IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV2015/0184

BETWEEN:

JOCELYN KIRTON
JUNIUS EMMANUEL MORRAIN

Claimants

and

LOUISA LUCAS
ALBERT LUCAS

Defendants

Appearances:
Ms. Anyika Johnson for the Claimants
Mr. Michael Lindo for the Defendants

2015: April 16
June 30

DECISION

[1] **AZIZ, J.:** This matter was initiated by way of notice of application dated the 2nd day of May 2007, whereby the claimants sought an injunction to restrain the defendant (Louisa Lucas) and her servants and/or agents from obstructing the allowed road[1] by placing materials and signs in the path that enables the claimants access to their property, which is located at La Borie.

[2] The 1st named claimant, by virtue of an indenture dated the 15th June 1971, between Rosina Morrain, Lennox Errol Morrain and Junius Emmanuel Morrain, became owner of the portion of land that is in boundary with the allowed road, the subject of the dispute.

[1] See footnote # 4

[3] The 1st named claimant in or about February 1999, having received permission from the 2nd named claimant, commenced occupation of the said land. Access to the land has always been by way of the allowed road.

[4] It was alleged that the defendant had never asserted that the disputed allowed road was her private property. In April of 2007, that allowed road was blocked with materials being brought for the use of the defendant. That obstruction caused the police to get involved, and as a result, the 1st named claimant alleged that she suffered loss and unnecessary inconvenience.

[5] In support of the application was an affidavit of Jocelyn Kirton dated the 30th April 2007 and filed on 3rd May 2007. The affidavit had several photographs attached and marked "JK1 – JK8". These photographs showed the various obstructions of the allowed road referred to.

[6] There was also an affidavit from Julien Kirton[2] in support of the injunction, again deposing to the fact that the defendant had put up signs outside of her property and close to the allowed road, which stated "**Keep Out**" and "**Private Property".**

[7] On the 3rd May 2007, Mr. Justice Benjamin, having heard Counsel for the applicants and considering the affidavits referred to above, granted the application for an injunction and ordered the defendants to remove materials and signs placed across the allowed road, leading to the parcel of land of the claimants and the house thereon situate at La Borie. The defendant was also restrained from erecting, placing or allowing to be erected or placed on the said allowed road, anything restricting, preventing or otherwise interfering with the claimant's access to their house until 11th May 2007 or until further order.

[8] A claim form and a statement of claim [3] were filed, detailing various obstructions to the allowed road and interferences with using the allowed road. The claim form sought:

[2] Dated the 30th April 2007, Filed on May 3rd 2007 at 9.05 a.m.
[3] Dated and Filed on the 7th May 2007

1. A declaration that the defendant had no legal or other right to block the claimants; access over and along an allowed road[4], running between the claimants property and the defendants' property at La Borie;

2. An injunction to restrain the defendant her servants and/or agents from erecting, placing or allowing to be placed on the said road anything restricting, preventing or otherwise interfering with the applicants' access to and from their home in La Borie;

3. A mandatory injunction to compel the defendant her servants and/or agents to remove forthwith all materials, signs and other instruments obstructing the allowed road;

4. Damages for trespass;

5. General damages;

6. Further and other relief that the court thinks fit and costs.

[9] A defence[5] from the 1st named defendant set out that she had been living on the property with her parents in their home in La Borie until a neighbor Mr. Lennox Morrain began living next door on a lot of land. The defendant set out the use of the allowed road by herself and Mr. Morrain.

[10] In 2005, the 1st named defendant noticed a mud driveway from their lands to the lands of Mr. Morrain, and also noticed concrete laid at the entrance, but placed on her parents land. Also deposed was the fact that from that time trucks would use the road to go to Jocelyn Kirton's house.

[4] The allowed road was defined as an "8 ft Allowed Road". Indenture dated 15th June 1971 recorded in the Deeds and Lands Registry of Grenada in Liber S11 at page 121
[5] Dated and Filed on the 10th May 2007

[11] It would seem from 2006, matters escalated and got worse to the point where the entrance to a churchyard was blocked, and allegations began about which party was blocking the allowed road, culminating allegedly in physical violence.

[12] A defence was dated on the 6th June 2007 and filed on the 21st June 2007 and in a nutshell the defendant[6] denied that any allowed road existed as alleged or at all on which the claimants are entitled to rely. The defendant indicated that they "had been in occupation as a licensee of the disputed land for some twenty years and more", next preceding the commencement of this action and therefore denies that the claimants or their predecessor in title or any of them have at any time used the said way referred to in the statement of claim as of right or at all except with permission of the aforesaid Geraldine Lucas or Lewis Lucas as mere licensees of the aforesaid owners.

