THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
CLAIM NO. ANUHCV2016/0190

' **Between:**

1. **EDWIN OKORO**
2. **VISION HOLDINGS LTD**

Claimants

and

DOROTHY SEBASTIEN SAMUEL

Defendant

Before:
Master Fidela Corbin Lincoln

Appearances:
Sylvester Carrot for the Claimants
Len Johnson with Latoya Letlow for the Defendant

2017: March 30

[1] **CORBIN LINCOLN M:** Dorothy Sebastian Samuel is seeking an order striking out the statement of case of Edwin Okoro and Vision Holdings Ltd. or parts thereof as an abuse of process and an order striking out Vision Holdings Ltd as a party,

Background

[2] Edwin Okoro and Vision Holdings Ltd. **("Vision")** commenced this claim against Ms. Samuel on 19th April 2016 *for"damages for breach of the covenant for quiet enjoyment,· breach of the implied*

term to ensure a *continuous supply of [sic] and breach of the defendant's duty of care as* a *gratuitous bailee."*[1] The statement of claim states that the claim is for: .

(1) Damages in excess of $60,000.00;
(2) Exemplary and Aggravated Damages;
(3) An order that the damages recovered herein be set off against the judgment in favour of the defendant in claim No. ANUHCV2012/0334;
(4) Alternatively, an order that the judgment in favour of the defendant in Claim No. NUHCV2012/0334 be set aside

[3] The statement of claim avers that by written agreement dated 1st August 2009 Ms. Samuel let premises in Newgate Street to Mr. Okoro for a period of one year for commercial use. At all material times Mr. Okoro was a director of Vision which traded in beauty products and provided services as a medical laboratory from the said premises. All goods in the premises belonged to Vision. It was an implied term of the tenancy that Mr. Okoro was entitled to quiet enjoyment and that Ms. Samuel would ensure a continuous supply of electricity. Ms. Samuel breached the said terms by:

(1) In or about April 2011 causing the supply of electricity to be disconnected by instructing Antigua Public Utility Authority .(APUA) to disconnect the supply of electricity and not to reconnect it.

(2) By clause 4 of the tenancy agreement it was the responsibility of Mr. Okoro to pay the electricity bill, the account for which was in the name of Ms. Samuel. It is admitted that there were arrears on . the account. Initially the account was disconnected because of arrears. However, Mr. Okoro paid APUA $1200 in part payment of the debt of $3760.69 and the electricity was reconnected. It was after the reconnection that Ms. Samuel instructed APUA to disconnect the electricity and prevented APUA from reconnecting it by instructing her staff not to allow APUAaccessto the meter.

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[1] Claim Form

(3) From April 2011 there was no supply of electricity the premises and Ms. Samuel specifically instructed her staff notto admit APUA to the premises.

(4) From April 2011 until 5th November 2012 when possession was recovered by Ms. Samuel there was no supply of electricity.

(5) Ms. Samuel caused a member of her staff to stand by Mr. Okoro's premises and inform potential customers that they ought not to buy any goods from him or use his services because he was in arrears of rent and because there was no electricity. This severely affected Mr. Okoro's passing trade.

(6) The actions of Ms. Samuel were calculated to interfere and did physically interfere with Mr. Okoro's ability to conduct his trade, was designed to ensure that he could not occupy the premises and amounted to an unlawful eviction from the premises.

[4] The statement of claim avers further that:

(1) On 14th May 2012 the defendant issued a claim for possession claiming mesne profits at a rate of $2800 per month from 1st June 2011 until the date of delivery was given up. Ms. Samuel and her legal advisers failed to inform the court that she had caused the electricity to be disconnected since April 2011.

(2) On or about 3rd November 2012 the defendant applied for awrit of possession and claimed the sum of $54,724.00.

(3) The disconnection of the electricity and the claimant's unlawful eviction from the premises suspended any liability on the part of the 1st claimant to pay rent and that no mesne profits were payable by the 1st claimant owing to the fact that the market rental for commercial premises with no supply of electricity was and is nil.

