(16)

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 6 of 1983

BETWEEN:

STRICKLAND JARVIS - Plaintiff/Appellant

and

CARIB ENTERPRISES LIMITED - Defendant/Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Williams (Acting)

Appearances: Mr. Gerald A. Watt for the Appellant
Mr. Frederick E. Kelsick for the Respondent

1985: March 8,
May 27.

JUDGMENT

BISHOP J.A.

In June 1979, some three years after he was dismissed by his employer, Strickland Jarvis filed in the High Court a claim for damages for wrongful dismissal against Carib Enterprises Limited.

Before that claim was filed, steps had been taken on his behalf in the Industrial Court. Reference No. 8 of 1977 between the parties Strickland Jarvis, as employee, and Blue Waters Hotel, as employer, was filed on 26th April 1977 seeking that Court's determination on whether or not the former had been unfairly dismissed by the latter.

In the case before the High Court the defendant company pleaded, inter alia, that the said Reference had been adjudicated upon on the 31st August 1977 by the Industrial Court and that the judgment was the subject of a Notice of Appeal by the employee, dated 5th September 1977, filed with the Registrar of the Industrial Court.

/At the....

At the hearing before Byron J., learned counsel for the company submitted in limine that (a) the judgment of the Industrial Court was a final determination under section 11 of the Industrial Court Act 1976 whereby the claim had been dismissed (b) since there was a pending appeal from that decision the issued raised for consideration and determination of the trial Judge in the High Court were subjudice, thereby preventing him from dealing with them at that stage. Learned counsel for Strickland Jarvis submitted in reply that there was nothing in the Industrial Court Act 1976 that, in the circumstances of the instant case, barred the plaintiff from seeking redress as was being done in the High Court.

It should be manifest, in my view, that the same parties ought not to be allowed to raise the same issues before different courts of similar or concurrent jurisdiction, simultaneously, thus seeking decisions which may or may not be the same. Where more than one remedy is available in more than one court, there must be an election of remedy or court. There could be no end of confusion if not injustice, were it otherwise.

Before the trial Judge it was also submitted, in reply to the point taken in limine, that the dismissal by the Industrial Court was for want of prosecution and not a determination of the merits of the matter.

The learned trial Judge dismissed the action after hearing the arguments in favour of and against the point urged in limine and it is against his decision that Strictland Jarvis has come to this Court for relief (i) that the judgment appealed against be set aside; (ii) that the plaintiff/appellant be permitted to proceed with the action filed in 1979 in the Court below and (iii) costs.

Four grounds of appeal were set out in the Notice of Appeal but learned counsel for the appellant did not wish to be heard on one of

/those....

those grounds. The following grounds were taken together and presented first:-

> "1. The learned trial Judge misdirected himself and erred in law and/or fact in holding that the Notice of Appeal aforesaid if filed in the Registry of the Industrial Court could be a valid and legal one and that failure to file the said appeal in the High Court Registry was a mere technical defect.
>
> 2. The learned Judge misdirected himself and erred in law and/or fact when he held that there existed something purporting to to be a pending appeal and that it was not open to the High Court to determine its validity or status."

In dealing with those grounds of appeal learned counsel submitted that when the judgment was read as a whole, it seemed that the learned trial Judge initially had a doubt about the validity of "the appeal" from the Industrial Court but at the end of the day he came to the conclusion that there was a valid appeal from that Court to the Court of Appeal; and in the view of counsel the trial Judge was duty bound to decide whether it was or was not a valid and proper appeal. Then, as I understood learned counsel, he submitted that the "appeal" filed by or on behalf of Strickland Jarvis, for whom he appeared, was bad and the learned trial Judge ought to have so found; then as a consequence of such finding Strickland Jarvis ought not to have been barred from pursuing his action inthe High Court.

Now the learned trial Judge had before him, among other things, a document in Reference No. 8 of 1977 and headed with the names of the employee and of the employer and the description "NOTICE OF APPEAL". This document was addressed to (i) The Registrar of the Industrial Court (ii) the Assistant Registrar of the Court of Appeal and (iii) the Blue Waters Hotel; and it advised onthe face of it that Strickland Jarvis was dissatisfied with the ruling and order of the Industrial Court contained in the Judgment of the Court delivered on the 31st

/August,.....

August, 1977 and that being dissatisfied he "doth hereby give notice of appeal" It is undisputed that section 17 of the Industrial Court Act 1976 gives a right of appeal in certain circumstances.

