

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO: ANUHCV 2007/0167

BETWEEN:

VERNON TONGE

Claimant/Applicant

And

SOTCHSON WHITFIELD TONGE

Defendant/Respondent

Appearances

Mr. Trevor Kendal for the Claimant/Applicant

Mr. Jason Martin for the Defendant/Respondent

.....  
2007: 13<sup>th</sup> July  
12<sup>th</sup> October  
22<sup>nd</sup> November  
.....

**RULING**

[1] **Harris J:** By fixed date claim form dated and filed March 16, 2007 the Claimant/Respondent<sup>1</sup> brought a claim (ANUHCV 2007/0167) against the Defendant/Applicant<sup>2</sup> in this matter seeking as against the said Defendant/Applicant injunctive relief, Damages, Costs and such other relief that the Court may deem just.

[2] Sotchson Whitfield Tonge a.k.a Seymour Tonge<sup>3</sup> to whom I shall refer to as 'Sotchson', by 'Notice of Application' dated May 14, 2007 applied to the Court for an Order that the

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<sup>1</sup> Vernon Tonge

<sup>2</sup> Sotchson Whitfield Tonge

<sup>3</sup> Vernon Tonge has not disputed this alias

Claimant/Respondent's - to whom I shall now refer to as 'Vernon'- Claim dated 13 March, 2007 and filed 16<sup>th</sup> March 2007 be struck out; and that the injunction<sup>1</sup> obtained by Vernon Tonge dated 21<sup>st</sup> March 2007 be discharged.

[3] One Leandra James, Legal Secretary, deposed to and filed an affidavit in support of the said application of Sotchson.

[4] The grounds of the application by Sotchson is that the action of Vernon is founded on "issues which have already been litigated<sup>2</sup>, namely (i) the ownership of property more particularly described as Registration Section: South West; Block: 53 1386A; Parcel 205; and the dwelling house thereon, and (ii) whether Vernon is a trespasser in respect of the said property.<sup>3</sup>

#### BACKGROUND

[5] The affidavit in support of Sotchson application to strike out sets out the history of the matter, detailing a previous civil action with Sotchson as the Claimant and Vernon as the Defendant. In that 1<sup>st</sup> action (ANUHCV 588/2005) filed and determined in the High Court of Antigua; Sotchson filed a 42 paragraph affidavit and exhibits in support of his fixed date claim form<sup>4</sup>. Also filed in that 1<sup>st</sup> matter is an 'Affidavit of Service' by one, Lovelace Christopher, a Bailiff of the Magistrate's Court of St. Johns, Antigua setting out the facts of service of that process on the Defendant in that 1<sup>st</sup> matter, on the said Vernon Tonge.

[6] Neither an Acknowledgement of Service nor Defence was filed by the Defendant Vernon as he then was, in the 1<sup>st</sup> action #588/05.

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<sup>1</sup> Entered on the 22nd day of march 2007

<sup>2</sup> Claim #ANUHCV 2005/05882007/0167 Sotchson Whitfield Tonge v. Vernon Tonge

<sup>3</sup> See Notice of Application – Court file

<sup>4</sup> ANUHCV 2005/0588 (#588/05)

[7] In the 1<sup>st</sup> matter 588/05, a High Court Judge acting in accordance with Part 27.2(3) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 treated the first hearing of the said matter<sup>1</sup> as the trial of the claim.

[8] Judgment was entered for Sotchson as claimed.

[9] By Judgment Order dated the 13<sup>th</sup> day of January 2006 and entered the 23<sup>rd</sup> day of January 2006 on Claim #588/05, it was thereby ordered that:

1. An injunction to restrain the Defendant whether by himself his servants or agents or otherwise, howsoever, from occupying or otherwise using the said property on parcel 205 as his residence is granted.
2. The Ford Pick up truck – Registration number C2774 – parked on the land of the Claimant being parcel 205 and the building materials stored on the said parcel 205 be removed within a month from the date of service of this Order;
3. EC\$1,500.00 be paid by the Defendant to the Claimant for trespass.
4. Costs in the sum of EC\$5,000.00 be paid to the Claimant.

