EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2012/0387

BETWEEN:

DAVIDSON FERGUSON

Claimant

and

SARAH ANITA FERGUSON

Defendant

Before:
Ms. Agnes Actie — Master

Appearances:
Mr. Dasrean Greene for the claimant
Mr. Alberton Richelieu for the defendant

2015: October 22 .

On Written Submissions

Case management powers- setting aside a consent order- striking out of claim- res judicata – abuse of process- whether a consent order signed by the parties in a previous claim makes the new claim res judicata and an abuse of process- disputing the court's jurisdiction- whether the defendant having filed a defence has submitted to the court's jurisdiction- Civil Procedure Rules 2000 (CPR 2000) CPR 9.7; CPR 26.3

JUDGMENT

[1] **ACTIE, M.:** This is an application to strike out a statement of claim on the grounds that the claim is Res Judicata and an abuse of process.

Background

[2] The parties in this claim were husband and wife who resided in the United Kingdom for over 50 years but returned to St. Lucia in 2002. On 21st April 2008,

the defendant filed a petition for divorce and a decree nisi was granted on 15th January 2009. On 5th February 2008, prior to the grant of the decree nisi order, the defendant in the extant claim, who was the claimant in claim SLUHCV 2008/0105, sought a declaration that a fixed deposit at the Bank of Saint Lucia in the sum of $800,000.00 be declared the joint funds of the parties together with a request for an interim injunction to restrain the defendant (now claimant) from removing, withdrawing or otherwise dealing with the funds. The court by order dated 11th February 2008 granted the injunction. The action led to a settlement agreement embodied in a consent order dated 3rd June 2008 signed by counsel for the parties in the presence of the parties in the following terms:

1. That the bank of Saint Lucia Ltd is directed and ordered to add the petitioner Sarah Anita Ferguson on the fixed deposit of $800,000.00 placed in a Secured Notes Investment held at the Bank of Saint Lucia Ltd.

2. That there be two signatories to the above fixed deposit account namely: Sarah Anita Fergusson and David Ferguson.

[3] The claimant in the extant claim filed on 27th April 2012 who was the defendant in claim SLUHCV 2008/0105 is seeking to set aside the consent order entered between the parties on the grounds of mistake. The claimant alleges that the defendant at a meeting held on 6th January 2009, subsequent to signing the consent order, confessed that she had withdrawn all monies that she was entitled from the claimant's RBTT account. The claimant contends that had he known that the defendant had already withdrawn the funds from his RBTT account he would not have settled on the terms in the consent order. The claimant alleges non-disclosure of material facts on the part of the defendant in inducing him to sign the consent order. The claimant also seeks to lift the interim injunction and for the defendant to give an account and restore the sum of $800,000.00 which she withdrew from the account.

[4] The defendant on 27th April 2012 filed an acknowledgment of service, a defence on 3rd October 2012 and an amended defence on 23rd October 2012.

The application

[5] The defendant by notice of application with supporting affidavit filed on 1st April 2014 applied to the court pursuant to CPR 9.7 for the following reliefs:

(1) A declaration that the court has no jurisdiction and or should decline jurisdiction to hear and determine the claimant's claim against the defendant.

(2) An order for summary judgment to be entered against the claimant in favour of the defendant.

[6] The defendant's application to strike out the claim is made on the grounds of Res Judicata (ie, that the new claim raised an issue which had already been adjudicated upon) and therefore is an abuse of process. The defendant contends that the consent order made in suit number 2008/0105 between the parties has already been adjudicated upon and the claimant is now seeking to re-litigate the same issues between the parties without pleading any significant change of circumstances. The defendant seeks an order to strike out the claim in its entirety pursuant to CPR 26.3(1) (a) and to enter summary judgment pursuant to CPR 15. 5.

[7] The claimant in an affidavit in opposition filed on 25th April 2014, deposed that the matters alleged in claim 2012/0387 are not subject to the doctrine of R*es Judicata* as the claim was never the subject of a final adjudication by the court. The claimant avers that he did not have knowledge neither was he aware that the defendant had withdrawn the monies held at the RBTT account when he entered into the consent order. The claimant contends that the fact that the consent order was made an order of the court is insufficient to remove it from the challenge of mistake or non-disclosure.