Because of the grounds of appeal already quoted and of the submission of learned counsel for the appellant it is necessary I think to quote the following passage of the judgment of the learned trial Judge:-

> "Section 17 of the Act gives a party dissatisfied with a judgment of the Industrial Court of Antigua the right to appeal to the Court of Appeal. The fact that the appeal in reference No. 8 of 1977 between the plaintiff and the defendant has been pending for so long and other matters appearing on the face of it raise the question as to whether procedurally it can be heard at this time. The Court of Appeal however has ample powers to ensure that mere technical defects do not defeat the ends of justice. But it is the Court of Appeal itself which would exercise its discretion on an application properly made to it. The fact is that there is something purporting to be a pending appeal and it is not open to this Court to determine its validity or the liklihood of its being heard or being successful. The parties, this Court and the Industrial Court of Antigua would be bound by any ruling made by the Court of Appeal but a ruling made by me on the validity or status of that appeal in these proceedings would not bind the Court of Appeal nor the parties."

That is the passage from the decision of the learned trial Judge which is pertinent to the grounds of appeal mentioned already. It includes those parts relied on by learned counsel for the parties in their consideration of these grounds.

My analysis of that part of the judgment, read by itself and read with the rest of the judgment, leads me to the view that the trial Judge did not hold "that the Notice of Appeal.....if filed in the Registry of the Industrial Court could be a valid and legal one and that failure to file it in the High Court was a mere technical defect"; but in any

/event .....

event, if it is accurate to say that the trial Judge did so state, then, in my view the use of the words "if" and "could be", in the context in which they appeared, showed no more than a supposition for his reasoning. It was not a finding that the Notice of Appeal was valid nor a finding that failure to file it in the High Court was a mere technical defect. As I perceive it, the learned trial Judge did not take unto himself the power to determine the validity or otherwise of the "NOTICE OF APPEAL" addressed on the 5th September 1977. He expressed the opinion that there were facts upon which that issue may properly arise for a decision, and that it was within the power of and for the Court of Appeal to say whether or not there was a technical defect that ought not to be allowed to defeat the ends of justice and also how it would exercise its judicial discretion after an application was properly presented to it.

I am satisfied that the learned trial Judge was correct when he declined to decide whether there was or was not a valid appeal. I do not share counsel's view that the learned trial Judge decided that there was a valid appeal from the decision of the Industrial Court; indeed he made it clear that it was NOT open to the High Court to determine its validity or the likelihood of its being heard or of it being successful if heard. There was no misdirection or error in law or in fact as stated in the above grounds of appeal.

The remaining ground of appeal was stated thus:-

> "The learned Judge misdirected himself and erred in law and/or fact when he incorrectly applied the doctrine of Estoppel by record and when he held that the Judgment of the Industrial Court in Reference No. 8 of 1977 was a final determination of the rights of the parties to that reference notwithstanding that there was no hearing or judgment on the merits of the case".

Learned counsel for the appellant asked this Court to hold that the Industrial Court did not go into the issue or merits of the case brought by the appellant against Blue Waters Hotel and that not having done so

/the judgment...

the judgment amounted to no more than a dismissal for want of prosecution. In support of that counsel relied on one of the same passages quoted by the learned trial Judge from the 3rd edition of Halsbury's Laws of England, Volume 15. At paragraph 336 thereof the principle of Estoppel of Record is explained as follows: "Estoppel of record .....arises (1) 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". Counsel cited the cases POPLE v EVANS (1968) 2 All E.R. 743 and KOK HOONG v LEONG CHEONG KWENG MINES LTD. (1964) 1 All E.R. 300. The former case, as I understand it, dealt with an action against a defendant by an agent for an undisclosed principal, which was dismissed and then the principal brought a fresh action against the defendant. It was held that the dismissal of the former action was no defence to the latter action. The case dealt with parties and quasi-privity, and interlocutory judgments. The KOK HOONG case dealt with the common law principle of election, estoppel against statue and the raising of issues which were available in a former action.

Learned counsel for the respondent referred to another passage from Halsbury's Laws of England which was quoted in the judgment of the learned trial Judge. It was paragraph 349 from Volume 15 and it stated: "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 default or as the result of admissions, provided the party against whom it is set up was under no disability; but the efficacy of a judgment so obtained is somewhat strictly limited".

