AGRICOM PTE LIMITED -V- RUSSELL ISLANDS PLANTATION ESTATES LIMITED

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No. 27 of 2001

Date of Hearing: 11th September 2003
Date of Judgment: 17th September 2003

Mr J. Sullivan for the Applicant
Mr G.K. Suri for the Respondent

JUDGMENT

Kabui, J. The Applicant filed an Originating Summons on 7th March 2003. It was subsequently amended on 5th May 2003. I ordered that the amended Originating Summons be treated as an ordinary Summons. It was further amended and filed on 11th September 2003, the same day the hearing took place. The amended Summons though described as Originating Summons seeks a declaration that the 135 metric tonnes of coconut oil currently stored in Russell Islands Plantation Estate Limited's oil tanks in Yandina is owned by the Applicant. It also seeks an order that the Applicant be permitted by the Respondent to remove 135 metric tones of coconut oil from storage at Yandina, Russell Islands, without interference or hindrance from the Respondent, its servants or agents. The Applicant further asks for costs. The Applicant was the Plaintiff and the Respondent, the Defendant, in previous proceedings.

The Background.

The facts were sufficiently set out in my ruling on 12th March 2001 and my judgment on 11th April 2001. Just briefly, the Applicant is a Company incorporated in Singapore and carries on business as a dealer in commodities such as coconut oil. copra, cocoa etc. in the Western Pacific and South East Asia. In July/August 2000, the Respondent obtained from the Applicant US$600,000.00 in advance for the supply of 2,600 tonnes of coconut oil at an agreed price of US$235 per tonne. In December 2000, the Respondent supplied 1829.92 metric tonnes of coconut oil, leaving a balance of 770.08 metric tonnes outstanding. The Respondent sold 1469 metric tonnes on 18th November 2000 and on 31st December 2000, sold 424 metric tonnes. The quantity of coconut oil now uncollected amounts to 135 metric tonnes of coconut oil.

The ownership of the oil.

The orders I made on 9th March 2001 were later confirmed in the ruling I made on 12th March 2001. The orders were of course interlocutory pending the hearing of the Applicant's claim for specific performance and other relief therein stated in the Statement of Claim filed on 7th March 2001. On 30th March 2001, the Respondent applied by Summons for orders to revoke the interlocutory orders I made on 9th March 2001 and that the proceedings be stayed under section 5 of the Arbitration Act (Cap.2). In my judgment delivered on 11th April 2001, I refused the application by the Respondent. At page 5 of my judgment, these words appear,

"... **The fact was that 2,600 metric tonnes of coconut oil had already been paid for by the Plaintiff. That tonnage of oil was already the property of the Plaintiff as from 17th October 2000. This fact was admitted by Solomon Ilala, the Managing Director of the Defendant when being cross-examined by Mr. Sullivan on his affidavit evidence filed on 30th March 2001... In his own words, Solomon Ilala said, "2,600 tonnes of oil is the property of the Plaintiff...** "

The Respondent having failed to file a defence on time, the Applicant filed a Notice of Motion for final judgment on 29th June 2001. The motion was heard on 8th August 2001 and again heard on 10th August 2001 by which time Mr. Apaniai was the new Solicitor and Counsel for the Respondent. Counsel, Mr. Apaniai stated in Court that the Respondent had no defence. On 13th August 2001, I signed a judgment upon motion for judgment in which I made a number of orders, one of which was to order specific performance of the contract as stated in paragraph 4 of the Statement of Claim. The other order was conditional in that if the Respondent failed to specifically perform the contact, it must pay the sum of US$180,968.80 as damages etc. Alternatively, the Respondent could pay the sum of US$180, 968.80 as monies had and received. The Respondent would also pay interest of 5% on the said sum as from 1st December 2000 until the performance of the contract or until the sum is paid sooner.

The Applicant's Case.