[13] The defendants joined issue with the claimants in their statement of claim, and the defendant denied each and every allegation.

[14] There was an order[7] injuncting the 1st named defendant by herself, her servants and/or agents from erecting or placing or allowing to be erected or placed on the said allowed road anything restricting, preventing or otherwise interfering with the claimants' access to their house on the said parcel of land.

[15] The injunction was to continue until hearing and determination of the substantive claim.

[16] On the 7th May 2000, there was an application by the 1st named defendant for Geraldine Lucas Administratrix of the estate of Lewis Lucas to be joined as a defendant to this suit. By further order[8] of Justice Cumberbatch, leave was granted to the defendants to join Albert Lucas as a party to the proceedings. It must be noted that there was an affidavit from Louisa Lucas, requesting that Geraldine Lucas be joined as a party. Exhibited to that affidavit was a signed

[6] At the time of filing this defence the only defendant was Louisa Lucas
[7] Dated the 14th My 2007, Entered and Filed on the 30th July 2007
[8] Dated the 31st October 2008, Entered and Filed on 3rd November 2008, on behalf of both defendants Louisa Lucas and Albert Lucas

notice from Geraldine Lucas consenting to be joined as a defendant in this suit. This was signed and dated the 6th May 2008.

Mediation

[17] The parties agreed in an attempt to resolve matters to engage in the mediation process. The matter was therefore referred to mediation on the 3rd November 2008[9].

[18] An amended defence[10] set out that the lands that the 1st named defendant referred to, and resides belongs to the estate of the late Lewis Lucas, father of the defendants. The defence set out where the boundaries were established since 1946, and that there was no right of way over the lands presently forming his estate on which the claimants were entitled to rely. The defendants denied that the said conveyance entitling Lewis Lucas or his estate nor various plans attached such as "LG3" demonstrates any right of way over lands presently forming the estate on which the claimants are entitled to rely. The defendants furthermore denied that "the property was to the right-hand side of the allowed road. The defendants never aver that access which commences at the culmination of the allowed road and which runs through the property of the late Lewis Lucas, though joined to the allowed road was created in 1980's by the late Lewis Lucas aforesaid 2nd named defendant for the convenience of the family members and invitees to the property exclusively for their access to and from their home and church located on the aforesaid property of Lewis Lucas.[11]

[19] The amended defence also deposed that the 2nd named defendant has gotten into the estate and is in the process of administering the same and as administrator has complete and absolute control of the same. Furthermore that the 1st named defendant's authority to block the property belonging to the

[9] As per the Mediation Referral Order of Justice Francis Cumberbatch
[10] Dated the 11th November 2008 and filed on the 12th November 2008
[11] See Amended Defence para. 3 (vii) filed on 12th November 2008

estate of Lewis Lucas was derived from the 2nd named defendant and Geraldine Lucas, deceased.

[20] There were matters deposed to about Geraldine Lucas granting permission for the 2nd named claimant to use the access road on foot for 2 months (presumably after hurricane Ivan in 2004), this permission was subsequently revoked after allegations were made of proprietary interference.

[21] There was a counterclaim for a declaration that the claimants were not entitled to pass over or enter the lands belonging to the estate of Lewis Lucas, and an injunction sought to restrain the claimants whether by themselves, their servants and/or agents from entering, passing over or remaining on the lands of the estate of Lewis Lucas.

[22] There was a further declaration sought that the deed dated the 15th June 1971 between Rosina Morrain and Junius Emmanuel Morrain is void to the extent that it purports to establish a right of way over lands of Lewis Lucas in favour of the claimants or anyone claiming through them. Also sought was an order setting aside the conveyance purporting to grant a right of way over lands belonging to the estate of Lewis Lucas.

[23] Attached to the amended defence was a certificate of truth and statement of consent dated the 31st October 2008 and signed by Albert Lucas.

[24] The mediation seemed to bear fruit, as there was borne a mediation agreement in this suit 0184/2007, after successful mediation sessions having taken place on the 4th February 2009 and 5th May 2009.