[10] This Order was allegedly served on Vernon. The details of the service are set out in the Affidavit of Luis Agostina.<sup>2</sup>

[11] Sotchson contends that Vernon, in the present case 2007/0167 is caught by the rule of issue estoppel.

[12] Further, or in the alternative Sotchson submits that the 1<sup>st</sup> action, is an action in which Vernon had a full opportunity of contesting the matter and determining all the facts and issues raised in the instant case 2007/0167, and that as a result the present action is, as a matter of public policy, an abuse of process.

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<sup>1</sup> 588/05, Part 39 (4) requires Judge to be satisfied that a notice of hearing has been served on the absent party in accordance with the rules.

<sup>2</sup> A process server of the USA. Affidavit reflects personal service and service by regular first class mail .

[13] On these grounds, contends Sotchson, Vernon's latest claim in 2007/0167 should be struck out.

[14] Sotchson suggests that Vernon's remedy lay in (1) application under Part 13 CPR 2000 to set aside the judgment and (2) Appeal, neither of which he pursued, and presumably are not now readily ( but technically still available) available to him.

#### ISSUES – 1<sup>ST</sup>MATTER

[15] What then are the issues that fell to be determined in the 1<sup>st</sup> matter 0588/05 that now form the basis of Vernon's more recent claim in action 2007/0167?

[16] Counsel for Sotchson submits that Sotchson provided the Court in the prior action 2005/0588 with evidence to establish three things<sup>1</sup>: (1) *that Sotchson is the owner of the subject property; (2) that the dwelling house thereon was built without his permission or authority; (3) that the Respondent was a trespasser on his land who was being abusive to him.*

[17] Sotchson further submits that in the present case No. 2007/0167 Vernon is attempting to establish three (3) things (i) *that Sotchson is not the owner of the subject property (ii) that the dwelling house thereon was built with the applicant knowledge and agreement (ii) and that in those circumstances the allegations made by Sotchson in the previous case that the Respondent was a trespasser on the said property, is unsustainable.*

[18] Counsel for Sotchson submits that in both matters the parties and the fundamental issues i.e. the question of ownership, are substantially the same, as are the facts on which they are based.

[19] Sotchson, in the 1<sup>st</sup> matter 588/05 in paragraph 6 of his "Affidavit in Support of Fixed Date Claim Form" says that he was on the 23<sup>rd</sup> May 2002 issued with his Land Certificate

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<sup>1</sup> See written submissions of Mr. Jason Martin at para. 16 for Sotchson

#2156/2002 for the subject land<sup>1</sup>. Vernon has not disputed that Sotchson is the Registered Owner. Sotchson in the said affidavit acknowledges in paragraphs including 14, 16, 23, the possibility of financial contributions by Vernon and another, albeit unknown to him then.

[20] In granting the relief claimed by Sotchson in the 1<sup>st</sup> action the Court would have had to satisfy itself that (i) Sotchson had an interest in the property (ii) Sotchson had an interest that would entitle him to occupy the premises to the exclusion of Vernon the Defendant in that 1<sup>st</sup> matter 588/05 and (iii) that he was entitled to the benefit of the other Judgment Orders.

[21] The interest that Sotchson claimed and gave evidence of, was that he was the sole registered beneficial<sup>2</sup> owner of the subject land. Sotchson acknowledged a possible financial contribution<sup>3</sup> to the construction of the building by Vernon and another and by so doing raised the spectre of Vernon's "(i) overriding interest and or equitable interest (ii) "consequential share and entitlement"<sup>4</sup> of Vernon in the subject parcel of land & building. This acknowledgement was before the Court in the 1<sup>st</sup> matter.

[22] Sotchson maintained his claim to registered ownership of the subject parcel of land. In determining the 1<sup>st</sup> matter the Court would have had to make a determination on Sotchsos proprietorship<sup>5</sup> (this being a fact in support of his possession) as alleged and consider the evidence of Vernon's interest as a result of a financial contribution by him.

