THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 97 OF 2004

BETWEEN:

KATHLEEN TYRELL

Claimant

V

HORACE JOHN
CYNTHIA JOHN

Defendants

Appearances:
Mr. Sylvester Raymond-Cadette for the Claimant
Mr. Stephen Williams for the Defendants

2005: October 21

DECISION

[1] **THOM J**: This is an application for summary judgment under Part 15 of CPR 2000 and alternatively an order for security for costs.

[2] The Claimant is the sister of the First Defendant and the First and Second Defendants are husband and wife.

[3] On the 18th day of October 2002 by Civil Suit No. 466 of 2002 the First and Second Defendants instituted legal proceedings against the Claimant for a declaration that they were the owner of the property described in Title Deed No. 5256 of 2002 and were entitled to vacant possession of the said property.

[4] On the 11th day of November 2002 the Claimant filed a defence in which she alleged that the Defendants obtained the said Title Deed No. 5256 of 2002 by fraud and a counterclaim

in which she sought a declaration that the children of Linton Lee as the beneficiaries are entitled to the land with buildings and erections described in the said Title Deed.

[5] On the 13th day of January 2003 Master Brian Cottle struck out the defence and counterclaim as disclosing no reasonable cause to defend the case and made a declaration that the said property belonged to the First and Second Defendants.

[6] No appeal was made against the Order of the Master.

[7] On the 17th day of February 2004 the Claimant filed a claim against the First and Second Defendants in which she seeks the following orders:

1. Cancellation of Title Deed No. 5256 of 2002.
2. A declaration that the land with buildings and erections as described in the schedule of Title Deed No. 5256 of 2002 is owned by the heirs of Linton Lee.
3. General Damages.
4. Costs.

[8] The First and Second Defendants filed a defence in which they pleaded res judicata.

[9] On 11th day of May 2005 the Defendants filed an application for summary judgment on the ground that the Claim is frivolous, vexatious and the Claimant has no realistic prospect of succeeding.

[10] Counsel for the Defendants submitted:

(a) That the Claimant has no locus standi since she claims the said property as an heir of Linton Lee (deceased) and no Letters of Administration has been granted to her.

(b) The principle of res judicata applies. The issue of ownership of the said property which is the subject matter of this suit was the subject matter of Civil Suit No. 466 of 2002. The matter cannot be relitigated.

(c) The Claimant is acting as a nominal Claimant and the Claimant will be unable to pay the Defendants' costs if ordered to do so.

[11] Counsel for the Claimant submitted that :

(i) The principle of res judicata does not apply since after the disposal of Civil Suit No. 466 of 2002 new evidence arose which proves that the Second Defendant fraudulently submitted a false affidavit to the Housing and Land Development Corporation and the said Title Deed was obtained by fraud.

(ii) Under Part 15(3)(e) of CPR 2000 the Court cannot grant Summary Judgment in proceedings commenced by way of fixed date claim.

[12] This case was not commenced by way of fixed date claim and it is not a matter which ought to have been commenced by fixed date claim. Part 15(3) (c) of CPR 2000 is not applicable.

[13] The issues to be considered in this matter are:

(i) Whether res judicata is applicable in this case.

(ii) Whether the Claimant has locus standi

(iii) Whether security for costs should be ordered pursuant to Part 24.

RES JUDICATA

[14] The principle of res judicata was considered in the case of Henderson v Henderson (1843) 3 Hare 100 at page 115 Wigham V.C. explained the principle as follows:

> ".....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."

[15] Henderson's case was approved by the Privy Council in Thomas v The Attorney-General of Trinidad and Tobago and by the Court of Appeal of the Eastern Caribbean Supreme Court in Etoile Commerciale SA v Owens Bank Ltd [1992] 42 WIR p. 128 and also in Arnold Bailey v St. Kitts-Nevis Cable Company Ltd Magisterial Civil Appeal No. 3 of 2004.

[16] In the Etoile Commerciale SA case the Court held that res judicata was applicable, the Respondents were estopped from raising and relitigating the issue of fraud, the issue having been raised by the Respondents and had been conclusively determined on its merits by courts of competent jurisdiction in proceedings between the same parties and there were no special circumstances entitling the Respondents to re-open the issue in the interest of justice.

[17] In the present case the parties are the same in this case as in the No. 466 of 2002 except that the roles are reversed, the First and Second Respondents were the Claimants in suit No. 466 of 2002 and the Claimant was the Defendant. Both Claims No. 466 of 2002 and Claim No. 97 of 2004 relate to the land described in Title Deed No. 5620 of 2002. The issue raised is the same. The First and Second Defendants in Claim No. 466 of 2002 sought a declaration that they were the owners of the property and entitled to possession and the Claimant then the Defendant alleged in her defence that the said Title Deed was obtained by fraud. Paragraph 6 of her defence reads:

" 6. The Defendant further contends that the Claimants fraudently induced the Chairman of the Housing and Land Development Corporation to transfer the said parcel of land to their names."

[18] In the present cause Suit No. 97 of 2004 the Claimant alleged in paragraph 8 that the Title Deed was obtained by fraud and outlines the particulars of fraud. Paragraph 8 reads:

"8. On the 22nd day of March 2002 the Second Defendant falsely and maliciously issued an affidavit to Housing and Land Development Corporation deposing that the said property belonged to herself and the First Defendant and requested that a deed be made in their names which was eventually registered as Title Deed 5256 of 2005."

