ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV1997/0228

BETWEEN:

STATE INSURANCE CORPORATION

Claimant

and

HADEED MOTORS LIMITED

Defendant

Appearances:

Dane Hamilton for the Claimant
Joyce Kentish for the Defendant

2002: July 12, 26

DECISION

[1] **MITCHELL, J**: This is an insurance contract case. It is a claim by an insurer for a declaration that it is entitled to repudiate on the ground of fraud a claim for payment in respect of damage to vehicles and a building and its contents alleged to have been caused by the passage over Antigua and Barbuda of Hurricane Luis on 4 September 1995. This decision relates to a preliminary issue earlier ordered to be dealt with prior to the commencement of the taking of evidence in the case and argued in Chambers.

[2] The writ in this suit was issued out of the High Court on 11 July 1997, and the Statement of Claim was filed on 22 December of the same year. The Statement of Claim seeks a declaration that the appointment by the Defendant of the arbitrator under the policies in question is invalid, null and void, and a declaration that the award made by the arbitrator is also invalid, null and void, and a declaration that

the Claimant is entitled to repudiate the claims of the Defendant made in respect of the loss and damage. Paragraph 6 of the Statement of Claim is the impugned paragraph. It might be as well to set it out. It reads

> 6.1 The [Claimant] will contend that notwithstanding the wording of condition 17 of the policy which reads as follows:
>
> > If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment the other party shall be at liberty to appoint a sole arbitrator . . .
>
> that the appointment of Robert Merkin as Arbitrator was not in accordance with section 11 of the **Arbitration Act, Cap 33** of the Revised Laws of Antigua and Barbuda and it was consequently improper, illegal, null and void.
>
> 6.2 Alternatively, that at the material time no difference arose as to the amount of any loss or damage given the matters set out in paragraph 4.2 and 4.3 hereof.
>
> 6.3 In the further alternative, the said claims made by the Defendant were barred by the Limitation period contained in section 18 of the policy.

6.4 Alternatively, that the said Arbitrator had no jurisdiction to enter into the reference and to make the award set out in paragraph 5.4 hereof.

[3] By the Defence and Counterclaim filed on 19 February 1998, the Defendant claimed, *inter alia*, that once the arbitrator had found in his interim award of 22 May 1997 that he had jurisdiction to arbitrate the amount of loss and damage suffered by the Defendant notwithstanding the plea of fraud raised by the Claimant, and the Claimant had failed to apply to set aside the interim award in accordance with the provisions of the **Arbitration Act** and **Order 59** of the Rules of the Supreme Court, an estoppel was created against the Claimant raising the matters pleaded.

[4] Meanwhile, in a related matter between the same parties, Suit 14 of 1998, on 31 July 1998 Moe J granted the Defendant in this suit leave to enforce the Final Award on Substantial Issues and the Final Supplementary Award on Costs both made on 11 July 1997 by the Sole Arbitrator Professor Robert Merkin. The relevant part of his decision is set out below. He also granted a stay of execution until the determination of Suit 228 of 1997, and he granted both parties leave to appeal the order. This decision of 31 July 1998 was not appealed.

[5] On 17 September 1998, the Claimant filed its Reply and Defence to Counterclaim. The reply*, inter alia*, was that the Claimant had at all times reserved the issue of the Arbitrator's jurisdiction, and that the Claimant was not estopped from raising the issue again. On 27 October 1998, the order on the Summons for Directions was made by Moe J and a copy was filed and entered on 24 November 1998. On 23 May 2000, the Request for Hearing was filed, and the matter has been ready for hearing ever since.