The learned trial Judge referred to the conclusion of the judgment delivered by the Industrial Court but before I turn to that I regard it as appropriate to draw attention to what, according to the same judgment (which was exhibited), transpired at the Industrial Court. Now the

/employee....

employee took advantage of the provisions of section 9(2) of the Industrial Court Act 1976 by which he was entitled to be assisted by a duly authorised representative in the presentation of his case. The record shows clearly that he was assisted by a labour consultant. As the person contending that his dismissal was unfair, Strickland Jarvis was called on to provide the Industrial Court with a memorandum disclosing the claim against the Blue Waters Hotel. There was an exchange of correspondence between the Registrar of the Industrial Court and the duly authorised representative of the claimant in which, among other things, the representative was informed that the time for filing a memorandum expired on May 6th 1977. Nothing was done to comply with the request to file a memorandum and then on 18th July a letter was written to the authorised representative pointing out his omission and asking whether or not it was intended to file a memorandum. He was further advised that if he intended to do so then he should apply for an extension of time within which to file it, and his application should be submitted to the President of the Court not later than 22nd July. Further, the authorised representative was informed that if no such application for extension of time was made it would be assumed that there was no intention to file a memorandum on the employee's behalf and the matter would be put before the Court for determination. There was no application made and the matter was fixed for hearing by the Court on the 10th August 1977. On that date the authorised representative appeared and made certain submissions about the filing of the memorandum and in particular that there was no duty on the employee to do so. In overruling the submissions it was pointed out among other things that it was within the discretion of the President of the Court to say which side in a dispute ought to file a memorandum and that since the employee was complaining of unfair dismissal and the issue was about his dismissal it seemed right and proper that the employee should state his case first and the employers be asked to reply to it. No prejudice could result from the request that the employee file a memorandum. It was also indicated in the decision of the Industrial Court that the Court is

/required.....

required to act expeditiously in determination of matters before it and in view of the opportunities which had been given to the employee to file a memorandum, the irrestible inference was that he did not wish or did not intend to have the question of his alleged unfair dismissal determined by the Court.

On the basis of those facts and opinions, which were undenied, it was clear that the employee was under no disability and that he made a firm decision not to submit a memorandum, for reasons which he advanced before the Industrial Court when it called up the matter for hearing on the 10th August 1977. He had the assistance of a duly authorised representative and he elected not to comply with the request of the President that he present his complaint in written form. With respect I am unable to agree with the view that there was a decision to dismiss for want of prosecution.

The part of the decision of the Industrial Court which was quoted by the learned trial Judge was this:-

> "Under section 11 of the Industrial Court Act it is provided that in addition to the powers conferred on the Court under previous sections the Court may "(d) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the trade dispute or any other matter before it". Dispite the fact that the merits of this reference have not been investigated which is due solely to the employee's persistent refusal to file his memorandum, the language of section 11 just quoted authorises this Court to declare that there has been a final determination of the trade dispute between the parties and the employee is therefore not at liberty to raise the issue of unfair dismissal again. The employee's complaint of unfair dismissal is accordingly dismissed."

Clearly from the document "NOTICE OF APPEAL" dated 5th September 1977, Strickland Jarvis was dissatisfied with the decision of the Industrial Court and clearly too he took steps, through his authorised representative, to exercise the statutory right of appeal afforded him. The eventual outcome of this action seemed as yet, unknown, though it is

/certain....

certain that the matter has not come before the Court of Appeal.

It was agreed that the parties before the Industrial Court in 1977 were the same parties in the action filed in the High Court in 1979. It was also agreed that the issues before each court were the same and learned counsel for the appellant, as I understood him, conceded that there was concurrent jurisdiction on the said issues.

It would seem that the Industrial Court decided that owing to the default by the employee who elected not to present the memorandum and because of statutory powers given to it, it was making a final decision. I have quoted a paragraph from Halsbury's Laws of England which showed that a judgment may be final though obtained by default.

In my view Byron J. acted correctly when he took notice of the decision of the Industrial Court and of the steps taken by the employee to challenge that decision and did not seek to usurp the role of the Court of Appeal. He also decided correctly when he decided not to entertain the same issues between the parties as had gone before the Industrial Court.

As the matter now stands if there is no appeal or no proper appeal before the Court of Appeal (as learned counsel for the employee has felt and felt strongly) then the decision of the Industrial Court must stand as an unchallenged decision wherein judgment was entered for the employee because of the employee's default. I make no finding on the validity of the "appeal" from the Industrial Court's decision.

For reasons which I trust I have made clear I would dismiss this appeal and award the respondent company its costs in the Court below.

E.H.A. BISHOP,
Justice of Appeal

I agree.

L.L. ROBOTHAM,
Chief Justice.

I also agree.

L. WILLIAMS,
Justice of Appeal (Acting).