And further:

"Particulars of Fraud

1. The Defendants falsely and maliciously informed the Housing and Land Development Corporation by affidavit that they were the owners of the said property.
2. The First Defendant who had knowledge of the family relationship failed to inform the Housing and Land Development Corporation that his other siblings were entitled to a share of the estate of their father the late Linton Lee.
3. The First Defendant refused to execute the title deed of Linton Lee."

[19] The only difference between Claim No. 466 of 2002 and Claim No. 97 of 2004 is that in Claim No. 97 of 2004 the Claimant has pleaded particulars of fraud and in the Claimant's List of Documents a letter from Housing and Land Development Corporation dated the 17th January 2003 is disclosed.

[20] Counsel for the Claimant submitted that this said letter from the Housing and Land Development Corporation dated 17th January 2003 is new evidence in support of the plea of fraud.

[21] The issue for consideration is whether this new evidence brings this case within the exception to the doctrine of res judicata.

[22] The underlying principle which emerges from an examination of cases such as Henderson v Henderson; Mills v Cooper [1967] 2 AER p. 100 (the dictum of Lord Diplock at p. 109

was approved and applied by the Eastern Caribbean Court of Appeal in The Etiole Commercial SA case, see judgment of Floissac CJ at p. 133) and Walpole and Another v Partridge & Wilson (a firm) [1994] 1 AER p. 392 is that the further or new evidence must be evidence which the party could not by reasonable diligence have adduced at the earlier proceedings.

[23] In the present case the Solicitor for the Claimant wrote to the Housing and Land Development Corporation on January 14, 2002 the day after the Claimant's defence and counterclaim in Claim No. 466 of 2002 were struck out by the Master. The response from the Manager (Ag.) is dated 17th January 2003.

[24] It is inconceivable that where the Defendant in Claim No. 466 of 2002 claimed that they purchased the land in dispute from the Housing and Land Development Corporation and the Claimant alleged that the title was obtained by fraud on the part of the Defendants on the Housing and Land Development Corporation that the Claimant did not seek to get information from the Housing and Land Development Corporation to support the allegation of fraud. In my opinion the letter dated 17th January from the Manager of the Housing and Land Development Corporation does not establish a prima facie case of fraud on the part of the Defendants. The letter does not indicate who paid for the land in August 1987 nor does it state that the Defendants did not pay for the land. Further on the 1st November 2004 the parties were ordered to file witness statements on or before 31st March 2005. No witness statement was filed by the Manager (Ag.) who wrote the letter, or any official from the Housing and Land Development Corporation on behalf of the Claimant. (The Housing and Land Development Corporation is a party to this action but the Corporation did not file a defence).

[25] In Swain v Hillman [2001] 1 AER p. 91 Lord Woolf MR in considering the approach to be taken by the Court in exercising its powers under Part 24.2 of the U.K. CPR which is similar to Part 15.2 of CPR 2000 said at p. 92:

> "Under rule 24.2 the court now has a very salutary power, both to be exercised in a Claimant's favour or, where appropriate in a Defendant's favour. It enables the

court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or as Mr. Bidder Q.C. submits, this directs the court to the need to see whether there is a "realistic" as opposed to a fanciful prospect of success."

[26] In the Etiole Commerciale SA case Singh J as he then was in striking out proceedings instituted by the Respondents as an abuse of process and in holding that the plea of res judicata was good stated:

> "When I consider the evidence as a whole on this issue of fraud I find it teeming with speculation, conjectures, hearsay, tenuous innuendoes, and very little if any direct admissible evidence to show with even the slightest weight any bona fides in this plea of fraud. I therefore cannot find the bona fides required in this plea. I am aware of the authorities which say that all [the respondent] has to do is to shriek fraud to defeat his plea of res judicata. But, my view is that when [the respondent] does so, it ought not to be a simulated shriek but one which must, by admissible evidence, appear to have some bona fides in it".

See also Gibson LJ in Walpole and Another v Partridge & Wilson (a firm) at p. 392 letters (d) - (g).

[27] A Case Management conference was held by the Master in Claim No. 466 of 2002 and on hearing counsel for the Claimants and counsel for the Defendant the Master ordered that the Defence and Counterclaim be struck out as disclosing no reasonable cause to defend the case. I find that the new material relied on by the Claimant is not material which the Claimant could not by reasonable diligence have adduced in her defence to Claim No. 466 of 2002. I find that the doctrine of res judicata applies and the Claimant is estopped from relitigating the issue of fraud. The Claimant therefore has no real prospect of succeeding on the Claim.

LOCUS STANDI

[28] The Claimant claims she is a beneficiary of the estate of Linton Lee (deceased). No Probate or Letters of Administration has been granted to the Claimant under the Administration of Estates Act Cap. 377 nor is the Claimant a Representative Claimant pursuant to Part 21 CPR 2000. The Claimant therefore cannot bring an action for the cancellation of Title Deed No. 5256 of 2002. See Ingall v Moran [1944] 1 AER p. 97.

[29] Judgment is entered for the Defendants. The Claimant shall pay the Defendants' costs in the sum of $2,000.00.

.....
Gertel Thom
HIGH COURT JUDGE