(4) On 12th October 2012 the defendant caused a writ of execution to be issued against the 1st and 2nd claimants goods for the total sum of $54,724.00. As a consequence the 1st and 2nd defendant's goods were seized on or about 5th November 2012. Some of the oods were sold but others were retained by the defendant's legal representative on her behalf. The 1st and. 2nd claimant demanded the return of the goods but they were retained for approximately 3 years and not returned until around 14th December 2015. The claimants contend that the defendant bt3came a gratuitous bailee of the goods and by virtue of the duty of care imposed as gratuitous bailee became the insurers of the said goods. Upon return of the goods the 1st claimant found that some of the goods were damaged were out of date and of no real value.

(5) Further or in the alternative the claimants contend that the defendant by retaining the goods for a period of3 years committed trespass to the said goods.

(6) The 1st and 2nd claimants will seek to recover the value of the goods as at the date of seizure or alternatively from the date when the defendant could reasonably have sold same.

The Defendant's Application

[5] Ms. Samuel seeks an order striking out the claim or parts thereof as an abuse of process and an order striking out Vision as a party. Ms. Samuel contends that:

(1) She obtained judgment against the Mr. Okoro in claim No. 2012/0334 brought to recover, inter alia, possession. Thereafter several enforcement mechanisms were applied for and implemented against Mr. Okoro, including a writ of possession, a writ of *fiera facias,* oral examination and an interim charging order.

(2) The court ordered Mr. Okoro to make an interim payment of $300.00 monthly towards the judgment and, after oral examination an increase of the monthly sum to $600.00.

(3) On 7th March 2016 an interim charging order was issued by the court preventing Mr. Okoro from disposing of his shareholding in the 2nd claimant. The final enforcement mechanism in the

form of the charging order over the 60% beneficial shareholding of the Mr. Okoro in the 2nd claimant was adjourned to facilitate this claim.

(4) This claim embodies the same issues disposed of by the cciurt in the previous claim. No new evidence has been prevented in the claimants' statement of claim which could not have been proffered in a defence, counterclaim or appeal.

(5) The claimants are seeking to circumvent the correct channel through which the can challenge the decision of the court in the previous possession claim as it relates to setting aside the judgment by bringing a fresh claim with the same issues.

(6) Mr. Okoro sat idly by throughout Ms. Samuels' attempts to enforce the judgment. It was not until Ms. Samuel applied for a charging order which threatened Mr. Okoro's shares in the 2nd claimant that he sought to change counsel, attempt to oppose the charging order and seeks to defeat the judgment granted to Ms. Samuel. .

(7) It would be a "scandal of the administration of justice" if the claimants were permitted to set up the same case again by changing the form of the proceedings.

(8) At the time of contracting Ms. Samuel was not aware that the goods which Mr. Okoro intended to carry on business belonged to Vision and neither did Ms. Samuel enter into a contract with Vision.

The Claimants' Response

[6] Mr. Okoro, in his affidavit in response, states:

(1) It is accepted that Ms. Samuel obtained judgment against him in claim No. 2012/0334. He did not attend the hearing because his previous attorney advised him that there was no judge available. Had he known that the hearing would go ahead he would have attended with or without an attorney.

(2) When he was served with the judgment he went back to his attorney with a copy of the judgment and he was advised by him that he would fight back.

(3) He did notunderstand that he could apply to set aside the judgment because of his absence. It is only because of the advice of his new attorney that he realized that he could have applied to set aside at least the money judgment on the grounds that he had a defence to the claim because Ms. Samuel was in breach of the implied term to ensure a continuous supply of electricity and by preventing the reconnection of the supply was also in breach of he covenant of quiet enjoyment.

(4) He was in arrears of rent. In April 2011 the electricity was disconnected because of the arrears. The electricity was in the landlord's name. He owed approximately $3,760.29 and paid $1,200 whereupon the electricity was reconnected on 3rd April 2011. However on 4th April 2011 the electricity was disconnected on the instruction of Ms. Samuel. He was advised that as the occupier of the premises the obligation to pay was his and thus APUA agreed to reconnect the electricity but they could not do so because the landlord refused to open the gate for APUA.