[25] The mediation agreement set out the following agreed terms:

i. Both parties have access over and along the existing road, and subject matter of the dispute;

ii. *The claimants agree to widen the existing road to a minimum of 8 feet, such widening to take place within 9 months on the claimants property and at their (the claimants) expense;*

iii. *Neither party is to obstruct the other in the use and enjoyment in the existing and widened road.*

[26] The mediation agreement was signed by all parties involved and endorsed by Justice Mohammed with the date 17/1/13.

[27] As a natural consequence of the mediation agreement being endorsed, a formal order subsequent to mediation was prepared. Counsel appeared along with the 2nd named defendant on the date when Justice Cumberbatch formalized the mediation agreement and ordered that:

> *"All further proceedings in this matter be stayed except for the purpose of carrying into effect the terms of the said agreement.*
> *For that purpose the parties have permission to apply to the Court".*

The Current Application

[28] There were submissions on behalf of the claimants which amounted to this; that what the defendants were seeking, amounted to an abuse of process and/or an attempt to re-litigate the matter after a mediation agreement was reached, and formalized by the Court.

[29] Mr. Lindo, on behalf of the defendants submitted that there was no basis in law for the respondents' contention that there is an abuse of process. Mr. Lindo further submitted that there is no re-litigation and argued that issues raised in their current application were not decided at a previous hearing, as the respondents say in paragraphs 4, 5 and 6 of their supplemental affidavit of Jocelyn Kirton.

[30] Counsel Ms. Johnson alleged that there was an attempt to re-litigate the matter and/or the application if followed would lead to an abuse of process.

[31] Mr. Lindo firmly stated that the real issue before the court was the fact that there was no widening of the road, as required by the mediation agreement and order[12].

[32] The court was referred to the case of **(1) Clarvis Joseph (2) Esworth Martin, (3) Public Utilities Company and Antigua Power Company Limited**,[13] which Mr. Lindo submitted, gave guidance on how to look at cases in which abuse of process was alleged.

[33] This case referred to above, (Claim 2014/0016) was one in which the applicants had applied for leave to appeal an order of the Learned Judge by which he refused to stay a claim in 2013, commenced by the respondent, against the applicants and 6 other parties. Without delving into too much detail, the matter had been fought all the way to the Privy Council. The Privy Council remitted the assessment of compensation for breach of contract back to the High Court, as well as an issue on accepted repudiation. In the 2013 claim, the respondent had sought damages based on the commission of various economic torts of conspiracy to breach a contract and interference with the respondent's contract, with the third applicant.

[34] The applicants applied to stay the 2013 claim on the basis that the respondent, rather than pursue the assessment currently before the High Court or the determination of the question of accepted repudiation, filed the 2013 claim which was based on the very same facts and claimed damages that had already been claimed.

[35] The applicants in that case submitted that by the filing of the 2013 claim, the respondent was seeking to re-litigate those issues which had already been

[12] See paragraph 25 ii above
[13] CA 2014/0016

finally litigated before the Privy Council and in respect of which, the assessment of damages, would have brought the matter to conclusion.

[36] The Learned Judge in that case refused the application for a stay on the basis that the issues raised by the applicant in the stay application would have formed the basis of an application to strike out for res judicata or an abuse of process.

[37] It is important to note, that in the case referred to by Mr. Lindo, the Learned Judge took the view that the application was not one to strike out the 2013 claim because the applicants appreciated that no grounds existed on the facts of the case for striking out the claim for res judicata or abuse of process, and if the applicants were not persuaded that the matters being litigated indeed formed the subject of the earlier litigation, then no grounds existed for staying the claim. The applicants had therefore appealed the Learned Judge's decision.

[38] It was held that:

> "*Had an application for a stay been advanced on the basis that the alternative claims should have been brought as part of the 2007 proceedings then it would have been necessary to place considerable material before the judge so that a careful analysis of the claims could be carried out. This however was not done".*

[39] It was further held as Mr. Lindo submitted that:

> "*It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.* ***That is to adopt too dogmatic an approach to what should have been a broad, merits based judgment which takes into account all facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process which could have been raised before.*** *As one cannot comprehensively list*

all forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not"

[40] I have formed the view that to be able to come to a determination on this particular matter, this Court ought to have before it all of the information, and submissions that were heard (on this claim 184 of 2007), when both Mr. Ferguson and Ms. Ettienne appeared on Monday the 28th June 2012.