Law and analysis

Whether the claim should be struck out on the grounds of abuse of process/res judicata

[8] CPR 26.3(1) (c) empowers the court to strike out a statement of claim which is an abuse of the court's process. Lord Diplock in **Hunter v Chief Constable of the West Midlands Police**[1] describes this power "…..which any court of justice must possess to prevent misuse of its procedure in a way in which, although not inconsistent 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".

[9] The principle of Res Judicata was explained in the case of **Henderson v Henderson**[2] 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."

[10] The underlying principle in Res Judicata is that where party A has brought an action against party B, a later action against party B may be struck out where the second action is an abuse of process. The burden of establishing abuse of process is on party B. The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances constitutes an abuse of process.

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[1] (1982) AC 529 at P. 536

[2] (1843) 3 Hare 100 at page 115

[11] Counsel for the defendant in his submissions in relation to the issue of R*es Judicata* relies on Article 1171 of the Civil Code[3]. The Article provides as follows:

> "The authority of a final judgment (res judicature) supplies a presumption incapable of contradiction in respect of that which has been the object of the judgment, when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged".

[12] The starting point in this application before this court is whether the claimant is seeking to re-litigate the same issue already determined in claim 2008/0105 to bring this claim within the doctrine of R*es Judicata*. The principles that are engaged in an application to strike out a claim made on the basis of abuse of process are summarised by Lord Bingham of Cornhill in **Johnson v Gore Wood**[4] in the following pronouncement:

> "The[re] is [an] underlying public interest … 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 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 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 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

[3] Laws of St Lucia Cap 2.01

[4] (2002) AC 2 AC 1 at page 31

abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. … [I]t is in my vie**w preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances.** Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

[13] A consent order is tantamount to contract and the parties are bound by the terms. Byron JA as he then was in **Cecilia Francis v Louis Boriel**[5] said

> "The legal principles to be applied are not in dispute as this branch of law has been settled for a long time. A consent order is binding on the parties to it but is no less than a contract, because there is added to it the command of the court, and as such it is subject to the incidents of a contract including the liability to be set aside. The point is succinctly stated in Huddersfield Banking Company, Limited v Henry Lister & Son, Limited (1895) 2 C, 273 by Lindley L,J, at 280: " In a consent order, I agree, is an order and so as it stands I think it is as good as an estoppel an any order. I have not the slightest doubt on that: nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual."

[14] A consent order records an agreement reached between the parties in respect of certain interim matters or it may also be used for the same purpose when a full settlement compromise is reached. A consent order is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent. The order is based on a contract between the parties. Due to the contractual nature of a consent order, all elements of contractual agreement need to be present at the time when the agreement was formed for the order to exist and be enforceable.

[15] A party who wishes to challenge a consent order that has the effect of finally disposing of the issues between the parties can do so by bringing fresh proceedings to set aside the order. The court will only interfere with a consent order on any ground that would invalidate any other contract such as fraud,

[5] SLUHCAP No 13 of 1995 il Appeal

misrepresentation, undue influence, non-disclosure and supervening events which invalidate the whole basis of the order, if the justice of the case requires it.

[16] The essential issue on this claim is whether the consent order entered into by claimant was induced by non-disclosure or mistake as alleged. The burden lies on the claimant to prove that the further or new evidence on which he now seeks to rely could not have been obtained or could not by reasonable diligence have been adduced at the earlier proceedings. The claimant must prove that the information only came to his knowledge after signing the consent order or the earlier proceedings.

[17] The issue of Res Judicata as alleged by counsel for defendant does not arise at this stage since there had not been a determination of the case on its merits. The claimant is seeking to set aside the consent on the grounds of non-disclosure or mistake. It is an option available to the claimant.

[18] The objective of litigation is for the resolution of disputes by the courts through trial and admissible evidence.[6] Whether the new information on which the claimant is now seeking to put before the court could have been obtained with due diligence at the time of the signing of the consent order to bring this claim within the exception to the doctrine of abuse of process is a matter to be determined at trial.

