SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

MAGISTERIAL CIVIL APPEAL NO.3 OF 2004

BETWEEN:

ANALDO BAILEY

Appellant

and

ST. KITTS-NEVIS CABLE COMMUNICATIONS LIMITED

Respondent

Before:

The Hon. Mr. Adrian Saunders	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon Mr. Hugh Rawlins	Justice of Appeal [Ag.]

Appearances:

Mr. Joseph Quinlan and with him Dr. Henry L. Browne for the Appellant
Mr. Damien Kelsick for the Respondent

2004: July 28;
November 1.

JUDGMENT

[1] GORDON, J.A.: By a Summons in the Magistrates Court filed on December 13, 2001 the Respondent sought to recover the sum of $4,176.00 from the Appellant for arrears of cable television services. By a later summons filed on July 19, 2002 the Appellant sought certain remedies in the nature of injunctive relief. By consent the two summonses were heard together and the learned Magistrate gave judgment for the Respondent on his summons and dismissed the Appellant's summons. There is no appeal against that latter dismissal.

[2] This appeal concerns only the judgment given by the learned Magistrate in favour of the Respondent for the amount claimed by the Respondent, to wit, the sum of $4,176.00

[3] The Appellant is dissatisfied with that judgment and has appealed to this Court. The single ground of appeal which was argued by the Appellant was that the learned Magistrate erred in law in not dismissing the Respondent's claim on the grounds that the Respondent was estopped per *res judicata* from pursuing its claim.

[4] The issue of *res judicata* arose in this way: some time in 1999 the Appellant filed a Writ of Summons in the High Court claiming against the Respondent a number of declarations, injunctive relief and damages. The Respondent filed a defence in that suit., Paragraph 12 of the defence reads as follows:

> "12. With respect to paragraph 6 of the Statement of Claim, the Defendant admits that the Plaintiff was not in arrears with respect to the primary service to his residence but states that he was indebted to the Defendant in respect of the provision of the service to the apartments as aforesaid and in breach of the agreement."

[5] It was submitted by learned Counsel for the Appellant that by that pleading the Respondent had put the Appellant's indebtedness to the Respondent in issue in the High Court case and that case having been adjudicated the Respondent was barred from re-litigating the issue. As I understood learned Counsel, his submission was that even though the Respondent had not claimed for sums owing to it in the High Court matter, that was of no import; he had the right to counter-claim and he should have done.

[6] I believe that a good starting point is Halsbury's Laws of England[1], from which I quote as follows:

> "975. Essentials of res judicata. In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same but also that the Plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties…….It is not enough that the matter alleged to have been estopped might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed." (my emphasis)

[7] Learned Counsel for the Respondent rested his argument on the simple proposition that the debt claimed by the Respondent and found owing by the learned Magistrate had not been litigated and hence the doctrine did not apply. Indeed, a review of the judgment of Bruce-Lyle J reveals that at no point did he address the issue raised by paragraph 12 of the defence quoted above. Countering that, learned Counsel for the Appellant quoted Order 15 Rule 2 of the Rules of the Supreme Court, 1970, which rules prevailed at the time that the pleadings in the High Court action were filed. Order 15 Rule 2 reads in part as follows:

> "2. Subject to rule 5 (2) a defendant in any action who alleges that has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counter-claim to his defence"

In the light of the above quoted rule, argued Counsel for the Appellant, the Respondent was obligated to raise by way of counter-claim the issue raised by the Summons.

[8] I do not agree. In Thomas v The Attorney-General of Trinidad and Tobago[2], a Privy Council decision, Lord Jauncey, who delivered the opinion of the Board went

[1] 4th Edition (Reissue) para. 975
[2] [1990] J.C.J No 46

at some length into the law surrounding the doctrine and I hope I may be forgiven if I quote extensively from that opinion, at page 3:

> "The principles applicable to a plea of *res judicata* are not in doubt and have been considered in detail in the judgment of the Court of Appeal. It is in the public interest that there should be finality to litigation and that no person should be subjected to action at 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 therefor are the same in the second action as in the first 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. The classic statement on the subject is contained in the following passage from the judgment of Wigram V.C. in Henderson v. Henderson (1843) 3 Hare 100 at page 115:-
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> > "…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."

Lord Jauncey continued:

> "The principles enunciated in that dictum have been restated on numerous occasions of which it is sufficient to mention only three. In Hoystead v. Commissioner of Taxation [1926] A.C. 155 Lord Shaw of Dunfermline, at page 165, in delivering the opinion of the Board said:
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> > "Parties are not permitted to begin fresh litigations because of new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

In Greenhalgh v. Mallard [1947] 2 All E.R. 255 Somervell L.J. at page 257 said:

> "I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that 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 Yat Tung Co. v. Dao Heng Bank [1975] A.C. 581 Lord Kilbrandon, at page 590, in delivering the opinion of the Board referred to the above quoted passage in the judgment of Wigram V.C. and 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."

It is clear from these authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules. It is against this background that the Appellant's submissions must be examined.

[9] What I derive from the authorities is that where a plaintiff brings a suit against a defendant he must place before the Court all that is relevant to that suit. Thus, for example, if a plaintiff brings a suit against a defendant for damages for breach of contract then all the circumstances relevant to that cause of action must be brought forth. If, at the time of the filing of that action, the same plaintiff has a cause of action against the same defendant, but arising, say, in tort in circumstances entirely unrelated to the first claim, then the doctrine of *res judicata* does not require that he join the two actions in one, and he may quite properly bring one after the other as separate actions. If, on the other hand the cause of action in tort arose in circumstances surrounding the breach of contract, then *res judicata* might require that the two causes of action be joined in one suit.

[10] There is a further point, relevant to this case, to be derived from the authorities, and it is this: In each of the cases cited above the issue was whether the plaintiff in the cause of action might bring up further issues related to the cause which had been tried; There is nowhere in the authorities, as I read them, the assertion that once a plaintiff brings a case against a defendant, then that puts an obligation on the defendant to assert by way of counter-claim any cause he, the defendant, may have against the plaintiff. Indeed, Order 15 rule 2 is permissive and no linguistic gymnastics can make its language mandatory.

[11] In the circumstances, I find that the learned Magistrate was correct in her conclusion that absent a counter-claim by the Defendant (the Respondent in this appeal) in the High Court suit the Judge in that case could not have adjudicated on the issue that was before her. In other words the doctrine of *res judicata* did not avail the Appellant as a defence. My order therefore is that the appeal is dismissed with costs to the Respondent in the sum of $750.00.

Michael Gordon, QC
Justice of Appeal

I concur.

Adrian Saunders
Chief Justice [Ag.]

[Sgd.]
I concur.

Hugh Rawlins
Justice of Appeal [Ag.]