[41] It was submitted and rightly so by Mr. Lindo, that the onus of proving abuse of process lies on the respondent. This was quoted from a passage[14] which says: "*The onus is on those alleging abuse; and the absence of any hearing on the merits tends to favour allowing re-litigation.*[15]

[42] It must also be taken into account that the concept of abuse of the court's process in the form of re-litigation is wider than the principles of res judicata or issue estoppel. It covers re-litigation where the party failed to bring his whole case forward in one go and wishes to supplement it. Importantly this Court makes it clear that it is not proper or acceptable to seek to re-litigate any issue which has been raised but not fully dealt with, having been struck out on a previous occasion, on the grounds of delay or abuse. The court must and will take into account the overriding objectives of the Civil Procedure Rules (CPR 2000). Parties ought to bear in mind that it has been held that the public interest in the conduct of litigation extends not only to finality and to preventing a party from being vexed twice but also to efficiency and economy in litigation.

[43] Ms. Johnson's submissions amounted to this, that all matters had been dealt with and there was an order made, and now the applicants have attempted once again to have matters re-litigated and this ought not to be allowed.

[44] The court looked at the various endorsements on file, whilst it was submitted by Mr. Lindo that the notes of the clerk are and did not indicate that there had

[14] The Caribbean Civil Court Practice, 1st Edition 2008, Note 23.27, Page 235
[15] Bradford and Bingley Building Society v Seddon [1999] 4 All ER 217

been a substantive hearing. His submission amounted to the fact that there was no formal order perfected.

[45] Mr. Lindo indicated that his application was compliant with the court order. Mr. Lindo submitted that he relied on the affidavit of Albert Lucas indicating that he was at the previous hearing, and no substantive hearing of the issues were raised.

[46] Counsel, Mr. Lindo, summarized his position and set out his stall as follows:

a. The order after mediation provided for "liberty to apply"
b. The Court was referred to exhibit "AL2A"
c. That this Court has jurisdiction to deal with the matter, that there is no evidence of a substantive hearing
d. A broad-based approach was recommended following the authority of **(1) Clarvis Joseph (2) Esworth Martin (3) Public Utilities Authority and Antigua Power Company**[16]
e. As far as jurisdiction was concerned this Court could deal with the matter under the "liberty to apply" term in the order.

[47] Mr. Lindo submits that in 2014, the respondents sought relief and were granted an order. The respondents, he says, relied on the same provisions to bring their application.

[48] Mr. Lindo further submitted that applying the overriding objectives of the CPR 2000 and considering the principles of fairness with the time and expense incurred, there is an opportunity within the liberty to apply provision to hear this matter and make a determination. He submitted that the overriding objective is to deal with cases justly. Mr. Lindo pressed that this Court had jurisdiction to deal with this matter.

[16] Court of Appeal Decision from Antigua and Barbuda, ANUHCVAP2014/0016

[49] Counsel, Ms. Johnson, submitted that what Mr. Lindo was seeking to do was set aside the mediation agreement. The court was referred to CPR 2000, Rule 62.5, which deals with the time for filing an appeal.

[50] Ms. Johnson also submitted that on the 26th August 2014 an application was filed for the purposes of committal through the CPR 2000. The application was different because it dealt with the liberty of persons.

[51] Ms. Johnson referred the court to CPR 2000, Part 53.3[17], and says that the overriding objective is the key consideration. Ms. Johnson also submitted that there must be consistency when orders have been made and the parties are entitled to the fruits of the court. She submits that the court orders must stand. There is no doubt and Mr. Lindo accepts all parties must comply with court orders made.

[52] Ms. Johnson submits that if the principles of consistency were applied then the application must be set aside. The submission goes on to the effect that the order entered in May 2009 was never challenged, and Counsel submits that the mediation agreement order could have been set aside within 42 days or appealed as per the CPR 2000.

[53] Counsel, Ms. Johnson, forcefully and robustly submitted that the order must stand supported by the overriding objectives of the CPR 2000 and also by the principle of fairness. Ms. Johnson states that there was a similar agreement to what was made in 2012, heard by Madame Justice Vikki Ann Ellis. The matter was heard on the merits and costs were awarded. Furthermore there was a hearing in 2009, even if the order was not formalized; the issues could have been raised at that substantive hearing. This was a clear abuse of process and the court does not have jurisdiction to re-open the order. Ms. Johnson contends that an order has been made in respect of the current application, and now the only route open to the applicants is by way of appeal or to bring a new claim.