[19] It is well settled law that the jurisdiction to exercise the nuclear weapon of striking out should be exercised sparingly as the exercise of this jurisdiction deprives a party of its right to a trial, and/or of its ability to strengthen its case through the process of disclosure. Striking out is limited to plain and obvious cases where there was no point of having a trial[7].

[6] The Caribbean Civil Court Practice 2011 page 249.
[7] Blackstone's civil practice 2005 page 339

[20] I am of the view that that the defendant has not satisfied the court that the matter before the court is of such frivolity to attract the draconian sanction of striking out. The parties settled by consent without the matter being fully ventilated at a full trial. Whether the claimant had given up his right to a full hearing by being mistakenly induced to settle is critical to this claim. If it is accepted, it can undermine the parties' consent order and may result in the setting aside or varying the consent order. For these reasons above, therefore, I have decided that I will not strike out the action.

Challenging the court's jurisdiction

[21] The second issue contemplated by the defendant's application is disputing the court's jurisdiction to hear the claim. The relevant part of the CPR 2000 that governs the procedure for disputing the court's jurisdiction is Part 9.7.

CPR 9.7 Procedure for disputing court's jurisdiction etc.

(1) A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.

(3) An application under paragraph (1) of this rule must be made within the period for filing a defence; the period for making an application under this rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence. Rule 10.3 sets out the period for filing a defence

(4) An application under this rule must be supported by evidence on affidavit.

(5) A defendant who –
(a) files an acknowledgment of service; and
(b) does not make an application under this rule within the period for filing a defence;
is treated as having accepted that the court has jurisdiction to try the claim."

(6) An order under this rule may also –

(a) discharge an order made before the claim was commenced or the claim form served;
(b) set aside service of the claim form; and
(c) strike out a statement of claim.

….."

[22] The rule requires a party who wish to dispute the courts' jurisdiction must make the application during the period for filing a defence after filing an acknowledgment of service. The **Caribbean Civil Court Practice 2011**[8] states that a defendant who files an acknowledgement of service and does not make an application to dispute jurisdiction under Rule 9.7 within the time period for filing a defence is treated as having accepted that the court has jurisdiction to try the claim.

[22] I note that the defendant filed a defence on 3rd October 2012 and an amended defence on 23rd October 2012. The application challenging the court's jurisdiction was filed on 1st April 2014 in excess of one year after filing the defence. The defendant's application had to have been within the period in CPR r.10.3 for filing of the defence.

[23] Counsel for the defendant is of the view that the fact that the application was not made within the time limit for filing of a defence by the rules, is of no consequence. Counsel in support of his contention relies on the Privy Council decision in **Texan Management Ltd v Pacific Electric Wire & Cable Company Ltd**[9].

[25] The word "jurisdiction" in CPR 9.7 is used in two different senses. One meaning is "territorial" jurisdiction which governs service of the claim form out of the jurisdiction and the other is "jurisdiction or authority" to try the claim. The defendant's challenge does not denote territorial jurisdiction rather it is a challenge to the court's power or authority to try the claim on the ground of abuse of process. The defendant having failed to dispute the court's jurisdiction within the

[8] Page 113
[9] [2009] UKPC 46

time for filing the defence is deemed to have accepted that the court's has jurisdiction to try the claim in accordance with CPR 9.7.

[26] The court in **Texan Management Limited & ors v Pacific Electric Wire & Cable Company Limited** dealt with a situation where there had been a procedural defect in an application challenging jurisdiction and a stay of proceedings. The application had been served on the last day for filing a defence without the supporting affidavit evidence as required by CPR r.9.7(4). It was held that the procedural inadequacies were not fatal, and the court could exercise its discretionary powers under the inherent jurisdiction to grant a stay on *forum non conveniens* grounds, independent of the provisions of EC CPR r.9.7.