[23] Further, it must have had to determine the facts upon which Sotchson's claim was made and determine the relevant facts in favour of Sotchson. Sotchson's claim however was not for a declaration of his registered proprietorship although he did plead registered proprietorship. Nor was his claim for ownership generally. It was for the relief referred to in

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<sup>1</sup> See Land Certificate in name of Seymour Tonge exhibited to said Affidavit

<sup>2</sup> He exhibited the Land Certificate in the name of Seymour Tonge a name not disputed by Vernon in either action as being that of Sotchson

<sup>3</sup> Paragraph 11 of Sotchson's Affidavit on Claim #588/05 "She also said that she was given money by Vernon and Godfrey" his two brothers

<sup>4</sup> See Vernon's Fixed date claim Form filed 16/3/207 in claim # 2007/0167

<sup>5</sup> This being strong evidence (along with the other facts in his affidavit) of his possession in that 1<sup>st</sup> matter

para. 8 above that Sotchson claimed. His relief was to alleviate acts of trespass, which did not necessarily require a finding of proprietorship. Mere possession on the part of Sotchson would have sufficed on the facts of the 1<sup>st</sup> case to support Judgment in favour of Sotchson.

- [24] The Court in my view in the 1<sup>st</sup> case (i) made a finding that Vernon had committed acts of trespass as alleged by Sotchson and in arriving at this conclusion may have relied on a finding of Sotchson's registered proprietorship (although certainly would have relied upon his other affidavit evidence covering period of his return to Antigua in 1988 and onwards) and (ii) may have considered the question of Vernon's equitable interest (if any) based on the brief reference by Sotchson in his Statement of Case, to Vernon's minimal financial contribution (Unknown to Sotchson) to the house. The 1<sup>st</sup> Judgment however, could have been made without that finding and consideration, respectively.

#### ISSUES – 2<sup>nd</sup> CASE

- [25] Vernon Tonge, by fixed date claim form 2007/0167 claims several items of relief<sup>1</sup> all of which touch upon the facts and issues referred to above and dealt with in the 1<sup>st</sup> case of 588/05. The substance of a declaration that Vernon has acquired and is entitled to an overriding interest and/or other equitable interest<sup>2</sup> and the other declarations of interest claimed by Vernon Tonge may not only be subsumed under the determination of the Court in the 1<sup>st</sup> case, but certainly, even if they are not subsumed under the first determination, are issues Vernon could have raised and should have raised in the 1<sup>st</sup> action:

1. *A Declaration that the Claimant has acquired and is entitled to an overriding interest and/or equitable interest and/or legal interest in the parcel of land with property thereon situate at Bolans Village, St. Mary's Parish, Antigua described as Registration Section: South West; Block: 53 1386A; Parcel: 205 held under proprietorship of the Defendant;*
- 2.. *A Declaration that the aforesaid parcel of land with property thereon situate at Bolans Village, St. Mary's Parish, Antigua described as Registration Section: South West; Block: 53 1386A; Parcel: 205 is held by the Defendant in trust for the*

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<sup>1</sup> This is the 2<sup>nd</sup> matter in which Vernon is now the Claimant

<sup>2</sup> See also para. 27 below

*Claimant and subject to the overriding interest and/or equitable interest and/or legal interest of the Claimant as so acquired and/or entitled thereto.*

3. *An order declaring the consequential share and entitlement of the Claimant in the parcel of land with property thereon situate at Bolans Village, St. Mary's Parish, Antigua described as Registration Section: South West; Block: 53 1386A; Parcel 205;*
4. *An injunction preventing the Defendant from charging, transferring or entering into any dealings with the title to the aforesaid parcel of land and or carrying out any construction, alteration or any works thereon until the determination of this Court by this Honourable Court;*
5. *Damages for any injury or loss occasioned by the Defendant to the interest of the Claimant in the said parcel of land.*
6. *Interest pursuant to Statute.*
7. *Costs.*
8. *Such further or other relief as this Honourable Court may deem fit.*

[26] What other issues arise in this 2nd matter?

[27] Counsel for Vernon submits<sup>1</sup> that Sotchson holds registered proprietorship under S.23 of the Registered Land Act Cap. 374, and as such is deemed to be subject to such overriding liabilities, rights and interests as declared by Section 28 of the said Act.

[28] To determine whether Sotchson holds subject to one of the *interests* claimed by Vernon in his fixed date claim form<sup>2</sup> one need only peruse the said section.