[6] On 1 June 2001, the Defendant by summons applied for an order that

(1) The issue of law raised by paragraph 18 of the Defence [that once the Arbitrator had found in his interim award dated 22 May 1997 that he had jurisdiction to arbitrate on the amount of loss and damage suffered by the Defendant and the Claimant had failed to apply to set aside the interim award in accordance with section 24(3) of the **Arbitration Act** and **Order 59 r.4** of the Rules of the Supreme Court, an estoppel was created against the Claimant raising the matters pleaded by paragraph 6 of the Statement of Claim] be tried as a preliminary issue;

(2) The whole of paragraph 6 of the Statement of Claim in this suit be struck out as an abuse of the process of the Court;

(3) Alternatively, the whole of the Statement of Claim be struck out as an abuse of the process of the Court;

(4) The Claimant pay the costs of the Defendant.

[7] This application was supported by an affidavit of Juliette L Dunnah, a clerk in the employ of the Solicitors for the Defendant, filed on 1 June 2001. This affidavit, which has not been contested, sets out the history of the various proceedings between the parties as follows:

(a) The Claimant issued two policies of insurance to the Defendant last renewed on 24 September 1994 and numbered F88/11/5193 and F88/11/5194. Condition 17 was an agreement to refer any difference arising as to the amount of any loss or damage to arbitration.

(b) A difference or dispute having arisen between the parties in January 1996 as to the amount of any loss suffered by the Defendant as a result of the passage of Hurricane Luis over

Antigua on 5 September 1995, the Defendant invoked the arbitration proceedings contained in condition 17 above.

(c) By letter from the Claimant's adjusters to the Defendant dated 20 August 1996, the Defendant was informed that the Claimant had elected to repudiate policy liability on all claims made by the Defendant for unspecified breaches of condition 13 of the policies of insurance.

(d) The Defendant in pursuance of the already invoked arbitration process appointed a Professor Robert Merkin as its arbitrator on 31 January 1997, the Claimant having failed to concur in the appointment of an arbitrator. Professor Merkin subsequently by reason of the failure of the Claimant to appoint its own arbitrator became the Sole Arbitrator on 26 March 1997 pursuant to condition 17 of the policies of insurance.

(e) The arbitration proceedings scheduled for 18 April 1997 proceeded ex parte by reason of the non-attendance of the Claimant or its counsel. The Claimant's counsel hand-delivered a letter dated 15 April 1997 stating that the Claimant had rejected the claim of the Defendant in its entirety for fraud and believed there was no difference between the parties as to the amount of loss or damage. In the circumstances, the jurisdiction of the Sole Arbitrator was denied by the Claimant.

(f) On 21 April 1997, the Sole Arbitrator communicated to the solicitors for the parties that as a result of the Claimant's objections to his jurisdiction, the arbitration would be conducted in two stages, namely:

(i) a written preliminary stage (oral if requested by either party) based on written submissions by both parties in which the jurisdiction of the Sole Arbitrator would be determined by an Interim Award; and

(ii) assuming a finding of jurisdiction, a subsequent oral hearing on the substantive issues.

(g) Both the Claimant and the Defendant submitted written legal argument on the jurisdiction of the Sole Arbitrator on the understanding that the Claimant's participating in the preliminary stage was not submitting to the jurisdiction of the Sole Arbitrator.

(h) On 22 May 1997, the Sole Arbitrator's written Interim Award on the jurisdiction issue finding that the Sole Arbitrator had jurisdiction was published to the parties.

(i) On 7 July 1997, the Sole Arbitrator commenced oral hearings on the substantive issues. The Claimant did not appear nor was it represented.

(j) The Sole Arbitrator having completed the arbitration, on 11 July 1997 made his verbal award on the substantive issues and costs, but was prevented from publishing his written awards due to the service on him of an injunction obtained ex parte by the Claimant in these proceedings. This injunction was discharged on 9 December 1997 on the application of the Defendant.

(k) On 15 December 1997, the Sole Arbitrator published his written Final Award dated 11 December 1997 to both parties. A

separate supplementary document also dated 11 December 1997 and setting out the Sole Arbitrator's interpretation of the evidence put to him was published.

(l) It is a term of the Final Award that the Claimant pay to the Defendant the sums awarded within 28 days commencing at midnight on 10 December 1997.