[27]. I am of the view that **Texan Management Ltd v Pacific Electric Wire & Cable Company** does not assist the defendant in the case at bar as the Privy Council reinforced the timeline for making an application disputing the courts' jurisdiction. Lord Collins at paragraph 26 states:

> "For the purposes of this appeal the following points, to which it will be necessary to revert, should be noted. ***First, r.9.7 applies to applications disputing the court's jurisdiction and also to applications arguing that "the court should not exercise its jurisdiction*****."* (my emphasis)** Second, the types of order which may be made under this rule do not expressly mention (by contrast with English CPR r.11(6)) an order staying the proceedings: EC CPR r.9.7(6). Third, the application must be made within the period for filing a defence, and the note states that EC CPR r.10.3 sets out the period for filing a defence: EC CPR r.9.7(3). Fourth, the application must be supported by evidence on affidavit: EC 9.7(4). **Fifth, if an acknowledgment of service is filed, and an application is not made within the period for filing a defence, the defendant is treated as having accepted that the court has jurisdiction to try the claim**: EC CPR r.9.7(5). "

[28] Applications to strike out for abuse of process should be made after service, but before the end of the period for filing a defence. The defendant in this case is asking the court not to exercise its jurisdiction to determine the claim. The defendant filed his defence and amended defence in excess of one year prior to the application challenging jurisdiction. The defendant is taken to have waived

any challenge to jurisdiction. The defendant having filed a defence has accepted the court's jurisdiction to try the claim. Having submitted to the court's jurisdiction (by the action of filing a defence) the defendant cannot now at this late stage state that the court should not determine the matter.

Conclusion

[29] Courts are astute to ensure that it is only in a case where a party in a previous claim can establish oppression or an abuse of process that a later case against the same party should be struck out. When parties choose to settle a claim, they are choosing to forego their right to a determination at trial. What is to be determined in the matter before this court is whether the claimant would have given his attorney the same instructions to sign the consent order in the first claim had he been aware of the information that he now has in his possession. The claimant is seeking the court's assistance to review arrangements that had been previously agreed and formalized into a consent order. A consent order is a contract that maybe set aside by any of the methods for setting aside a normal contract namely (1) non-disclosure of material facts (2) mistake (3) fraud and misrepresentation (4) supervening events (4) undue influence.

[30] The court will at trial have to decide whether the non-disclosure or mistake now alleged by the claimant in the statement of claim makes a substantial difference to the consent order entered into by the parties.

[30] The defendant in his request for striking out also sought an order for summary judgment. The court may only grant summary judgment on a claim where the claimant has no real prospect of succeeding on the claim or issue[10]. The principle in **Swain v Hillman**[11] states that the court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: A "realistic" claim is one that carries some degree of conviction. The entry of the summary judgment is a related procedure in a successful application for striking out. The refusal to

[10] CPR 15.2
[11] [2001] 1 All ER 91;

strike out the claim thereby renders the application for summary judgment otiose and is accordingly dismissed.

[31] Applying the principles outlined above to the facts of the present case, there can be no doubt that the defendant has submitted to the court's jurisdiction to determine the claim filed by the claimant. The facts before the court raise issues of law which cannot be decided summarily. Although there is a strong public policy interest in the need for finality in litigation however this is to be balanced with the competing public interest in the need to avoid the corruption of the administration of justice if the court was misled. It is for the court at trial to decide whether the defendant (wife of claimant) was under a duty to disclose that she had already withdrawn funds from the husband's account before the agreement that lead to the consent order and whether the claimant (the husband) was of sufficient industry to have obtained the information at the time of the signing the consent order. It is for the court on evidence to decide whether the amount allegedly withdrawn by the defendant was of direct relevance to the particular matters pleaded by the claimant in his statement of claim and whether the defendant's non-disclosure entitles the claimant to have the consent order set aside.

Order

[32] Applying the law to the facts of this case, I am of the view that the defendant's application to strike out the claim and summary judgment should be dismissed. Accordingly, I make the following orders:

(1) The defendant's application to strike out the statement of claim and for summary judgment to be entered in favour of the defendant is refused.

(2) Costs in the sum of $500.00 to be paid by the defendant to the claimant.

[34] The matter shall be placed on the master's list for further case management conference.

Agnes Actie
Master