GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.22 OF 2004

BETWEEN:

ATTORNEY GENERAL

Appellant

and

DIPCON ENGINEERING SERVICES

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal [Ag.]
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal [Ag.]

Appearances:

Mr. Hugh Wildman for the Appellant
Mrs. Celia Edwards for the Respondent

2005: March 2
June 27

JUDGMENT

[1] RAWLINS, J.A. [AG.]: This is an appeal against a decision that the Master made on 15th July 2004. By that decision, the Master struck out the Statement of Claim of the Appellant, the Government, and entered judgment for the Respondent, Dipcon. The Master also awarded costs to Dipcon. The Master's decision was made on Dipcon's application, in which it urged the court to strike out the Statement of Claim on the ground that it was an abuse of the process of the court.

In that application, Dipcon also prayed, in the alternative, that the court should strike out certain paragraphs and/or the prayer for special damages from the Statement of Claim.

[2] In his decision, the Master held that the issues, which the Government sought to litigate in its Statement of Claim, constituted an abuse of process because they could have been and should have been litigated in earlier proceedings that Dipcon had instituted against the Government in Civil Suit No. 1 of 1996 ("the Dipcon proceedings"). In the Dipcon proceedings, Dipcon claimed damages mainly on the ground that the Government had wrongfully terminated agreements between them. Dipcon entered default judgment in those proceedings. Alleyne J., as he then was, dismissed the Government's application to set aside the default judgment. This court overturned that decision, but the Privy Council restored the decision of the High Court. An application by the Government to file a defence in the Dipcon proceedings was not granted. However, prior to the decision of the Court of Appeal, the Government initiated its own action by way of Writ in Civil Suit No. 368 of 2001 ("the Government's proceedings"). In its action, the Government claimed that Dipcon had committed several breaches of the said agreements.

[3] On 11th June 2001, Dipcon applied to strike out the Government's Writ on the ground that the proceedings constituted an abuse of the process of the court. Sylvester J. (Ag.) dismissed the application and directed Dipcon to file a defence. Dipcon did so. On 8th June 2004, Dipcon brought the application to strike out the Statement of Claim on the grounds that it also constituted an abuse of process. Dipcon brought this latter application after the Master had adjourned an application by the Government for leave to amend its Statement of Claim and directed the Government to serve its application for leave to amend on Dipcon. On the resumed hearing, the Master heard Dipcon's application instead and struck out the Government's Statement of Claim.

The reasons for the Master's decision

[4] In his reasons for decision, the Master stated that the Government should have raised the issues that it sought to litigate in its claim in the Dipcon proceedings, by way of a Defence and Counterclaim. Since the Government did not litigate the issues in those proceedings it had to provide a satisfactory explanation for that failure. The Master found that the Government did not provide a satisfactory explanation. He held that the case Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd. [1975] A.C. 581 (P.C.) is authority that where a claimant advances no compelling reasons to show why issues that could have been litigated in earlier proceedings were not litigated, it would be an abuse of process to permit those issues to be raised in subsequent proceedings. The Master thought that the Government did not litigate the issues in the Dipcon proceedings because of negligence or inadvertence. He further stated that these did not amount to compelling reasons. He stated that in the absence of special circumstances, it would be an abuse of process to permit the Government to litigate the case that it brought at this stage because:

> "There must be an end to litigation. Parties must bring forward their cases at the earliest opportunity."

[5] Learned Counsel for the Government submitted before the Master that issue estoppel does not arise on a default judgment. The Master restated the words of Viscount Radcliffe in Kok Hoong v Leong Cheong Mines [1964] 1 All E.R. 300, at page 305C, as authority that a default judgment is capable of giving rise to an *estoppel per rem judicatam*. He said that the court is required to examine the particular default judgment to determine what it necessarily and with complete precision decided. Looking at this, he found that Dipcon's default judgment was obtained on its claim, which alleged breach of the same contract on which the Government brought its claim. In the Master's view, the continuation of the Government's claim could permit the Government to secure a judgment against Dipcon for damages for the breach of the same contract when Dipcon had already received damages from the government for the breach of that contract. The

Master said that the Court could not permit this. He concluded that it would be an abuse of process for the Government to litigate its claim, when it could and should have litigated it in Dipcon's proceedings.