[17] CPR 2000, Part 53.3 deals with When committal order or sequestration order may be made

[54] Ms. Johnson asked that the application be dismissed and costs be awarded to the claimants.

[55] Mr. Lindo, in reply, indicated that the application ought to be considered on the merits and it would be useful to see if there was a hearing where the issues were raised. He maintains that there was no hearing on the merits.

[56] Both parties agreed that it would be useful to find the notes of Her Ladyship Madame Justice Vicki Ann Ellis to see what happened at the previous hearing and whether there was a substantive hearing on the merits.

The Hearing in 2012

[57] I have examined the record of proceedings that took place on Monday 28th June 2012 in this matter (claim 184 of 2007). As indicated earlier, on that day both Ms. Ettienne for the defendants and Mr. Ferguson appeared along with Ms. Johnson for the claimant, Jocelyn Kirton.

[58] The application dated the 18th March 2011 was supported by an affidavit of Albert Lucas which was also filed on the 18th March 2011. On the 28th June 2012 the hearing of the application was for the words "liberty to apply" to be inserted in the consent order, dated 5th March 2009, made between the parties; and also requested were suitable directions for the purpose of working out the claimants' obligations under the aforesaid consent order.

[59] It became clear from the proceedings on that date that the court was of the view that there was no consent order, but Ms. Ettienne submitted more than once that the mediation agreement was the consent order. The Learned Judge indicated that a mediation agreement was not an order of the court as it had not been formalized. The Learned Judge made it clear that there was no consent order filed by the court, signed by the Registrar, or approved by the Judge. Despite the court's observations, Ms. Ettienne continued to submit that: "***the order in question is, the agreement in question is actually the***

mediation agreement, which might have been an oversight to be a consent order. But this is the actual order that determines the matter that was before the court."

[60] Mr. Ferguson explained to the court that once the agreement is signed, then the mediation centre sends the agreement to the court and they (the court) return the order. This practice was clearly agreed with by Ms. Ettienne. The Learned Judge then enquired and postulated the process that is usually to be followed.[18]

[61] Mr. Ferguson submitted, after being questioned by the Learned Judge about not coming back to court to have mediation agreements formalized, that there is an order but the parties only come back to the court, the mediation centre sends the order to the Registry and the Judge approves it and sends it back out as an order. The Learned Judge formed the view that this could not be right, and indicated that parties could not assume that the court would say that this was a proper disposal of the matter. Ms. Ettienne then raised the application before the court, and the Learned Judge indicated the problem with the application.

[62] The application being referred to was the "Liberty to apply" and it was made clear by the court that[19]

"**The Court**:	***The application is problematic now having said that you do not need to apply to have liberty to apply … in a consent order, that is an implication.***
Ms. Ettienne:	***I was going to --***
The Court:	***There is no question that that is what the law says --***

[18] See Notes of Proceedings on the 28th June 2012, Page 6, Lines 3-9.
[19] Notes of Proceedings, Page 7 lines13

Ms. Ettienne: *Yes.*

The Court: *-- it is an implication but it will only be to apply to have the terms of the order effective, it is not going to happen for you to go ahead and change what was in the order.*

Ms. Ettienne: *I understand that, My Lady --*

The Court: *So if it was 8 feet that you agreed to its 8 feet that I am going to effect; nothing more than 8 feet.*

Ms. Ettienne: *My Lady, the fact of the matter is the facts, as it existed.*

The Court: *It will have to be 8 feet, anything more than 8 feet is a matter that you would have to appeal or apply to set aside the order on the basis of fraud, misrepresentation and the usual others. You would have to apply to set aside on the basis of fraud, misrepresentation or you would have to file an appeal. If you are looking to vary this order in any way, shape or form.*

Ms. Ettienne: *My Lady --*

The Court:	*It can either be varied by consent, in which case you would have to get Mr. Ferguson to agree. But I am concerned that there is no order formalizing this and I think that it is time, if this is a true reflection of the consent arrived at by the parties. Mr. Ferguson would you have any difficulty with having that order perfected now?*
Mr. Ferguson:	*Not basically --*
The Court:	*Although several years have passed?*
Ms. Ettienne:	*My Lady, in light of the --*
The Court:	*The order needs to be perfected.*
Ms. Ettienne:	*Perfected.*
The Court:	*In the terms that are set out in the mediation agreement?*
Ms. Ettienne:	*But, My Lady, the fact of this matter is that the applicants contend that the rule was never 8 feet.*
The Court:	*It was not extended to 8 feet?*
Ms. Ettienne:	*It was not 8 feet and this is the basis.*