The Applicant's case is that the Respondent cannot now raise the issue of the ownership of the 135 metric tones of oil because it is prevented from doing so by the principle of issue estoppel. Counsel for the Applicant, Mr. Sullivan, in this respect, made reference to my earlier judgment delivered on 11th April 2001, in which I said that the 2,600 tonnes of coconut oil purchased in advance by the Applicant of which the present 135 metric tonnes is the remaining quantity was the property of the Applicant. Counsel cited a number of authorities in support of his

stand. Counsel argued that the Respondent would not be allowed by the principle of issue estoppel to reopen that issue of ownership for litigation the second time.

The Respondent's case.

The Respondent's case is that title to the 135 metric tonnes of coconut oil did not pass to the Applicant until shipment took place. Counsel for the Respondent, Mr. Suri, argued that the evidence given by Mr. Ilala which I relied on in my judgment delivered on 11th April 2001 was inconclusive and a mistake of fact and law and therefore the principle of issue estoppel did not arise for determination by me as the Court deciding the issue of ownership of the coconut oil. Counsel also distinguished the orders I made on 13th August 2001 as not being orders deciding ownership in favour of the Applicant but rather they were orders seeking to enforce contractual obligations of the parties. Counsel therefore concluded that the Applicant should only be concerned with recovery of damages for failure to perform the contract than recovery of the oil in specie.

The law on issue estoppel.

It goes without saying that the principle of issue estoppel is an old one. It has been restated by the Courts many times and this fact can be found in the law reports and the relevant text-books. This principle stated in simple terms is that any issue or issues of law or fact decided by a court of competent jurisdiction cannot later be raised by a relevant party for a decision a second time. This principle also extends to situations where the relevant party for whatever reason failed to raise a claim or defence and after the judgment attempts to raise such issues for further determination at a later date in the hope to obtain a favourable judgment. The law forbids that second chance. The rationale behind this principle is also well known and I need not restate it than simply to say that it prevents repetitive litigation over the same issues between the same parties. Public policy dictates that such a practice is wasteful, pointless and must be discouraged by the Courts in the interest of seeking justice in litigation. All these matters are well covered in cases such as **Hoysted and Others v. The Federal Commissioner of Taxation** (1921) 29 CLR 537, affirmed by the Privy Council on appeal, [1926] A.C. 155, **Khan v. Golechha International Ltd.** [1980] 1 W.L.R. 1482 and **D.S.V. Silo- Und Verwaltungs-Gesellschaft M.B.H. v. Owners of the Sennar and 13 other ships (Sennar (No.2))**[1985] 1 W.L.R. 490. These authorities do show that the principle of issue estoppel is formulated in the following ways-

1. An admission of a fact fundamental to the decision reached by the court of competent jurisdiction, cannot be withdrawn to allow fresh litigation to proceed to obtain another decision based on a different assumption of fact;

2. The same applies where the issue is an attempted challenge based on an alleged erroneous assumption as to the legal quality of that fact. I take the term "**legal quality**" to mean "**the degree of weight given to that fact**" in influencing the decision of the court which is alleged to be an erroneous assumption of that fact;

3. The same applies where the challenge is based on the premise that a point fundamental to the decision of the court had been overlooked by the relevant party.

This is the Lord Shaw formulation in the **Hoysted** case cited above.

Expressed differently, these become the following-

1. The decision relied on as creating an estoppel must be of a court of competent jurisdiction;

2. Its decision on the issue creating an estoppel must be final and conclusive on the merits; and

3. The issue creating an estoppel must be the same as was decided in the first decision and must be between the same parties in the first instance.

This is the Lord Brandon formulation in the Sennar case cited above.

There are of course exceptions but such cases do clearly fall outside these perimeters of the principle of issue estoppel.

Application of the principle.

Having stated the principle, how have the courts applied it to the facts? In practice, the Court looks at the court record to ascertain the issue or what the majority judgment (**Knox, C.J. and Starke, J.**) of the High Court of Australia in the **Hoysted** case cited above referred to as the "**traversable allegation**" or the "**matter in issue**" or the "**point controverted.**" Lord Wilberforce in **Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No.2)** [1967] 1 A.C. 853 and cited in the **Khan** case cited above, at page 1490 has this to say,

"... **And from this it follows that it is permissible to look not merely at the record of the judgment relied on... but at the reasons for it, the pleadings, the evidence and if necessary other material to show what was the issue decided...**"

The majority judgment (**Knox, C.J. Starke J.**) in **Hoysted's** case cited above at page 555 of the judgment, expressed the same in these words-

"..We must look behind the formal judgment to the record, if there be one, or, if the record be not precise or there be no record, to the issue actually litigated between the parties in the first action..."