(m) The Defendant being desirous of enforcing the Awards instituted proceedings in Misc Civil Suit 14 of 1998 applying to the court for leave to enforce the Final Award in the same manner as a judgment of the court.

(n) By a judgment dated 31 July 1998 Moe J granted the Defendant leave to enforce the Final Award, subject to a stay of execution pending the final determination of Suit No 228 of 1997.

[8] Pursuant to directions of this court given on 27 March 2002, both counsel filed written submissions supported by copies of the authorities on which they rely. I have found these written submissions very useful in assisting me to come to a determination as to the preliminary issue. The submissions of Counsel for the Defendant can be summarised as follows:

(1) The jurisdiction of the Arbitrator has already been litigated, and the Claimant is barred by the principles of *res judicata* and *issue estoppel* from re-litigating this issue. Counsel for the Defendant relies on the authority of **Halstead v A-G of Antigua and Barbuda (1995) 50 WIR 98** where Sir Vincent Floissac CJ said (at page 107):

> There can be no doubt that the High Court has an inherent power to strike out any pleading which is an abuse of the process or procedure of the court. That power . . . is exercisable whenever the circumstances of the pleadings are such that the entertainment of the pleading would result in manifest injustice. These circumstances . . . include . . . the circumstances which make it appropriate to apply the principles of res judicata and . . . other related principles.

He described (at page 107) the principle of *res judicata* as being appropriate when:

> A right or cause of action or an issue had arisen or could or should have been raised in previous civil proceedings and that right or cause of action or issue was expressly or impliedly determined on its merits by a final and conclusive judgment of a court of competent jurisdiction. In that case, the parties to the previous civil proceedings and their privies are *inter se* estopped *per rem judicatam* from re-litigating that same adjudicated right or cause of action or issue in subsequent civil proceedings, unless there are special circumstances entitling one of the parties or privies to re-open that adjudicated right or cause of action or issue in the interests of justice.

(2) Counsel urges that the roots of the principle of *res judicata* were closely examined by McShine CJ in **Morley v R Shannon & Co (Trinidad) Ltd 17 WIR 28** where he said at page 32:

> When judgment has already been recovered in a prior action . . . for the identical demand, the cause of action is merged into a matter of record and it is a good defence that he has already

recovered judgment for the same cause of action. Hence *res judicata* arising from estoppel by matter of record is a rule which prevents a party from denying the facts on which the prior judgment in the came cause was based.

(3) Counsel also relies on the *locus classicus* on the principle of *res judicata*, the judgment of Wigram VC in **Henderson v Henderson (1843) 3 Hare 100**, in particular:

> 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 to 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.

(4) Counsel also relies on the judgment of Lord Keith of Kinkel in **Arnold v National Westminster Bank [1991] 2 AC 93**, where he said (at page 104F):

> The principles upon which cause of action estoppel is based are expressed in the maxims *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litum*. Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action . . .

(5) The court requires that parties to litigation bring their whole case in one action, and they may not engage in piecemeal litigation. The administration of justice would clearly be brought into disrepute by the unnecessary costs and confusion that would arise if a party to litigation,

without special or exceptional reasons, were allowed to re-litigate an issue which had already been determined by a court of competent jurisdiction.

(6) So far as the jurisdiction of the Arbitrator is concerned, the Arbitrator himself had found that he had jurisdiction to proceed. Further, the Claimant had challenged the jurisdiction of the Arbitrator in Misc Suit 14 of 1998, though the opportunity was not taken to apply to set aside the award of the Arbitrator at a time when the issue of the Arbitrator's jurisdiction was very much a live issue engaging the attention of the court. Moe J having found that (1) the Arbitrator could legally determine whether he had jurisdiction to enter into the reference, and (2) that in any event the Arbitrator's jurisdiction was "good and valid," the Claimant is now estopped from re-litigating this issues; the Arbitrator's jurisdiction has been determined in a final judgment of a court of competent jurisdiction.