The Court: ***It was not extended to 8 feet? Because the order is clear in the agreement, it agreed to widen the existing road to a minimum of 8 feet. Such widening to take place within 9 months on the claimant's property and at their expense. Is it now 8 feet?***

Ms. Ettienne: ***My Lady, the fact of the matter is the road would definitely have been more than 8 feet and what is not correct in the order --***

The Court: ***Yes, but that cannot be the problem, I mean that would not be the problem, that is a matter that you all would have to go back and sort out. That cannot be the problem because in the event that this is in fact a consent order, I am prepared to go ahead and endorse it as a consent order. If that is what you agreed to if you are applying to set aside that, that's a different application entirely. And if you want to deal with that you have to appeal it."***

[63] The court was directed to Halsbury's Laws of England 5th Edition, Volume 12 at paragraph 1166 which states that:

> "*The law discourages re-litigation of the same issues except by means of an appeal. It is not in the interests of justice that there should be a re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions; but there is a danger not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute. The principles of res judicata, issue estoppel and abuse of process have been used to address this problem."*

[64] I have considered the doctrine of res judicata, and it is clear that this principle or doctrine is based on three maxims:

a. No man should be punished twice for the same cause;
b. It is always in the interest of the parties and of the state that litigation comes to an end; and
c. A judicial decision should be accepted as correct.

[65] These are the principles that have been enunciated by Lord Bingham in the case of **Johnson v Gore Wood & Co** (A Firm)[20]:

> "It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in **Henderson v. Henderson:** A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287), that what is now taken to be the rule in **Henderson v Henderson** has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But **Henderson v Henderson** abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: 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 interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more

[20] [2002] 2 AC 1 at 30-31

> obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

[66] It is certainly my view that this court has jurisdiction to hear an application to strike out any matter attempting to re-litigate issues between the same parties and a discretion to do the same at times between different parties. It must be in the interests of the public and of course in the interests of justice to do so, otherwise one of the core factors to be taken into account with res judicata is defeated and that is that there must be an end to litigation.

[67] It was Lord Diplock[21] who stated that:

> "*The inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not consistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied …"*

[68] I have considered the applications and the original claim. I have read the affidavits supporting the various applications, heard submissions and in addition had the tape of the proceedings transcribed. The parties were informed and invariably agreed that for this court to come to an informed and importantly a just decision, the proceedings on the 28th June 2012 would have to be considered to determine whether there was a substantive hearing.

[21] Case of Hunter v. Chief Constable of the West Midlands Police (1982) AC 529 at p.536

[69] In my view there was a mediation referral order in 2008, that was transposed into a mediation agreement[22], signed by the claimants, Jocelyn Kirton and Jemma Morrain. The agreement was also signed by the defendants Albert Lucas and Louisa Lucas along with the legal practitioners on both sides.

[70] On the 26th January 2010, Counsel for the defendants wrote to Counsel for the claimants, Mr. Ferguson, indicating that there was some dissatisfaction with the "consent order" and in particular a "mistake" as to the width of the existing road being eight feet (8 ft.).

[71] Counsel, Ms. Ettienne, requested a review of the "Consent Order" as far as the mistake in the consent order. As mentioned thereafter an application was filed on the 18th March 2011. Throughout that application the mediation agreement had been referred to as the consent order. It was clear in my view that the parties had agreed during the mediation and at the time of the signing of the agreement all parties and their respective Counsels understood what was to be done. After work had been done there was some unhappiness about the work that was carried out by the claimants. A mediation session at the site did take place, and Mr. Lucas said he was reluctant to the suggestion to extend the road but agreed on the undertaking of the 1st claimant to pay for the same. The minimum of 8 feet widening was agreed to by the parties although it was an arbitrary estimation, but nonetheless an agreed estimation, otherwise why would that have been inserted in the mediation agreement?

[72] The matter was heard by Justice Vicki Ann Ellis on Thursday the 28th June 2012, and parts of the proceedings have been referred to already.[23] It became clear from above that the court was of the opinion that there was no formal order, despite the parties believing there was, based on the practice here and also based on what the attorneys had been accustomed to doing.

