

IN THE KIRIBATI COURT OF APPEAL]
CIVIL JURISDICTION]
HELD AT BETIO]
REPUBLIC OF KIRIBATI]

Civil Appeal No. 5 of 2011

BETWEEN **ATTORNEY-GENERAL**
 IRO COMMISSIONER OF POLICE **APPELLANT**

AND **BAITONGO TIRIKAI AND OTHERS** **1ST RESPONDENTS**
 DAVID PINE **2ND RESPONDENT**

Before: Paterson JA
 Williams JA
 Barker JA

Counsel: *Monoo Mweretaka* for appellant
 Taoing Taoaba for 1st respondents
 Banuera Berina for 2nd respondent

Date of Hearing: 26 August 2011
Date of Judgment: 31 August 2011

JUDGMENT OF THE COURT

INTRODUCTION

1. In a judgment given on 5 August 2010 the Chief Justice found that the Attorney-General's defence of res judicata failed. On 10 August 2010 he gave judgment for the plaintiffs (now the first respondents) for \$140,123. Subsequently he increased this amount to \$141,123, because of a clerical error in the previous judgment.
2. In addition, in the 10 August 2010 judgment, judgment was given in favour of the first respondents against Mr Pine for \$18,750. The Attorney-General was ordered to indemnify Mr Pine for this amount.

3. The Attorney-General now appeals this judgment. There are three grounds of appeal, namely:
 - (a) *The Learned Chief Justice erred in law in finding that the Appellant is liable against the claim made by the First Respondent;*
 - (b) *The Learned Chief Justice erred in law in finding that the principle of res judicata does not apply and entered judgment in favour of the First Respondents;*
 - (c) *Further and in the alternative, the Learned Chief Justice erred in law in finding that the Appellant is liable to indemnify the Second Respondent.*
4. The first respondents were crew members of a vessel wrongfully seized by the Police at Kiritimati Island on 15 February 2006. They were left stranded on the island and were not paid their wages for the voyage from Tarawa.
5. Counsel agreed that the Chief Justice should first decide, as a preliminary point, whether the first respondents' claims against the Attorney General are estopped by the doctrine of res judicata. The basis of this alleged estoppels was that Mr Pine had brought proceedings against the Attorney General arising from the same incident. Mr Pine was the owner of the vessel.
6. Mr Pine succeeded on his claim and was initially awarded \$900,000. This Court set aside that award and the High Court then reassessed damages at \$200,000. There was a further appeal against this reassessment and the parties settled the claim for \$125,000.

7. The Chief Justice, in this present case, summed up the Attorney General's position as:

The Attorney-General settled his liability to Pine: Pine should now pay these people out of his own pocket.

8. The Chief Justice, in his judgment of 5 August 2010, noted that the damages in the Pine claim did not include claims relating to the first respondents.
9. The Chief Justice found as misconceived the submission on behalf of the Attorney-General that as the first respondents were not employed by the Attorney-General their claims were against Mr Pine. He determined that the first respondents' claim was in tort and the principle of res judicata did not apply.

ATTORNEY-GENERAL'S SUBMISSIONS

10. One submission on behalf of the Attorney-General is obviously incorrect and can be disregarded. It was that in the Pine case the first named first respondent was a party to the proceeding as a witness. A witness, by virtue of giving evidence, does not become a party, unless he is also joined as a party.
11. The basic submission for the Attorney-General was that the tortious action of the police has been adjudicated in the Pine case. This is a submission that one party having recovered damages from a tortious wrong doer, prevents another party who has also suffered damages from the same tort, recovering his loss.
12. An extension of the submission is that Mr Pine has been compensated for his loss and should now pay the first respondents.

Mr Pine is said to have had an obligation to include in his claim any claims the first respondents may have.

13. Further, the principle of res judicata extends to the indemnity ordered.
14. Although the first ground of appeal was not based on res judicata, the Attorney-General's submissions concentrated on res judicata, and counsel did not make meaningful submissions on whether or not the Attorney-General had any liability in tort to the first respondents.