It is said the only inquiry is to ascertain whether the causes of action are the same or identical. (See page 552 of the majority judgment (**Knox, C.J. and Starke, J**) in **Hoysted's** case cited above) Obviously, the causes of action are the issues and if they are the same or identical, that is the end of the matter. If not, then the matter may proceed further as the court may determine.

The cause of action in Agricom Pte. Limited v. Russell Islands Plantation Estates Limited, Civil Case No. 027 of 2001 and the issues determined by the Court in its judgment delivered on 11th April 2001.

There were two issues raised in the Summons filed by the Respondent in that case. The first was an order to revoke the order I made on 9th March 2001. That order was made in the following terms-

1. ----------;

2. The Defendant, its servants, agents, or any other persons claiming under or through the Defendant be restrained until further or other order from in any way whatsoever moving transporting selling processing or otherwise dealing with all and any of the Defendant's remaining crude oil or else in possession or control of the Defendant;

3. ----------;

4. The Defendant shall, within 14 days of the date hereof, prepare, file, and serve on the Plaintiff an account in writing containing the following:-

    a. All coconut oil produced by or on behalf of the Defendant wheresover on each date during the aforementioned period;

    b. All coconut oil produced by the Defendant on each date during the aforementioned period;

    c. All coconut oil sold transferred or otherwise disposed of (collectively "the Disposition") by the Defendant on each date

during the aforementioned period including the date and place of the Disposition, the name of the person in favour of whom the goods were disposed, and the price for such oil either by money or other considerations;

5. ----------.

The second issue was that the proceedings be stayed under section 5 of the Arbitration Act on the ground that the dispute should be referred to arbitration. The point on arbitration failed because Mr. Ilala who was the Managing Director of the Respondent at that time and who signed the contract to supply 2,600 tonnes of coconut oil to the Applicant admitted in evidence that there was no case to answer as regards the second contract to supply 2,600 tonnes of coconut oil. In other words, there was no case to go to arbitration about because there was no dispute about the ownership of 770.08 tonnes of coconut oil nor a dispute about the failure of the Plaintiff to collect the oil unlike the failure to collect the oil in the earlier contract. Mr. Ilala further confirmed in evidence that that total tonnage of coconut oil belonged to the Applicant as the property of the Applicant. Obviously, that being the case, the application to revoke the order I made on 9th March 2001 could not have been granted because the admission made by Mr. Ilala was clearly against granting such application. The application was accordingly refused with costs. The Respondent was then being represented by Mr. Radclyffe as the Solicitor and Counsel at the hearing of that Summons. However, Counsel for the Respondent, Mr. Suri, argued that whilst he accepted what Mr. Ilala had said regarding the ownership of 770.08 metric tonnes of coconut oil being vested in the Applicant, that admission was based on a mistake of fact and law. I understood this argument to relate to the judgment delivered on 11th April 2001 and to mean that the Applicant did not specifically put in issue the question of title to the 135 metric tonnes of oil and asked for a court ruling on that issue and the fact that title passed at the point of delivery of that quantity of oil was not drawn to the attention of the Court. These two omissions were what I understood to be the mistakes of fact and law cited by Mr. Suri in his argument. His conclusion therefore was that the question of issue estoppel did not arise in this case for that reason. The fact is that the contract of sale was signed by the parties on 3rd November 2000, the terms of which had been specific and intended to modify the FOSFA 53 terms and conditions. The most peculiar term of the sale contract was the pre-payment of US$600,000.00 for the supply of 2,600 metric tonnes of coconut oil to be delivered as advised by the Respondent. In a letter addressed to Mr. Chek of Agricom Pte. Ltd.(the Applicant) and dated 22nd November 2000, Mr. Ilala, the Managing Director and Mr. Notere, the Financial Controller of the Respondent, assured Mr. Chek that 2,600 metric tonnes of coconut oil belonged to Agricom Pte. Ltd. (the Applicant). This assurance was understandable because Mr. Chek had to be assured of ownership of the oil for Agricom Pte. Ltd. (the Applicant) had parted