[29] For my part I see no *interest* referred to in S.28 (a) - (h) which is claimed by or made out by the facts alleged in the pleadings(or affidavits) in the 2<sup>nd</sup> case by Vernon. Further, Vernon in the 2<sup>nd</sup> case 2007/0167 has not conceded any interest in the property to Sotchson and is claiming his interest in the property without expressly recognizing any interest by Sotchson.

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<sup>1</sup> See written submissions

<sup>2</sup> Claim #0167/2007

[30] In any event, such 'interests' appear to me to be 'interests' that could have been claimed in the 1<sup>st</sup> case<sup>1</sup>. The affidavits in support of the Fixed Date Claim Forms in 588/2005 and 0167/2007 by Sotchson and Vernon respectively, are similar in several respects and cover much common background to the dispute.

[31] Counsel for Vernon argues in his written submissions that the 1<sup>st</sup> Court was wrong to have given judgment in favour of Sotchson; service not having been proven, thereby raising the issue of whether (i) the said service was bad and (ii) whether this apparent defect in the 1<sup>st</sup> proceedings is a proper consideration for a court of concurrent jurisdiction in determining the issue estoppel and/or abuse of process argument with respect to the recent action.

## **LAW**

### **Determination on its merits:**

[32] The Order made in the 1<sup>st</sup> case was made pursuant to Part 27(2) (3)<sup>2</sup>, i.e. where a Defendant does not appear the judge may proceed in his absence. Judgment for the Claimant is not automatic in these circumstances, but rather he must still prove his case to the satisfaction of the Court<sup>3</sup>. It is in essence an ex-parte trial on the merits of the claim.

[33] The Claimant having proven his case is entitled to such relief as he claims. The fact that the Claim is not responded to, does not render the judicial decision any less a decision on its merits.

### **Issue estoppel**

[34] There is no better place, I think, to start than by the observation by Diplock L.J in relation to issue estoppel:<sup>4</sup>

“That doctrine so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party an assertion, whether of facts or of the legal consequences of facts, the correctness of which is an essential element in his

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<sup>1</sup> See LAW below

<sup>2</sup> Eastern Caribbean Supreme Court CPR 2000

<sup>3</sup> *Duncan Finch v Denfield Christopher and Samuel Payne Claim #ANUHCV1998/0259*

<sup>4</sup> *Mills v Cooper* [1967] 2 Q.B. 459 (468-469)



cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.”

- [35] The law recognizes the distinction between Cause of Action estoppel and issue estoppel. Cause of Action estoppel: *“Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged such as to justify setting aside the earlier judgment”*.<sup>1</sup>
- [36] In this matter the Defendant in the 2<sup>nd</sup> case submits that Issue Estoppel is applicable to these circumstances and that further or alternatively the 2<sup>nd</sup> action is an abuse of process.
- [37] The relief asked for by the Claimant, Sotchson in the first matter reflects incidents of both proprietorship and mere possession. The Court, in the first case 588/2005, need not have addressed the issue of Proprietorship at all; mere possession alone being necessary to found Sotchson’s right to bring an action in trespass.
- [38] The Claim and Relief thereto by Vernon Tonge in the 2<sup>nd</sup> case 2007/0167, is an express claim for the determination of interest in Registered Land. Whereas some underlying issues may be common to both claims, the Claimant/Applicant Vernon Tonge in this matter 2007/0167 certainly has raised issues that should have and could have properly been dealt with in the 1<sup>st</sup> case. (see also the similarity in the facts alleged in the respective affidavits relied on in the two matters)
- [39] The issues to be determined in the 2<sup>nd</sup> case were not for the most part issues, or founded on facts, that were determined in the 1<sup>st</sup> case sufficient to support an application to strike out the 2<sup>nd</sup> claim. This determination is difficult to make without an improper speculation as to what facts the court relied upon in the 1<sup>st</sup> case.