The grounds of appeal

[6] The grounds of appeal are stated as follows:

> (a) The Learned Master erred in law when he held that Dipcon Engineering Services Ltd was entitled to re-new its application to challenge the Attorney General's Statement of Claim as constituting an abuse of the process when a similar application to have the Attorney General's writ struck out as constituting an abuse of process was refused by Justice Sylvester and there was no appeal by Dipcon Engineering Services Ltd.
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> (b) The Learned Master erred in law when he held that the default judgment obtained by Dipcon Engineering Services Ltd against the Attorney General precludes the Attorney General from raising those issues in subsequent proceedings brought by the Attorney General against Dipcon Engineering Services Ltd.
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> (c) The Learned Master erred in law when he held that the doctrine of *Res Judicata* applies to the default judgment in the instant case.
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> (d) The Learned Master erred in law when he held that it would be an abuse of process to permit the Attorney General to litigate its case against Dipcon Engineering Services Ltd.

[7] The first ground of appeal challenges the Master's decision on a procedural ground. Its basic thrust is that the Master erred because by entertaining the application to strike out, he gave a second hearing to an application that was the same as that which Sylvester J (Ag.) had already decided. The second and third grounds provide a substantive challenge. The basic issue that they raise is whether *Res Judicata*, a specie of issue estoppel, is applicable in this case to

preclude the Government from pursuing its claim, because there was no trial on the merits as Dipcon obtained a default judgment. The fourth ground of appeal, in essence, urges this Court to find that, in any case, the Government should be permitted to pursue its claim because the issues that arise on that claim are not the same as those on which Dipcon's claim was based, and the Master erred when he held that it would be an abuse of process to permit the Government to pursue its claim.

[8] A brief background, which shows particularly the procedural aspects of the litigation thus far in both proceedings, would provide a helpful precursor to the consideration of the issues that arise from this appeal.

The background

[9] The parties entered into 2 agreements, which are dated 30th September 1994. In the first agreement, the Government leased 80 acres of land at Perseverance in the Parish of St. George to Dipcon ("the Perseverance Agreement"). That property was leased with an asphalt mixing plant, machinery, equipment, tools, spare parts, materials, chattels and buildings that were on it. The second agreement was a collateral agreement between the Government, Dipcon and Grenada Model Farms Corporation for the lease of a quarry at Mt. Hartman ("the Mt. Hartman Agreement") to Dipcon. Under this latter agreement, Dipcon was to undertake quarrying and excavation works in the quarry.

[10] The Government purported to terminate both agreements by letter to Dipcon dated 1st November 1995. According to Dipcon, the Government then moved to take possession of the Mt. Hartman Quarry and the Perseverance Asphalt Plant in January 1996. Dipcon sued the Government and others on 9th July 1996. It prayed for declarations that the agreements were still valid and binding. Dipcon also sought an injunction restraining the defendants from entering upon the lands at Mt. Hartman and at Perseverance, and damages.

[11] In its Statement of Claim, Dipcon alleged that, in breach of the agreement, the Government did not deliver the premises at Perseverance to it (Dipcon) until July 1995. Dipcon said that, notwithstanding this, it still performed under the agreements. Its Statement of Claim further stated that the agreements also contained a term that it (Dipcon) would pay the Government royalties quarterly from 1st January 1995 or on such dates as the parties otherwise agreed. According to Dipcon, the parties were still negotiating on the manner and the date for the payment of royalties. They engaged in this up until 1st November 1995 when the Government wrongfully and forcefully entered upon the lands, ejected it (Dipcon) from the premises and took possession of the lands and quantities of materials that it had on those lands.

[12] Dipcon stated, further, in its Statement of Claim, that it suffered loss and damages because of the Government's breach of contract. It claimed some $20 million as special damages, but subtracted from this $228,019.15 that it owed the Government for royalties and materials not collected.

[13] According to the Government, it did not file a Defence in the Dipcon proceedings because the parties entered into negotiations. The negotiations resulted in a Consent Order, which provided for the Government to pay $3 million to Dipcon. The High Court set aside the Consent Order on Dipcon's application, on the ground that the Order was entered without Dipcon's authority. Since the Government had still not filed a Defence, Dipcon entered default judgment. The High Court refused to set it aside and assessed damages for Dipcon. On the 1st June 2001, while the Government's appeal against this decision was pending before the Court of Appeal, the Government instituted its proceedings by Writ against Dipcon for damages for breach of contract under the Civil Procedure Rules, 1970. On 14th January 2002, the Court of Appeal set aside the assessment of damages, but the Privy Council restored the decision of the High Court on 7th April 2004.

[14] In paragraph 3 of this judgment, I noted that it was on 11th June 2001 that Dipcon applied to strike out the Government's Writ. The Government filed a Statement of Claim on 25th June 2001, in which it alleged that Dipcon breached several terms of their agreement. Sylvester J. (Ag.) heard Dipcon's application to strike out the Government's Writ on 5th October 2001. He dismissed the application and directed Dipcon to file a defence within 4 weeks of the Order. Dipcon filed a defence to the Statement of Claim on 2nd November 2001. Apparently, little happened under the Government's proceedings until the Privy Council's decision, which restored the assessment of damages in Dipcon's proceedings.