(7) Alternatively, the Claimant having contended in Misc Suit 14 of 1998 that the Arbitrator's award was invalid and improperly procured, the Claimant was obligated to seek the remedy available under section 24(2) of the **Arbitration Act, Cap 33** at that time.

(8) Further, the Claimant contended in Misc Suit 14 of 1998 that the appointment of the Arbitrator was not in accordance with the **Arbitration Act Cap 33** and this issue has clearly been determined as Moe J found the jurisdiction of the Arbitrator to be "good and valid."

(9) The limitation issue raised at paragraph 6.3 of the Statement of Claim is an issue that goes to the root of the Arbitrator's jurisdiction. Although the "clause 18" limitation point was raised before the Arbitrator, it was never raised by the Claimant in Misc Suit 14 of 1998 before Moe J. This aspect of the issue of the Arbitrator's jurisdiction could have been conveniently raised before Moe J in Misc Suit 14 of 1998. The Claimant is therefore

barred under the principle of *res judicata* in both its narrow and wider applications from re-opening this issue.

(10) There are no "special circumstances" justifying further litigation on the issue of the Arbitrator's jurisdiction insofar as the same rests on (1) the existence of a dispute as to the amount of the loss sustained, (2) the validity of the appointment of the Arbitrator, and (3) the clause 18 limitation point. Counsel relies on the judgment of Lord Keith of Kinkel in **Arnold v National Westminster** [supra] where he concluded:

> In my opinion your Lordships should affirm it to be the law that there may be an exception to *issue estoppel* in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . .

[9] The submissions of counsel for the Claimant in opposing the application can be summarised as follows:

(1) This claim was commenced by way of a generally endorsed writ issued on 11 July 1997. On 22 December 1997 the Statement of Claim was filed. The now impugned paragraph 6 raised several issues:

(a) that the appointment of the Arbitrator was null and void as it was not in accordance with section 11 of the **Arbitration Act, Cap 33**.

(b) No difference arose as to the amount of any loss or damage which could trigger condition 17 of the policy, the arbitration clause.

(c) That the claims made by the Defendant were barred by the limitation period contained in condition 18 of the policy.

(d) That the Arbitrator had no jurisdiction to enter into the reference and to make the award as set out in paragraph 5.4 of the Statement of Claim.

Counsel submitted that of the above, only issues (a) and (b) could be described as purely jurisdictional issues.

(2) On 21 January 1998, the Defendant issued a summons in Misc Suit 14 of 1998 under section 27 of the **Arbitration Act, Cap 33**. Section 27 provides:

> An award on an arbitration agreement may by leave of the High Court or a Judge thereof be enforced in the same manner as a judgment or order of the High Court to the same effect, and where leave is given, judgment may be entered in terms of the award.

Counsel submits that all that the Defendant was seeking to achieve was the enforcement of the award of 11 July 1997. The court was not called upon to decide any pleaded issue between the parties, only to enforce the award in like terms as a judgment of the court.

(3) On 11 February 1998, the Claimant filed and served the affidavit of Rolston Bartheley and requested a suspension of the proceedings in Misc

Suit 14 of 1998 or a consolidation of both suits. On the same day, the Claimant applied by summons to have Suit 228 of 1997 and Misc Suit 14 of 1998 consolidated on the grounds that they both raised common issues of fact and law. This summons was neither considered by the court nor was any order for consolidation made.

(4) On 19 February 1998, the Defendant filed and served a Defence to the Statement of Claim. Paragraphs 13-18 pleaded specifically to paragraph 6 of the Statement of Claim. These paragraphs form an integral part of the Defendant's counterclaim for which damages for breach of good faith are claimed. Those issues will have to be investigated and determined if the Defendant is to succeed on its counterclaim, as these issues impact on the very essence of this claim: breach of the duty to observe utmost good faith.