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<sup>1</sup> Arnold and Others v National Westminster Bank PLC [1991] 2 A.C. 104 (D-E)

- [40] It is clear to me however, that the effect of the Orders in the 1<sup>st</sup> case are such so as to extinguish or diminish the rights and benefits to which Vernon Tonge may otherwise be entitled under the relief he seeks in the 2<sup>nd</sup> matter. This raises the finding that the issues in the 2<sup>nd</sup> matter are issues that should have been or could have been properly raised in the 1<sup>st</sup> action.
- [41] The effect of a judicial determination on an entire cause of action such as the 1<sup>st</sup> case, "*is as if the Court had made declaration on each issue fundamental to the ultimate decision.*"<sup>1</sup>
- [42] The fundamental issues in the 2<sup>nd</sup> action 2007/0167 include those argued by counsel for Sotchson as being the issues in the 1<sup>st</sup> action; (i) whether Sotchson had an interest in the subject parcel of land and building thereupon (ii) what interest did he have and (iii) the extent of his interest as against Vernon.
- [43] Looking at Vernon Tonge action 2007/0167, more specifically his Claim; his interlocutory application filed March 16, 2007 and his relief claimed thereto along with the grounds of the Application,<sup>2</sup> I acknowledge that the ambit of the arguments and facts now known to the Court through case 2007/0167 were not canvassed before the Court in the 1<sup>st</sup> action. **However**, they are facts that appear to have been known to Vernon Tonge at the time the 1<sup>st</sup> case was filed.
- [44] The question for this Court is; shall Vernon be permitted to pursue this 2<sup>nd</sup> action? Judge Bowsher Q.C in Times Group v Comp. 2000 Distribution Ltd [2002] EWHC 126 a QBD (Technology and Construction Court) matter, in reviewing the case of Gleeson v J Wippell & Co. Ltd [1977] 3 All ER 54 at 60<sup>3</sup>; quoted Robert Megarry V-C "*second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the Public.*"

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<sup>1</sup> Shoe Machinery Co. v Cutlan [1896] 1 Ch. 667

<sup>2</sup> See Order of the Court dated 13<sup>th</sup> January 2006

<sup>3</sup> See also [1977] 1 WLR 510 (515)

- [45] And further, in the decision by the Board<sup>1</sup> an expanded doctrine was recognized “... *there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matter which could and therefore should have been litigated in earlier proceedings.*”
- [46] Counsel for Sotchson submits, not only have the same issues raised in the 2nd case 2007/0167 been litigated in the 1<sup>st</sup> action 588/05, but that alternatively, if any issue raised by this recent action was not already litigated in the manner prescribed by the law, it is an issue which properly could have and should have been raised in the 1<sup>st</sup> case 588/05 and therefore in either case Vernon is estopped from raising them in further action.
- [47] Further support for the existence of the expanded doctrine of issue estoppel, which I find applies equally<sup>2</sup> to cause of action estoppel, is found in the Nat West Bank case<sup>3</sup> per Lord Keith of Kinkel: “*Cause of Action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negating the existence of a cause of action.*”
- [48] I am cognizant of the caution to which a court must attach to the application of the wider ambit of the issue estoppel doctrine. Perhaps Lord Wilberforce sounded this caution best in the case of Brisbane City Council v AG for Queensland<sup>4</sup>: “*and it ought only to be applied when the facts are such as to amount to an abuse of process otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.*”
- [49] However, “*when abuse is revealed the Court has a duty not a discretion, to dismiss the action*<sup>5</sup>.”

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<sup>1</sup> Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] A.C. 581

<sup>2</sup> Arnold v National Westminster Bank PLC H.L 1991 2 AC 104 F. See also Fidelitas Shipping Co Ltd. v V/O ExportChLeb [1966] 1 QB 630, 642 L. Diplock

<sup>3</sup> See Waning (Mo 2) [1948] Ch. 221; Arnold v Nat West Bank PLC H.L 1991 2 AC

<sup>4</sup> [1979] AC 411 (425); See also Yat Tung Investments Co Ltd v Dao Heng Bank Ltd AC 581 (590) per Lord Kilbrandon

<sup>5</sup> A.C. 529; [1981] 3 W.L.R. 906; [1981] 3 All ER 727 (729)

### Abuse of process

- [50] Vernon has provided as a ground for his application in the 2<sup>nd</sup> case Claim #2007/0167 what cumulatively amount to an allegation that the Court was wrong in finding that he had been lawfully served with the prior proceedings and the Court was wrong to have proceeded to and given judgment in favour of Sotchson.
- [51] The significance of this touches on the question of another form of abuse of process. In the Fidelitas Shipping Company case<sup>1</sup> Lord Diplock LJ put it like this: *"Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce evidence directed to showing that the issue was wrongly determined. It operates in subsequent suits between the same parties in which the same issue arises."*
- [52] There is a public interest policy underlying the doctrine: *"that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole"*<sup>2</sup>.