FIRST RESPONDENTS' SUBMISSIONS

15. No doubt because of the nature of the Attorney-General's submissions in both the High Court and this Court, the first respondents' submissions were designed to counter the res judicata argument.

MR PINE'S SUBMISSIONS

16. Mr Pine's counsel noted that the only issue before the Chief Justice was the res judicata issue.
17. It was submitted that Mr Pine could not include the first respondents' claim for wages in his previous claim because the first respondents had not claimed against him. He sought indemnity from their claims in the present proceeding because the crew were claiming against him also. The basis of his indemnity claim was that he could not pay the wages because the wrongful seizure by the Police had affected his ability to pay.

DECISION

18. The res judicata issue is a non issue in respect of the first respondents' claim against the Attorney-General. The Attorney-General relies upon *Henderson v Henderson* [1860] ER 378. That case is of no assistance to him. Reliance was placed on the following extract from that case:

Where a given matter becomes the subject matter of the litigation in, and 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 the matter... but which was not brought forward only because they have negligently, inadvertence, or even accidentally omitted part of their case.

Res judicata... applies... not only to points on which the Court was actually required... to form an opinion and pronounce judgment, but too every point which properly belonged to the subject matter of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time.

19. An essential element of res judicata is that the parties in both matters are the same. The first respondents were not parties in the Pine case. There can be no question of res judicata as a defence available to the Attorney-General.
20. The matter which troubles this Court is that the Chief Justice appears to have assumed that the Police owed a duty to the first

respondents. That duty was not articulated. Nor did the Attorney-General's counsel make relevant submissions on this point.

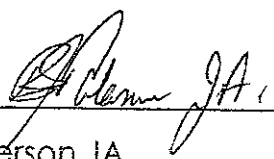
21. The wrongful seizure of the vessel caused the first respondents to be stranded on Kiritimati Island. The losses they claimed, amounting to \$141,123 resulted from this stranding. The Chief Justice held that this amount was caused by the Police's wrongdoing.
22. In the circumstances the seizure of the vessel led to the false imprisonment of the first respondents. They were, because of the circumstances, detained in that they could not leave the island. The damages awarded against the Attorney-General were caused by this "detention".
23. The appeal against the award of \$141,123 is disallowed.
24. This Court takes a different view on the order that the Attorney-General indemnifying Mr Pine.
25. It is not disputed that the sum of \$18,750 was a debt due by Mr Pine to the first respondents for wages for the period up to the date of the seizure of the vessel. He sought the indemnity because he claims that the action of the Police affected his finances to such an extent that he could not afford to pay.
26. Thus the liability arose before the wrongful action of the Police. There may be an issue of such damages being too remote or not caused by the seizure.
27. Further, this is a case, where in this Court's view the doctrine of res judicata applies. The authority referred to in paragraph 18 above states that the principle applies to "every point which properly belonged to the subject matter of the litigation, and which the

parties, exercising reasonable diligence, might have brought forward at the time.

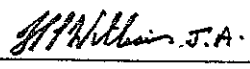
28. Mr Pine would have known of his liability to the third respondents. If he wished to recover that liability from the Attorney-General, as damages arising from the seizure, he had an obligation to claim this amount in his own action against the Attorney-General. Res judicata now prevents him from doing so.

DECISION

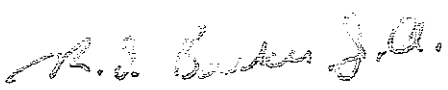
29. The appeal against the order in favour of the first respondents is disallowed and dismissed.
30. The appeal against the order requiring the Attorney-General to indemnify Mr Pine is allowed. Mr Pine's liability to the first respondents for \$18,750 is his liability alone.
31. The first respondents are entitled to costs against the appellant, which we fixed at \$500 plus disbursement to be agreed or fixed by the Registrar. There is no order of costs against Mr Pine.



Paterson JA



Williams JA



Barker JA