(5) On 2 March 1998, the Defendant applied on the same grounds as in this present application for paragraphs 5.1 through 6.4 of the Statement of Claim to be struck out. This summons was withdrawn by consent on 27 October 1998 when directions were given by the court.

(6) Concerning the arguments and subsequent judgment of Moe J in Misc Suit 14 of 1998, counsel for the Claimant submits that this was an application to invoke the summary process of enforcement and that the issues as to jurisdiction and other matters were not required to be canvassed extensively on the hearing of this application. There was no litigation of the issues arising in paragraph 6 of the Statement of Claim. Although the Claimant applied for consolidation on the ground that these issues raised substantial matters of fact which required a trial, this application was never addressed by the court. Moe J did find that the jurisdiction of the Arbitrator was good and valid, but that must be taken in context of his finding that the Arbitrator has jurisdiction to determine

whether or not he has jurisdiction. Counsel submits that in the circumstances of this suit as outlined in the pleadings the issue that the Claimant seeks to have adjudicated is whether or not the Arbitrator did have jurisdiction, whether or not he determined that he did have jurisdiction. This is an issue for determination by the court on the available evidence before it and only the court can so decide. One cannot exclude the court from determining whether an assumption of jurisdiction by an inferior tribunal is good or bad.

(7) On the question of *res judicata*, counsel submits that the issues decided by Moe J in Misc Suit 14 of 1998 while tangentially related to issues in the Statement of Claim in Suit 228 of 1997 were not identical as they were not issues for determination by Moe J. Nor did Moe J decide whether the Defendant's claims were time-barred by a provision of the contract, an issue raised in paragraph 6 of the Statement of Claim. These are live issues for determination on the pleadings of both parties to Suit 228 of 1997. Counsel relies on **Morley v RJ Shannon & Co (Trinidad) [1970] 17 WIR 29**.

(8) Counsel submits that no question of *res judicata* or *issue estoppel* arises on the facts of this matter as:

(a) the causes of action were distinct, one was for summary enforcement of an award in the same manner as a judgment or order, the other was for trial on issues of contract, legality and fraud;

(b) although the Arbitrator did conclude that he had jurisdiction, the point in issue in Suit 228 of 1997 is whether in all the pleaded circumstances he did in fact have jurisdiction, and this is a

matter for the determination of the court having heard all the evidence;

(c) whether the Arbitrator did in fact have jurisdiction has never been decided, notwithstanding dicta of Moe J taken out of context;

(d) the issue of the Arbitrator's jurisdiction was not put forward for the determination of the court nor could the court determine an issue which was not before it.

[10] The whole issue before me in this application hinges on the decision of Moe J of 31 July 1998 in Misc Suit 14 of 1998. It will be as well to look at that decision. The first thing that one notices on the face of the decision is that Moe J titles it in both suits, No 228 of 1997 and No 14 of 1998. Counsel for the Claimant has submitted that Moe J did not expressly rule on the application of the Claimant to consolidate the two suits, and that would appear to be correct, but it would also appear that Moe J might have been under the impression that the two suits had been so consolidated. In any event, this is what Moe J said on the extensive submissions of counsel for the Claimant on the lack of jurisdiction of the Arbitrator and fraud on the part of the Defendant in giving his decision:

> [The Claimant] submits that the Arbitrator cannot legally determine whether or not he has jurisdiction and cites in support thereof the cases **Dalmia Dairy Industries Ltd v National Bank of Pakistan** and **Christopher Brown Ltd v Genossenshcaft (1953) 2 All ER 1019**. As I understand it this is not really the position in the **Christopher Brown** case but quite the opposite. Rather the report is saying, if I understand it correctly, that the arbitrator is entitled to consider the question whether or not he has jurisdiction to act in order to satisfy himself that it is worthwhile to proceed . . .