[15] The Government filed an Amended Statement of Claim on 7th May 2004. It sought to amend the original Statement of Claim by inserting a new paragraph 15 and by consequential amendments to paragraph 16. By these amendments, the Government seeks to recover from Dipcon the damages to which Dipcon became entitled under its default judgment.

The proceedings before the Master

[16] The notes of proceedings before the Master indicate that the Government's application for leave to amend the Statement of Claim came on for hearing in that Court on 20th May 2004. The Master adjourned the hearing to 16th June 2004 and ordered the Government to serve the application, affidavit in support and the amended Statement of Claim on Dipcon by 27th May 2004. On 8th June 2004 Dipcon applied to strike out the Statement of Claim or parts of it. It was this latter application that the Master heard on 16th June 2004 when he struck out the Statement of Claim.

[17] Against this background, I shall now consider the first ground of appeal, which challenges the jurisdiction of the Master to hear that application.

Did the Master have jurisdiction?

[18] Learned Counsel for Dipcon submitted that the application to strike out, which Sylvester J. (Ag.) heard, was directed only against the Writ because the Statement of Claim was not served when that application was made. She said that, on the other hand, the application, which the Master heard, was directed not at the Writ, but at the Statement of Claim. She suggested that the application before Sylvester J. (Ag.) might have been premature because the Writ would not have contained sufficient particulars to clearly show the abuse of process under the principles of *Res Judicata*. Learned Counsel therefore submitted that when the first application to strike out failed, nothing precluded Dipcon from bringing a fresh application to strike out the Statement of Claim. According to Learned Counsel, the application that the Master heard was a different and distinct application, which focused on the Statement of Claim, and it was the Statement of Claim that clearly showed that the Government's proceedings raised issues for litigation, which were already decided in Dipcon's favour by the default judgment.

[19] On the other hand, Learned Counsel for the Government submitted that the Writ initiated the proceedings against Dipcon, while the Statement of Claim merely particularized the claim. He contended that the Statement of Claim, which took its 'life' from the Writ, disclosed the nature of the claim and the issues joined between the parties. According to Learned Counsel, the Writ in the Government's proceedings discloses the Government's claim against Dipcon with sufficient particularity. It makes reference to both agreements, which the parties signed, and also sets out the reliefs sought. Learned Counsel submitted that it necessarily follows that when Dipcon first applied to strike out the Government's Writ, that application constituted a challenge to the Government's case. He insisted that when that first application was dismissed, Dipcon should have appealed that decision. Having not appealed, Dipcon could not now by another application attempt to strike out the Government's Statement of Claim on the same ground.

Findings

[20] Against the foregoing procedural background in this case, the issue whether the Master had jurisdiction to hear the second application to strike out reflects the unnecessary difficulties that sometimes arise because of failure to rationalize the procedural process. In my view, the pleadings process indicate that it was the application, which Dipcon brought to strike out the Statement of Claim that was an abuse of the process of the court.

[21] When Sylvester J (Ag.) dismissed Dipcon's prior application to strike out the Writ on 5th October 2001, the Government had already filed the Statement of Claim on 25th June 2001. The judge did not therefore direct the Government to file a Statement of Claim. Rather, he directed Dipcon to file a defence. A look at that defence reveals that Dipcon replied to the various paragraphs contained in that Statement of Claim. It is in this context that I find no merit in the contention, which was advanced on behalf of Dipcon, that when the judge dismissed the application to strike out the Writ, it was still open to Dipcon to challenge the Statement of Claim on the same ground of abuse of process.

[22] The pleadings process also reveals that Dipcon applied to strike out the Statement of Claim or parts of it after the Master adjourned the hearing of the Government's application for leave to amend the Statement of Claim. The adjournment was to facilitate service. Dipcon could have applied to strike out paragraph 15 and the consequential amendments to paragraph 16 of the Statement of Claim because they constituted a new claim. The new claim stated that the award of damages to Dipcon, made as it was on Dipcon's allegation of wrongful termination of the agreements by the Government, was a direct and foreseeable consequence of the breaches that Government alleged in its Statement of Claim that Dipcon committed. The Government also amended the particulars of special damages to include the award of pre-judgment interest, costs and post-judgment interest. Alternatively, Dipcon could have urged the Master to refuse to grant leave to

amend the Statement of Claim. Dipcon's challenge to the amendments would have been heard at the same time that the Master considered the application to amend the Statement of Claim.

