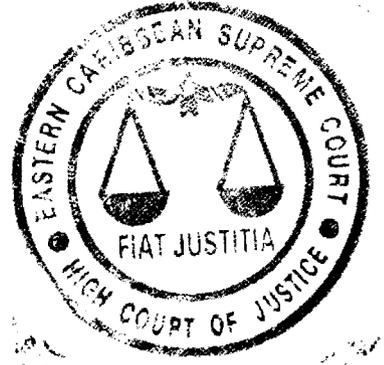


THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 318 OF 2004



BETWEEN:

DOUGLAS O'NEAL CREESE

Claimant

v

VIBERT CREESE (as administrator of the Estate of James Creese, dec'd)

Defendant

Appearances:

Mr. Perry Joseph for the Claimant

Mrs. Kay Bacchus-Browne for the Defendants

2005: October 24

RULING

- [1] **THOM, J (In Chambers):** This is an application to strike out the Claimant's statement of Claim under Part 26 of CPR 2000.
- [2] On the 29th day of June 2004 the Claimant filed a Fixed Date Claim in which he sought several orders including the following:
- (a) Revocation of the Grant of Letters of Administration of the Estate of James Creese (deceased) which was granted to the Defendant on 9th October 2002.
 - (b) That the Defendant do render an account of his administration of the estate of James Creese (deceased).
 - (c) Payment of the sum of \$93,985.67 by the Defendant personally and interest thereon as the Court thinks fit.

- [3] The Defendant made an application to strike out the Statement of Claim on the grounds that:
- (a) The Claimant has no reasonable grounds for bringing the claim, the Claimant has no real prospect of succeeding and it is an abuse of process.
 - (b) The doctrine of res judicata applies the matter having been determined in earlier proceedings.
- [4] Having regard to the plea of res judicata it is necessary to outline in some detail the earlier proceedings.
- [5] On the 10th day of December 2001 in Civil Suit No. 266 of 2000 between James Creese (by his next friend Douglas Creese) and R. Theodore L.V. Browne, Justice Ian Mitchell Q.C. by consent ordered inter alia that the Defendant pay to the Claimant the market value at 1992 for land conveyed to the Defendant and that the market value be determined by trial by the court.
- [6] A trial was duly held and the Judgment was given by Justice Mitchell Q.C. on December 12, 2001 and the value of the land was assessed at \$24,000.00 per acre.
- [7] James Creese died on April 10, 2002 and Letters of Administration of his estate was granted to Vibert Creese on the 9th October 2002. The administrator Vibert Creese was substituted as Claimant in Suit No. 266 of 2000 and he enforced the Order of Justice Mitchell Q.C.
- [8] On September 9, 2003 Douglas Creese a beneficiary of the estate of James Creese (deceased) filed a Fixed Date Claim No. 354 of 2003 against the Administrator Vibert Creese in which he sought:
- (a) An Order restraining the Defendant whether personally or by his solicitor's servants and/or agents from collecting or paying any monies whatsoever or otherwise taking any further steps in Claim 266 of 2000.
 - (b) Directions in the matter of the Estate of James Creese.

(c) Leave to pursue a claim against R. Theodore L.V. Browne in the name of the Estate of James Creese on behalf of the Estate and/or beneficiaries of the said Estate.

[9] This claim was withdrawn and discontinued on the 11th December 2003.

[10] The issues to be determined are:

- (i) whether the doctrine of res judicata apply and the Claimant is estopped the issues having been adjudicated in earlier proceedings
- (ii) whether the Claim is frivolous vexatious and an abuse of process.

RES JUDICATA

[11] The doctrine of res judicata was considered in the case of Henderson v Henderson [1843] 3 Hare 100 at p. 115 Wigram 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 matters 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.”

[12] 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 S.A. v Owens Bank Ltd. [1992] 42 WIR p. 128 and also in Analdo Bailey v St. Kitts-Nevis Cable Company Ltd Magisterial Civil Appeal No. 3 of 2004.