(5) He sought legal advice from his previous attorney. with a view to bringing action to ensure electricity was restored but no action was taken by his attorney.

(6) In May 2012 Ms. Samuel issued the claim against him and he took the document to his previous attorney who advised that steps would be taken to defend the proceedings and counterclaim. So far as the acknowledgment of service and defence forms were concerned he gave these documents to his previous attorney and does not know why these documents were not completed. He had given full instructions and paid monies on account.

(7) Throughout the enforcement steps taken by Ms. Samuel he continued to rely on his previous attorney.

THE LAW - STRIKING OUT

[7] Parts 26.1 (b) and (c) of the Civil Procedure Rules 2000 **(CPR)** states that the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing a claim or is an abuse of the process of the court.

Abuse Of Process

[8] In **Donald Halstead v The Attorney General**[2] Sir Vincent Floissac stated:

> *"**30** There can be no doubt that the High Court has an inherent power and is under a duty to exercise that power to strike out any pleading which is an abuse of the process or procedure of the Court. That power (which is confirmed by R.S.C. Ord 18 r 19) is exercisable whenever the circumstances of the pleading are such that the entertainment of the pleading would result in manifest injustice. These circumstances (which are various) include (but are not confined to) the circumstances which make it appropriate to apply the principles of resjudicata and merger in judgment and other related principles.*
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> ***31** In Hunter v Chief Constable (1981) 3 A.ER. 727 at 729, Lord Diplock said:*
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>> *"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way 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. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the*

[2] ANUHCVAP1993/0010

kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

32 The first ground on which the institution of suit No. 261 of 1987 is said to be an abuse of the process of the Court involves the principle of res judicata. That principle is appropriate when a right or cause of action or an issue had arisen or could or should have been raised in previous civil proceedings and that right or cause of action or issue was expressly or impliedly determined on its merits by a final and conclusive judgment of a court of Competent jurisdiction. In that case, the parties to the previous civil proceedings and their privies are inter se estopped per rem judicatam from relitigating that same adjudicated right or cause of action or issue in subsequent civil proceedings unless there are special circumstances entitling one of the parties or privies to reopen that adjudicated right or cause of action or issue in the interest of justice...

34 Counsel for the appellant sought to minimise the identity in the causes of action and to maximise the differences in the nature of the proceedings and of the rights of action and remedies claimed in the consolidated motionand suit No.261 of 1987. But this is precisely what the principle of res judicata forbids, A litigant is precluded from relitigating an adjudicated cause of action either by instituting a different kind of proceedings or by relying on a different right of action or by claiming a different remedy. If the previous and fresh proceedings could or should have been consolidated or the new right of action or remedy could or should have been claimed in the previous proceedings in which the original right of action was determined, the relitigation is regarded as an abuse of the process of the Court.

***35/n** Reichel v Magrath (1889) 14 App.Gas 665 at 668, Lord Halsbury L.C. said:*

"My Lords, I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." ...

38 In the present case, there was nothing to have prevented the appellant from litigating in one action all the rights of action and remedies which he claimed against the respondents on the basis

of the causes of action common to the consolidated motions and suit No.261 of 1987. The institution of the suit after obtaining judgment against the respondents on the basis of the common causes of action is an abuse of the process of the Court even if arguably the appellant may not strictly have been estopped per rem judicatam from instituting the suit.

[9] In **Clark and Another v In Focus Asset Management and Tax Solutions Ltd.**[3] Arden LJ stated:

> *"Res judicata.principally means that a court or tribunal has already adjudicated on the matter and precludes a party from bringing another set of proceedings (see generally Lemas v Williams [2013] EWCA Civ 1433, [2013] All ER (D) 160 (Nov)). The doctrine also covers abuse.by a litigant of the court's process by bringing a second set of proceedings to pursue new claims which the claimant ought to have brought in the first set of proceedings (this is known as the rule in Henderson v Henderson (1843) 3 Hare 100, (1843) 67 ER 313).*
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> *[7] The requirements of res judicataare different from those of merger....Resjudicata may apply either because an issue has already been decided or because a causeof action has already been decided."*