[23] I find that the decision that Sylvester J (Ag.) gave on 5th October 2001 and the defence that he directed Dipcon to file, which defence actually answered the Statement of Claim that the Government filed on 25th June 2001, precluded Dipcon from mounting what was, in effect, a second challenge by way of application to strike out the Statement of Claim. If anything, Dipcon should have appealed the decision of Sylvester J (Ag.). But then, Learned Counsel for Dipcon submitted that the application to strike out the Writ was premature. Against the procedural background, the Master had no jurisdiction to hear Dipcon's application and to strike out the Statement of Claim. He should have heard the application for leave to amend the Statement of Claim and any challenge that Dipcon raised to that application. If, however, this finding is in error, I consider the issue of *Res Judicata* and the basic principles that relate to it, particularly in the context of Dipcon's default judgment.

Res Judicata

[24] I agree with the Master's finding that a default judgment could give rise to an *estoppel per rem judicatam*. I also agree with his statement that in deciding whether this arises, it is necessary to examine the default judgment to determine with complete precision what it decided. Having made this latter statement, however, it was insufficient for the Master to state that the Government's claim could not continue because the claims in both proceedings were for alleged breaches of the same contract, and, additionally, that there would be a risk that the Government would secure a judgment against Dipcon for the award of damages, which Dipcon obtained in its default judgment. It was necessary to examine both claims more closely.

[25] Paragraphs 11 and 12 of this judgment indicate that Dipcon based its claim on the Government's wrongful termination of the agreements, and its subsequent forceful and wrongful entry and breach. Dipcon's allegation of breach by the Government stated that the Government failed to deliver to it the property at Perseverance in a timely manner. On the other hand, the Government's Statement of Claim reveals that its claim is based on allegations that Dipcon breached various terms of the agreements. The parties have not alleged breaches of the same terms. It is for the court to determine the merits of this claim.

[26] Additionally, the Master's finding that the Government should have earlier brought forward its case by way of counterclaim in Dipcon's proceedings is against clear principles, which this court stated in Analdo Bailey v St. Kitts-Nevis Cable Communications Limited, Magisterial Civil Appeal No. 3 of 2004 (St. Kitts and Nevis, 1st November 2004). In this case, at paragraph 6, Gordon J.A. referred to Halsbury's Laws of England, 4th Edition (Reissue), paragraph 975, which is under the rubric "Essentials of res judicata". He emphasized the following words from that passage:

> "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."

[27] At paragraph 7 of the judgment in Analdo Bailey, Gordon J.A. noted that Learned Counsel for the Appellant submitted that Order 15 Rule 2 of the Rules of the Supreme Court, 1970, under which the Writ in that case as well as in the present case was filed, required and obligated the Respondent to raise, by counterclaim in the prior proceedings, the issues that its Writ brought for trial. Order 15 Rule 2(1) stated:

> "2. Subject to rule 5(2), a defendant in any action who alleges that he 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."

I note, further, that Order 15(2)(3) stated that a counterclaim might be proceeded with notwithstanding that judgment is given for the plaintiff.

[28] In Arnaldo Bailey, this Court considered the purport of this rule. It also considered the relevant principles of *Res Judicata* as reviewed by the Privy Council in Thomas v The Attorney-General of Trinidad and Tobago [1990] J.C.J No 46. This Court noted that, in Thomas, the opinion of the Privy Council, which Lord Jauncey delivered, drew upon the statements of principle in Henderson v Henderson (1843) 3 Hare 100, at page 115; Greenhalgh v Mallard [1947] 2 All E.R. 255, and the judgment of the Privy Council in Yat Tung Co. v Dao Heng Bank [1975] A.C. 581, at page 590. This Court concluded, at paragraph 10:

> "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 compulsory."

[29] These are the provisions and principles that are applicable. Based on them, the Government was not obliged to counterclaim in Dipcon's proceedings. The decision by Sylvester J (Ag.) that dismissed Dipcon's application to strike out was in keeping with these principles, while the decision by the Master to strike out the Statement of Claim was not. The result is that the appeal must be allowed and the decision of the Master set aside.

Order

[30] In the foregoing premises, the appeal is allowed and the decision that the Master gave on 15th July 2004 is set aside. The Master shall proceed to hear the application for leave to amend the Statement of Claim and to give such directions

as are necessary to facilitate a speedy trial. Dipcon shall pay $5,000.00 costs to the Government on this appeal.

Hugh A. Rawlins
Justice of Appeal [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal [Ag.]