[13] In the present case while the parties are the same as in Claim No.354 of 2003, Claim No. 354 of 2003 was withdrawn and discontinued by the Claimant before any determination by the court. Where a claim was withdrawn and none of the issues raised in the claim were

adjudicated upon, the doctrine of res judicata does not apply to prevent a party from raising the same issues in a subsequent proceeding. This issue was considered in Land v Land [1949] AER p. 218. In Land's case a summons by a wife for maintenance on the ground that her husband had deserted her was withdrawn after the wife had given evidence but before the Court made a ruling. The wife subsequently filed a second summons on the ground of the husband's desertion. The evidence given was substantially the same as in the earlier proceedings. It was argued on behalf of the husband that the wife was precluded from bringing a second summons on the same grounds. The Court held that the matter of complaint not having been adjudicated on, the wife was not estopped from proceeding with a second complaint based on the same matter.

- [14] Also in Marie Egger v Herbert Egger C.A. (St. Lucia) No. 5 of 2004 Alleyne JA (as he then was) after examining Halsbury Laws of England 4th Ed. para 1520 and New Brunswick Railway Corp v British and French Trust Corporation stated:

"I think the principle to be gleaned from these passages is that, where there is a challenge as to the effect of a judgment, the binding authority of the judgment in the sense of estoppel or res judicata only arises when the court has had the benefit of argument by counsel on both sides and has actually adjudicated the question. A consent order like a default judgment is not the result of adjudication by the judge, but of agreement between the parties, or in the case of a default judgment of failure of the defendant to take a procedural stop within a prescribed time or at all."

- [15] In the case of Claim No. 266 of 2002 the parties were different from the parties in Claim No. 318 of 2004. The parties to Claim No. 266 of 2000 were James Creese (by his next friend Douglas Creese) and R. Theodore L.V. Browne. See James v Duke 43 WIR p. 39. The cause of action and the issue were also different from the present case. In Claim No. 266 of 2000 James Creese (by his next friend Ronald Creese) the owner of the property brought a claim against his solicitor in which he sought to rescind an order for transfer of land on the ground that the transfer was procured by undue influence. This case related to the relationship between a client and his solicitor.

- [16] In the present case the claim is for revocation of the grant of Letters of Administration to the Defendant, for the Defendant to render an account of his administration of the Estate of

James Creese and the payment of \$93,985.67 to the estate. The issue of revocation of grant of Letters of Administration under the Administration of Estates Act Cap. 377 and an account of the Administration of the Estate are not issues which were determined or could have been determined in Claim No. 266 of 2000. Claim No. 266 of 2000 was instituted by James Creese by his next friend Douglas Creese. James Creese died on April 10 2002 that is after the judgment was delivered in Claim No. 266 of 2000 on December 12, 2001.

[17] The Claimant also claims payment of \$93,985.65 by the Defendant personally. The Claimant contends that the Defendant in his administration of the estate of James Creese ought to have instituted proceedings to enforce the undertaking given by Mr. R. Theodore L.V. Browne on December 11, 2001. This issue relates to the performance of the duty of Administrator by the Defendant. This issue was not decided and could not have been decided in Claim No. 266 of 2000. On the death of James Creese after Judgment was entered in No. 266 of 2000 the Defendant was substituted as the Claimant in No. 266 of 2000 and the Defendant enforced the Judgment.

[18] For the reasons stated above I find that the doctrine of res judicata does not apply.

ABUSE OF PROCESS

[19] Counsel for the Defendant submitted in paragraph 4 of her submission that:

“Further the undertaking was signed before the parties submitted to the Court, so that judgment must take precedent. In any event the Claimant by virtue of his being dead cannot advance any evidence in support of such an allegation. Any attempt to do so would amount to an abuse of process. The beneficiaries cannot have more right than the deceased. The deceased was the Claimant in the original action and his stake is bound by his abandonment of any claim in excess of the consent court order.”

The order of the court was made on December 10, 2001, the undertaking is dated December 11, 2001. The undertaking was therefore not signed before the parties submitted to the Court. The decision on the assessed value of the land was delivered on December 12, 2001. James Creese died almost four months after the Judgment of Justice Mitchell. At the date of his death the right to litigate the enforceability of the undertaking

was not abandoned. The issues which the Claimant seeks to litigate in Claim No. 318 of 2004 are not issues which have already been determined by a competent court. I accordingly find that there is no abuse of process.

[20] The application is dismissed; costs shall be costs in the cause.


.....
Gertel Thom
HIGH COURT JUDGE.