[73] This mediation agreement was signed or endorsed by Justice Mohammed on the 17th January 2013. This, in my view, transposed the mediation agreement

[22] Mediation Agreement on the 5th May 2009
[23] See paragraph 62 of this decision.

into a formal mediation consent order. This then became a final order to be complied with between the parties.

[74] Curiously enough, there were submissions made on the disputed issue of the widening of the road by a minimum of 8 feet. Those submissions were detailed and the learned trial judge at one point enquired the width of roads in Grenada. Both Counsel on either side made submissions on the issue. Those submissions were made on the 28th June 2012, but despite dissatisfaction there was never any appeal or other applications made after the order was formalized by the signature of Justice Mohammed in January 2013.

[75] In my view, on closer inspection of the mediation agreement filed on the 1st February 2013, it is clearly evident that Mr. Justice Cumberbatch upon hearing both Counsel, Mr. Ferguson and Ms. Ettienne, and the 2nd named defendant being present, the terms of the mediation agreement being signed and agreed, the court made a formal order signed also by the Deputy Registrar setting out that:

a. "All further proceedings in this matter are stayed except for the purpose of carrying into effect the terms of the said agreement. For that purpose the parties have the permission to apply to the court."

[76] It is also clear that once a consent order is drawn up and sealed, the Court has no power to vary it, and it is my view that once the consent order has been perfected by having a Judge sign it, then the only ways of challenging it, is by way of an appeal from the order or by bringing a fresh action to set it aside. This court placed weight on what was agreed between the parties and what the parties decided between themselves was a final agreement.

[77] I refer the parties back to what Mr. Lindo started out submitting which came from Halsbury's Laws of England 5th Edition, Volume 12.[24]

[24] Set out at para 63 of this decision.

[78] It is clear from the orders sought that the applicants/defendants wish to re-litigate the issue of the widening of the road by a minimum of 8 feet having agreed to that term. This court finds that the proceedings on the 28th June 2012 amounted to a substantive hearing, as there was no formal order yet made, and submissions were made to the court. At that time, before the order was finalized, various applications could have been made to challenge the terms of the agreement or simply inform the other side that they were not content with the mediation discussions and come back to court.

[79] What seems clear, is that the mediation agreement (being accepted and endorsed by the Court, and this is evidenced as set out already by both Justice Mohammed and Justice Cumberbatch), was at no time challenged within the relevant time period and neither was any fresh action brought. I find that this was and is a formal consent order.

[80] The court is also mindful of the affidavit of Mr. Albert Lucas filed on the 30th April 2015, and in particular paragraphs 4 to 8:

> 4. Firstly, although there is similarity between the issues raised in the previous application and the present one, particularly the issue of the Respondent's failure to widen the road, the issues are not all the same.
>
> 5. Secondly, the issues raised in the previous Application was made by the previous Counsel before the Order after the Mediation Agreement ("AL2A") was filed in Court. The Honourable Judge asked Counsel present about the absence of a formal Order after the Mediation Agreement had been reached. Counsel continuously referred to the Mediation Agreement. The Judge explained to Counsel that the Mediation Agreement was supposed to be brought to the Court as a formal Order. Counsel stated that many Mediation Agreements, were done in this country, without an Order being done after Mediation Agreement was reached. The Judge stated that we should start doing the right procedure, after a Mediation Agreement, and let this case be a first for that. Counsel for the Respondent then asked for $500.00

costs. The Judge granted $400.00 costs to the Respondents, which I paid. Therefore, because of the absence of an Order after Mediation Agreement, the issues raised by the Applicants in that previous Application were not heard nor decided by the Court.

6. In fact, the copy of the notes taken by the Court Clerk which is exhibited to the Respondents' affidavit "JK1" indicates the reason why the previous Application was dismissed. The notes state "Mediation Agreement arrived at and no formal order was perfected." These notes confirm my memory that there was no substantive hearing of or decision by the Court on the issues raised in our previous application.

7. After our Application was dismissed on 28th June, 2012 because of the lack of a formal Order, such formal Order ("AL2A") was filed February 1, 2013.

8. We, the Applicants, had asked our previous Attorney to apply urgently again to the Court for relief. However, after some time passed without a fresh Application, it became necessary to retain other Counsel. Meanwhile, pursuant to the liberty to apply under the Order after Mediation Agreement ("AL2A") the Respondents have made various applications in Court."

[81] In view of what I have stated above, the defendants' application is therefore dismissed.

[82] Costs of the application to the claimants in the sum of $750.00.

Shiraz Aziz
High Court Judge