

In any event the third party in its defence:

i). denies it carried out blasting on the days named in the plaintiff's Statement of Claim.

ii). claims that this blasting operation was not sufficiently proximate to cause damage to plaintiff.

iii). claims that its operation did not caused the damages to the plaintiff's property and

iv). claims that the plaintiff caused the damage to their own property.

In other words they are saying their defence is different from that advanced by the defendant to the plaintiff's claim and which was struck out. Counsel Mr. Ransford Braham submitted that on the plaintiff's claim in nuisance was an issue between plaintiff and defendant while the issue of negligence is joined between themselves and the defendant. In contrast the defendant is saying if the third party's defence is the same as their defence which was struck out then issue of liability was adjudicated upon and the third party can not relitigate this issue.

Although the defendant did not expressly refer to the plea of **res judicata** estoppel their arguments impliedly raise this plea.

The principle of **res judicata** estoppel was outlined and examined by Courtney Orr J (deceased) in **Ilene Kelly, Errol Melford, Executors Estate Evelyn Francis** deceased v. **Percival Gager et al** and **Fonten Downer.** S. C. C.L. E 299 of 1998). He adopted the following dicta:

> "**res judicature** is a special form of estoppel. It gives effect to the policy of the law that the parties should not afterwards be allowed to relitigate the same questions over even though the decisions may be wrong. As between themselves, the parties are bound by the decision and may neither relitigate the same course of action nor he open any issue which is an essential part of the decision. These two types of res judicata are now-a-days distinguished by calling them 'course of action estoppel' and 'issue estoppel respectively'.

(per, Millet J. Crown Estate Commissioner v. Dorset C C [1990] Ch. 291 at 305.)

The learned judge went on to show what a party must establish when a plea of **res judicata** is raised. He adopted the following:

"The constituents of **res judicata estoppel 19.** A party setting up **res judicature** by way of estoppel as bar to his opponents claim or as a foundation of his own, must establish the constituents elements, namely:

I. The decision was judicial in the relevant sense;
II. It was in fact pronounced;
III. The tribunal had judication over the parties and the subject matter;
IV. The decision was –
    a) final, and
    b) on the merits.
V. It determined the same question as that raised in the later litigation and;
V1. The parties to the later litigation were either parties to the earlier litigation or their privies or the earlier decision was **in rem.**"

(Per Moir J.A. R v Duhamel (No 2) 131 D.L.A. (3 d) 352 of 356 Alberta Court of Appeal). Orr J. then examined closer Lord Diplock's definition of issue estoppel in **Thoday v Thoday [1964]** P. 181 at 197 – 8. Where he explained it:

".... That where a course of action has been the subject of a final adjudication, the determination of issues which formed the essential foundation of the adjudication may give rise to issue estoppels if another course of action is brought ".

The arguments of the defendant supporting its claim to strike out the third party's defence does not only raise the pleas of **res judicata** generally but specifically that of issue estoppel.

There is a rule that where a plea of **res judicata** is raised "the record of the act of the court on which it is founded" should be produced (per Lord Parmoor giving the judgment of the Privy Council, **The Annie Johnson** [1921] 126 LT at 614). In this hearing the defendant did not produce any record and appear to be of the view that this is not necessary. Nor did the defendant give some valid reason why no record on which its plea is founded cannot be produced. The defendants simple relied on the pleadings between the parties, which is relevant; but this not equivalent to the production of the record of the court. Therefore the defendant faced a clear limitation in advancing its plea.

In **Administrator General v. Stephens Federal Investor Ltd. et al (1991) 28 J.L.R. 145 at 154 para. A Rowe P.** in the Jamaican Court of Appeal considered the principle of **res judicata** as enunciated in the classical statement in **Henderson** v. **Henderson** [1843] 12 E. R. 313. He pointed out that the Privy Council made a pronouncement on the principle of res judicature in **Endel Thomas** v. **Att Gen. Trinidad and Tobago** P.C. App. 20/89. There **Lord Jauncey of Tullichette** said of the principle:

> "It is in the public's interest that there should be finality to litigation and that no person should be subjected to an action of the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds thereof are the same in the second action as in the final but also where the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or

law directly related to the subject matter which could have been but were not raised in the first action".