### EVIDENCE OF SERVICE

- [53] Sotchson has produced in the 1<sup>st</sup> case, two (2) affidavits of service. One, of the service of the Fixed Date Claim Form with the Certificate of Truth endorsed thereon together with the Affidavit in Support of the said Fixed Date Claim Form and secondly, of the service of the Court Order/Judgment<sup>3</sup>. Vernon claims not to have been lawfully served with either process. Vernon must be a particularly unlucky man not to have had the process at least come to his knowledge in the circumstances described in the respective affidavits<sup>4</sup>.

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<sup>1</sup> [1966] 1 QB 630, 642

<sup>2</sup> Time Group Ltd case (ante) per Judge Bowsher Q.C. quoting Lord Bingham of Cornhill in Johnson v Gore Wood & Co (a firm) [2001] 1 All ER 481 (498), [2002] 2 AC 1 [30-31]

<sup>3</sup> Order/Judgment dated the 13<sup>th</sup> day of January, 2006

<sup>4</sup> See Affidavits of 21<sup>st</sup> day of March, 2006; 11<sup>th</sup> day of January, 2006 in matter 588/05

- [54] In the instant case Vernon has merely made the bald statement that he was not served or properly served in the 1<sup>st</sup> case. He has not provided the Court with any particulars of default, but left it to the Court to work out for itself.
- [55] Looking at Part 5 of the CPR 2000, more particularly rule 5:3 rule 5:5 and rule 5:13, the proof of service of Lovelace Christopher, Bailiff, appears to fall short in that (i) pursuant to 5.5 (2) Sotchson fails to file the additional affidavit referred to therein. (ii) the precise place or address at which it was served does not appear to have been provided in the affidavit of service.
- [56] Further, the service of the Court Order/Judgment of the 13<sup>th</sup> day of January, 2006 was permitted by the Court Order of 19<sup>th</sup> day of January 2006 to be served on Vernon out of jurisdiction pursuant to Part 7.8 (1) (a).
- [57] The said Order required service “to be made through the Agent of the Claimant, Donald D. Du Boulay, Esq. Attorney-at-law” of New York.
- [58] The notarized document sworn by the process server Luis Agostina evidencing service of the Antigua High Court Order on Vernon, does not disclose whether service was effected through Donald Du Boulay, Esq. Attorney at Law as required by the Order permitting service out of the jurisdiction.
- [59] This opens up the consideration that either or both instances of service were bad<sup>1</sup>.
- [60] If the prior judgment is wrong in law then this Court a Court of concurrent jurisdiction has no authority to make that determination and vary the said Order. This is a matter for appeal<sup>2</sup>.

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<sup>1</sup> No application was made; for the service to be dispensed with pursuant to Part 6.8 of CPR 2000 or a alternative or specified method of service be adopted, pursuant to Part 5.13 or 5.14 respectively.

<sup>2</sup> A trial and Judgment thereto pursuant to 27(2)(3) is not a summary or default Judgment so cannot be “Set Aside” under the CPR 2000. It must be appealed against.

- [61] To what extent, if any, can a Court of concurrent jurisdiction take into account a decision bad in law in its deliberations with respect to an application to strike out a subsequent claim on the basis of issue estoppel, and/or Abuse of Process?
- [62] Lord Diplock L.J in *Mills v Cooper* [1967] 2 QB 459 (468-469) in stating the nature of the Doctrine of Issue estoppel went on to say that *"if an assertion was an essential element in the previous cause of Action or Defence...between the same parties as their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him"* the Doctrine will apply as a bar to further proceedings.
- [63] The existence of an exception to the application of issue estoppel raised in the Mills v Cooper case above finds support, and in my judgment is settled law, in the Nat West case. Lord Keith of Kinkel very simply advised at pp 109 A-B of the **Nat West** Case. *'In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings'*.
- [64] Lord Keith of Kinkel in the same case at pp. 109 F identifies another exception to the application of the doctrine of issue estoppel, that is, *"If a Judge has made a mistake, perhaps a very egregious mistake .... and a later judgment of a higher Court overrules his decision in another case, do considerations of justice require that the party who suffered from the mistake should be shut out, when the same issue arises in later proceedings with a different subject matter from reopening that issue"?* (emphasis mine). In the **Nat West** case that question was answered in the negative thereby determining that circumstance to warrant the non application of issue estoppel in that case.

