

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE ENVIRONMENTAL COMMISSION

EAP No. 003 of 2007

BETWEEN

Michelle Dove

Appellant

AND

The Environmental Management Authority

Respondent

Attorneys - at - Law for the Appellant

Dr. Rajendra Ramlogan
Ms. Marina Narinesingh

Attorneys – at – Law for the Respondent

Ms. Nalini Sharma
Ms. Shireen Khan

Before: Her Honour Sandra Paul
Her Honour Indira Ramrekersingh

Dated June 27th, 2007

Introduction

(1) This is an interlocutory application brought by the Environmental Management Authority (the EMA), the Respondent, claiming the appeal of Michelle Dove, the Appellant, is barred by *res judicata* and therefore the appeal should be dismissed. Because the EMA has not met all the necessary elements for proving *res judicata*, the EMA's application fails.

(2) Specifically, of the two constituent elements of *res judicata* that the parties argued, the EMA did not prove one: that the question raised here was the same one determined in previous litigation. The EMA, however, did prove the second element, that the parties in the previous and current litigations are the same.

(3) In the previous litigation against Atlantic LNG, Ms. Dove could not, by law, have brought the action she brings here against the EMA. Therefore, the court dismisses the EMA's application, and awards no costs.

Consideration of the Issues

(4) Although full consideration of a *res judicata* claim requires the court to review the six constituent elements needed to prove that doctrine, because the parties did not raise any issues regarding four of the six elements, only the last two need be considered here. Specifically, a party setting up *res judicata* by way of estoppel as a bar to his opponent's claim, or as a foundation of his own, must establish the constituent elements, namely:

- (v) it determined the same question as that raised in the later litigation;
and
- (vi) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was *in rem*.

See Handley in the Third Edition of *The Doctrine of Res Judicata* at paragraph 20.¹

The EMA Failed to Prove That the Question Raised Here Is the Same One Raised in the Previous Litigation.

(5) Regarding the first of the two disputed elements of *res judicata*, the EMA has not proven that the issues before the court in this case are the same as those in Ms Dove's previous suit against Atlantic LNG (Direct Private Party Action (DPA) No. 001 of 2006). As counsel for Michelle Dove notes, the issue in the DPA was that Atlantic LNG failed to implement the Community Awareness and Emergency Response (CAER) programme, whilst the issue in the present appeal is that the EMA did not enforce the law when Atlantic LNG failed to provide the EMA with information about the CAER programme. Although the EMA argues that the two issues are substantially the same, that argument fails: the two suits are distinct because, unlike the previous suit, the present appeal is governed by section 62 (c) of the Environmental Management Act, 2000 (the Act).

¹ The other four elements include the following: the decision was judicial in the relevant sense, it was in fact pronounced, the tribunal had had jurisdiction over the parties and the subject matter, the decision was final and on the merits. [citation]

(6) The Act, at section 69 (1), provides for the types of violations of environmental requirements that give rise to an individual bringing a DPA at the Commission, and those that an individual could not pursue by way of a DPA. Based on their submissions, both parties in this case clearly understand that, under Section 69 (1) of the Act, any private party may institute a civil action for a claimed violation of an environmental requirement as set out in section 62 of the Act, except those environmental requirements provided for in sections 62 (d), (l), and (c), the last of which addresses failures to provide the EMA with complete and accurate information in a timely manner.

(7) To address her concern about the lack of the EMA's enforcement actions, Ms. Dove properly brought the present appeal under section 62(c)—one of the three sections that do not allow for a DPA. Thus, the DPA, by the Act's plain language, could not have addressed the issue in the present appeal because that issue is governed by section 62(c). That issue falls outside the ambit of actions an individual could bring for a claimed violation of an environmental requirement. Even if Ms. Dove had wanted to address the section 62(c) violation in her DPA, the Act prevented her from doing so.

(8) Consequently, although the EMA's counsel, Ms. Sharma, cited the case of **Henderson v. Henderson [1843–1860] All ER 378**, the leading authority on the principle that a court will disallow matters that could have been raised in previous proceedings, the case is inapposite in this instance. We find therefore, that the issue in the present appeal is not the same as that considered in the DPA 001 of 2006.

(9) The court finds that the EMA has not met its burden of proving all the elements needed to show that *res judicata* should apply to this matter. Therefore, the EMA's application fails. The EMA's request for costs is denied.

The Parties in this Dispute are the Same as Those in the Previous Litigation

(10) Regarding the second of the two disputed elements of *res judicata*, however, given the circumstances of this case, the court views the parties in this dispute as the same

parties in the earlier litigation. In the earlier litigation, Michelle Dove and Atlantic LNG reached a settlement agreement, which was consented to in the EMA's presence, but not signed by the EMA. Although the EMA was not a signatory to the compromise agreement between Dove and Atlantic LNG, it was a party to the proceedings to the court's judgment, which, in turn, was binding on all parties to the proceedings.

(11) Five facts, which are not in contention, establish the EMA's role as a party in both disputes. First, that the EMA is a party to the previous proceedings. Second, the EMA was present during the mediation sessions at which an agreement was eventually arrived at by Michelle Dove and Atlantic LNG. Third, the EMA did not sign the settlement agreement. Fourthly, the EMA was present in court when Michelle Dove indicated that the matter was settled in terms of the settlement agreement arrived at between herself and Atlantic LNG. Fifth the settlement agreement signed by Dove and Atlantic LNG was made an order of the court in the EMA's presence.

(12) Having regard to the foregoing non-contentious facts, the court holds that the EMA acquiesced when the parties reached the terms of the settlement agreement and when the signatories to the settlement agreement asked that the matter be determined by consent in terms of the agreement. The consent order finalises the proceedings and is determinative of all the issues raised. Consequently it is binding on all the parties to the proceedings. Therefore, in the circumstances the court finds that the parties in the present appeal and those in the previous proceedings are the same.

Her Honour Sandra Paul
Chairman

Her Honour Indira Ramrekersingh
Deputy Chairman