Counsel for the third party in their written submission referred to some authorities that applied the principle **res judicata** in third party proceedings.

Instructive was the New Zealand Court of Appeal case of **Craddock's Trans Ltd v Stewart** [970] N. Z. L. R. 429. There North P. examined and distinguished all the English and Australian cases dealing with estoppel and third party proceedings. There he examined the limits of the doctrine of issue estoppel in 'running down cases'. (supra p. 513 para. 45).

North P. in his judgment offered some guidelines where the plea of issue estoppel is raised. He said:

(a) " ... when a Judge is called upon to determine whether a plea of issue estoppel is well made, it is of the utmost importance for him to determine whether an issue in the second action is identical with the issue which has already been decided against case of the parties in the first action" (supra 504 para 40, and p. 515 para 5) **Barwich C.J. in Ramsay v Pigrom** (1968) 42 A.L.J.R. 89 emphasized the importance of the identification of the precise issue decided in the first place in order to ascertain whether it is identical with what is sought to be litigated in the second place.

(b) The fact that issues in two actions are similar, does not raise on estoppel.

(c) Examine the pleadings in the first action and compare them with the pleadings in the present action.

(d) Examine the record of proceedings of the court which heard the first action.

Applying the principles and approaches in the cases discussed I compared the pleadings of the actions between the plaintiffs and the defendant, Clarendon

Lime Company Ltd. with the pleadings of action of the defendant against the third party, General Compressor Services Ltd., I find that:

1). The writ of summons and endorsement, and Statement of Claim of the plaintiffs' alleged nuisance against the defendant.

2). The defendant amended defence raised the issue of causation of nuisance which they denied and attribute to general Compressor Services Ltd. as independent contractor.

3). General Compressor Services Ltd., was not a party to this first action.

4). The pleadings of General Compressor Service Ltd., when they were joined as third party raise the issue of causation in nuisance and negligence as between themselves and the plaintiff.

5). The issue of liability was adjudicated upon. This determination was between the plaintiff and the defendant and not between the plaintiff and the third party or between the third party and the defendant (North P. in **Craddock's** case demonstrated that the presence of a third person in actions between tort feasors many times give rise to different issue of causation).

6). The third party was not a party to the interlocutory and final judgment given against the defendant.

7). The third party was not given any notice of the trial for assessment of damage. This is necessary before the third party can be bound. (The reasoning of Bingham, J A in the **The Attorney General v Gladstone Miller S.C.C.A 95/1997** support this proposition admittedly that this case did not involve a third party but involved an application to strike out the defendant's defence).

8). The issue or issues in the action between the defendant and the third party are not identical to the issue or issues between the plaintiff and defendant.

(a) The third party's defence raised mixed questions of fact and law to be determined.

(b) the parties to the third party proceedings are not the same as the action between the plaintiff and the defendant. Unless the parties are the same or the issue of law and fact are the same the plea of issue estoppel cannot succeed **(per. Wright J.A. Edwards v Arscott and Campbell (1991), 28 J.L.R. 451).**

I now address the original application of the defendant to strike out the third party defence on the ground that it does not disclose a reasonable defence. The authorities establish that "the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed" (**Lord Pearson, Drummon – Jackson v British Medical Associate et al [1970] 1 ALL E.R. 1094 at 11O1 para c. Lord Pearson** who also stated: "that the power [to strike out] should only be used in plain and obvious cases". (supra). He also explained that the expression 'reasonable cause of action' means a cause of action with some chance of success when only the allegations in the pleading are considered. In **Dyson v. Attorney General [1911] 1 K B 410 at 419 para 1).** This is how **Fletcher Moulton C.J.** treated the summary process to strike out a claim:

> ".... our judicial system would never permit a plaintiff [third party] to be "driven from the judgment seat" in this way without any court having considered his rights to be heard, excepting in cases where the cause of action was obviously

and almost incontestably bad".

Based on my findings upon examination of the pleadings between the defendant and the third party it cannot be said that either it is plain and obvious that General Compressor Services Ltd., defence cannot succeed, nor its defence does not have a chance of success nor its defence is incontestable bad. The third party defence raised mixed questions of fact and law to be determined by the court. Therefore, as a result of these considerations I dismissed the defendants' summons to strike out the third party's defence.