with its money in advance. Agricom Pte. Ltd. (the Applicant) did what it did at the request of Messrs Ilala and Notere because the Respondent had been suffering from cash-flow problem at the time the contract was negotiated and signed. It was a special deal for a special situation based on mutual trust between the parties at that time. The fact that Mr. Ilala confirmed ownership of the oil in his evidence at the hearing of the Respondent's Summons on 9th April 2001 and the admission by Mr. Apaniai Counsel for the Respondent that it had no defence at the hearing of the Applicant's Notice of Motion for final judgment on 10th August 2001 both confirmed the fact that the Applicant owned the oil from the start. That had always been the intention of the parties all along the days and months since the signing of the sale contract. In this respect, section 17 of the Sales of Goods Act, 1893 as read with rule 1 under section 18 would appear to support the Applicant's case than against it. I reject the argument that title to 135 metric tonnes of coconut oil passes at the point of delivery. The intention of the parties to that effect was to the contrary as I have said in this judgment. There is another reason. Even if the admission by Mr. Ilala were erroneous on the fundamental fact of ownership or even if there was erroneous assumption of the quality of that fact, the principle of estoppel would still apply, nevertheless. The reason is as stated by Lord Shaw in the **Hoysted's** case cited above at pages 165-166 of His Lordship's judgment thus-

"... **Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or 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. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle...** "

For the Respondent to question the correctness of the Court's determination that the Applicant owned the 135 metric tonnes of coconut oil with the view of reopening that issue is not and cannot be permitted. It is rather surprising for Mr. Wong to question the correctness of Mr. Ilala's conduct in admitting the ownership of the oil as being vested in the Applicant two years after the event. As much as he is the new Chairman of the Respondent's Board of Directors, he cannot really deny the claim of ownership of the coconut oil by the Applicant. The Applicant had purchased the oil and therefore must own it. He never negotiated the contract nor did he sign it. He cannot really say that Mr. Ilala as the former Managing Director was wrong in making the admission of ownership of the oil. Whether the Applicant should only claim damages or possession of the oil is a matter for the Applicant to decide. It must be remembered that the orders I made on 13th August 2001 were default orders in the nature of unilateral orders, none of which seemed to have been complied with by both parties. The Applicant has now come back to reaffirm its claim of ownership over the 135 metric tones of coconut oil and having

done so to remove that quantity of oil without hindrance or interference from the Respondent. I do not see any reason why I should refuse to grant the application sought by the Applicant. The Respondent is clearly estopped from litigating the same issue of ownership of 135 metric tones of coconut oil which issue had already been conclusively determined by this Court in its judgment delivered on 11th April 2001. I accordingly grant the declaration sought in paragraph 1 and the consequential order in paragraph 2 of the amended Summons filed on 11th September 2003. I also order that the Respondent pays the costs of the Applicant. At the rising of the Court Mr. Katahanas applied for two consequential orders, namely, that the Applicant, its servants, agents, lawyers, or others authorized by it in writing are entitled on the giving of 24 hours' notice in that behalf to the Respondent to enter upon the Respondent's premises with or without equipment and to have full and unhindered access to the Applicant's coconut oil the subject of these orders for such lawful purposes as the Applicant may in its absolute discretion determine and the Police Commander at Yandina and all police officers there under his direction and command forthwith upon receipt of a copy of this order and a written request from the Applicant or its solicitors for enforcement of the same attend and enforce the said order using such force as is reasonably necessary for such purpose. Mr. Katahanas also applied for a Penal Notice to be attached to the Court order. Counsel for the Respondent, Mr. Suri, opposed the application but I granted it nevertheless. I felt the orders sought were in line with the purpose of the consequential order sought in the amended Originating Summons filed on 11th September 2003 and within the Court's power to grant such order or further order as the Court deemed fit.

F.O. Kabui
Judge