> Before leave to enforce the Arbitrator's award can be given it has first to be decided whether the Arbitrator did have jurisdiction. I have already found from examination of the submissions that the arbitrator can legally determine whether or not he has jurisdiction to proceed to hear the matter. In this case I did find the jurisdiction of the arbitrator to be good and valid. Having so found I would therefore give leave to [the Defendant] to enforce the final awards of the Arbitrator but at the same time I would order a stay of execution pending the final determination of suit No 228 of 1997. I so order. Leave to appeal is granted to both parties. Costs to be in the cause.

Note that Moe J does not say, as he might well have done, that this was a summary application by Hadeed Motors in the usual way for the leave of the court to enforce the arbitration award as a judgment; that the insurance company had raised a number of interesting issues of fraud and lack of jurisdiction before him; but that he declined to rule on them; that those were issues properly left to the court to determine in Suit 228 of 1998, first, because the Arbitrator has left them in his interim award for the court to try, and secondly, because they are properly pleaded and are yet to be proved before the court in Suit 228 of 1998; that he ordered the award to be enforced as a judgment of the High Court and that he granted a stay of execution pending the final determination of the issues raised in Suit No 228 of 1997. If he had done that, then no question of *res judicata* would have arisen. It was the Claimant who had asked him in dealing with Suit 14 of 1998 to consider the question of lack of jurisdiction pleaded in Suit 228 of 1997, and he seems to have obliged. He proceeded to rule on the substantial submissions produced to him by both parties on the jurisdiction point.

[11] I do not accept the branch of the argument of the Defendant to the effect that the decision of the Arbitrator that he had jurisdiction created an estoppel against the Claimant raising in this suit the issue of his jurisdiction. The decision of the

Arbitrator was expressly subject to the right of the Claimant to raise the issue before the High Court. The Arbitrator issued a certificate to that effect. In those circumstances, no question of *res judicata* or *issue estoppel* could logically or legally arise from the decision of the Arbitrator.

[12] The position is different as regards the decision of Moe J. As indicated above, the Claimant filed extensive submissions and argued the issue of the absence of the jurisdiction of the Arbitrator in Misc Suit 14 of 1998 in resisting the application by the Defendant in this case for enforcement of the Arbitration award. In response, Moe J has given a decision on the issue of the jurisdiction of the Arbitrator, and his decision has not been appealed. If he had misunderstood the application, or it was alleged that he had made an error in his decision on the point, then those were matters that only the Court of Appeal could have corrected. A judge of this court has no authority to ignore a decision of another judge of the same court on a particular point in dispute between two parties. In the absence of proof of fraud only the Court of Appeal can set aside a finding of a Judge of the High Court. The issue of the validity of the Arbitrator's appointment is, applying the principles in **Morley v R Shannon** [supra] and **Arnold v National Westminster** [supra], *res judicata.*

[13] Paragraph 6.3 of the Statement of Claim deals with the question whether the claims made by the Defendant were barred by the limitation period contained in paragraph 18 of the policies. The Defendant applies for the issue of limitation to be considered similarly *res judicata* on the principle in **Halstead v A-G** [supra]. However, I see no justice in so ruling. My reason for so finding is that this was not an issue that could or should have arisen in Misc Suit 14 of 1998. Misc Suit 14 of 1998 was a summary procedure dealing with the registration of an arbitration award in the High Court. It was proper for the limitation issue, as with the jurisdiction issue if the Claimant had not submitted it to adjudication by Moe, to have been left to be determined by the High Court in these proceedings. The Arbitrator in his First Interim Award did make a finding on this limitation issue

against the Claimant. The Claimant did not participate in the proceedings before the Arbitrator except to present written submissions on the jurisdiction point. The Arbitrator ruled on the limitation issue only because the Defendant produced written submissions on the point. This question remains open for determination at trial.

[14] The result will be that paragraphs 6.1, 6.2, and 6.4 of the Statement of Claim, but not paragraph 6.3, are struck out. I will now hear counsel on what further directions are necessary for the matter to proceed to trial.

I D MITCHELL, QC
High Court Judge