- [65] In the 2<sup>nd</sup> case before me, in my Judgment, the Issues arising in the 2<sup>nd</sup> case in part arose and was determined in the 1<sup>st</sup> case **but were** entirely issues that could have and should have been raised in the 1<sup>st</sup> case 588/2005.
- [66] I look to see what indications of special circumstances exist for the non application of the estoppel Doctrine. A higher Court has not determined the 'service' of the process in the 1<sup>st</sup> case to be bad in law; no further material relevant to a correct determination of a point involved in the earlier proceedings could not by reasonable diligence have been adduced in those proceedings are put forward in the 2<sup>nd</sup> case and the Judgment in the 1<sup>st</sup> case was not in the nature of a default Judgment but a Judgment on the merits. These are my findings.
- [67] I maintain that the service (and evidence of it) of the process even if bad in law, suggests to me that it would have brought the first proceedings and the judgment from it, to the knowledge of the Defendant (1<sup>st</sup> case) Vernon Tonge also Claimant/Applicant in the 2<sup>nd</sup> case. Vernon Tonge delayed before approaching the Court for relief.
- [68] I accept the evidence of service and date of the Court Order. I accept the previous Judgment of the Court dated 13<sup>th</sup>. January 2006. Vernon then, commenced this recent action of 2007 over one year later. Regrettably the Claimant in this matter has not provided the Court any additional authorities.
- [69] I do, however, glean from the submissions that Vernon is suggesting that this case is an exceptional one, and that even if I was to find the doctrine of issue estoppel – whether in its narrow or wider appellation – applicable here or that there is an abuse of process, I should, in the interest of justice stay my hand.
- [70] In *Henderson v Henderson*<sup>1</sup> Wigram V.C. suggested that *"all estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue*

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<sup>11</sup> Reviewed and quoted by Lord Keith of Kinkel in *Arnold v National Westminster Bank PLC* H.L. 1991 2 A.C. at pp. 107

*estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."*

[71] For the Courts part I am unable to conclude that Vernon had not received either of the documents served on him.

[72] Even if Vernon was not served, improperly served or proof of service is inadequate, do I permit the latter action to proceed? Beyond the question of service, no issue/argument has been advanced by Vernon in the recent case that I can find to be an issue/argument that could not properly have been dealt with in the 1st action.

[73] I am unable to discern an '*exceptional circumstance*' on which this Court, a Court of concurrent jurisdiction, can rely to disapply the effects of the Doctrine of issue estoppel and the abuse of process.

[74] Vernon in his present action is merely asserting a different version of the facts with a view to establishing a proprietary interest in the subject property. There are no facts raised by him that were not known to him at the time of the first action. The law suggests that his failure to have raised a matter in the earlier action, as a result of his negligence inadvertence or accident does not excuse him. Vernon recent action is based on his version of facts in existence<sup>1</sup> before the filing of the 1<sup>st</sup> action.

[75] Vernon has merely raised a defence, holds it out before the Court and asks that the matter be relitigated notwithstanding his unjustifiable failure to have defended himself in the previous proceedings before the Court, or to litigate the issues he now raises in that 1<sup>st</sup> action.

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<sup>1</sup> See his Statement of Case in ANUHCV 2007/0167



**ORDER**

- [76] In the circumstances the claim for the Claimant in ANUHCV 2007/0167 is struck out with costs to the Defendant on the Prescribed Costs scale, if not agreed within 21 days of this Order.
- [77] That the injunction granted the Claimant dated 21<sup>st</sup> day of March 2007 is forthwith discharged.

David C. Harris  
**Judge**