[1O] The doctrine of res judicata therefore essentially has two principles: *issue estoppel* and *cause of action* estoppel. Issue Estoppel *" ...may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen the issues."*[4] Cause of action estoppel - "... *arises where the cause of action in the latter 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."*[5]

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[3] [2014] 3 All ER 313
[4] Lord Keith in Arnold v National Westminster Bank pie [1991] 3 All ER 41
s ibid

[11] The courts in **Donald Halstead** and **Clark** appear to have treated the rule in **Henderson v Henderson** as being covered by the doctrine of *res judicata.* There.are however other authorities which treat the rule as separate from the doctrine of *res judicata.*

[12] In **Henderson v Henderson** Wigram V.C stated:

> " *In trying this question, I believe I state the rule of the coutt correctly, when I say, that where* a *given matter becomes the subject of litigation in, and of adjudication by,* a *coutt of competent jurisdiction, the coutt requires the patties to that litigation to bring forward their whole case, and will not (except underspecial circumstances) permit the same patties to open the same subject of litigation in respect of matter which might have been brought forward as patt of the subject in contest, but which was not brought forward only because they have, from negligence, inadvettence, or even accident, omitted patt of their case. The plea of res judicata applies, except in special-case, not only to points upon which the coutt was actually required by the patties to form an opinion and pronounce* a *judgment, but to every point which properly belonged to the subject of litigation and which the patties, exercising reasonable diligence, might have brought forward at the time.*

[13] In **Baudinet v Tavion** the Privy Council noted however:

> *"The Henderson principle is distinct from both cause of action estoppel and issue estoppel per rem judicatem and is now regarded as an aspect of abuse of process, although, as Lord Bingham pointed out in Johnson v Gore Wood* & Co *[2000] UKHL 65, {200111 All ER 481 at 499, all are based upon the same public interest 'that there should be finality in litigation and that* a *patty should not be twice vexed in the same matter'.*

[14] Whether or not the Henderson principle is treated as separate from the doctrine of *res judicata* it is clear that they both provide grounds for striking out a claim as an abuse of process. The court is

required to give a *"scrupulous examination of all the circumstances"*[6] before preventing a litigant the right to bring a genuine claim before the court.

Issues

[15] Ms. Samuel contends that the present claim embodies the same issues disposed of by the court in claim No. 2012/0334 **("the 2012 claim")** which she brought against Mr. Okoro and seeks an order striking out the statement of claim or parts thereof. She also seeks an order striking out Vision as a party.

[16) Neither party exhibited a copy of the statement of case in the 2012 claim but at the hearing counsel for both parties agreed that the 2012 claim sought:

(1) Possession
(2) Mesne Profits
(3) Arrears of Electricity
(4) Costs of Execution for distress

[17] A copy of the order in the 2012 claim discloses that the court ordered Mr.Okoro to:

(1) Give up possession of the premises on or before September 30th 2012
(2) Pay Ms. Samuel the sum of $44,966.61 comprising

(a) Mesne profits for 1st June 2011	$ 2,200.00
(b) Mesne profits from 1st July 2011 to 31st May 2012	$30,800.00
(c) Mesne profits at a rate of $2800.00 per month from 1st June 2012 until possession is delivered	$ 8,400.00
(d) Electricity charges to June 15, 2011	$ 2,310.81
(e) Costs of execution of distress	$1,110.80
(D Personal service and court fees	$ 145.00

6 Lord Bingham in Johnson v Gore [2002] 2 ACl

(3) Mesne profits of $2800 per month commencing on September 30th 2012 and every month thereafter until delivery of the premises

(4) Prescribed costs of $3,709.75 8:nd interest.

[18] The present claim seeks, among other things, damages for breach of the implied covenant to provide a continuous supply of electricity, breach of the covenant of quite enjoyment and trespass to goods.

[19] The issues arising for consideration are therefore:

(1) Whether the claims for damages for gratuitous bailment, trespass to goods, breach of the implied covenant to provide a continuous supply of electricity and breach of the covenant for quiet enjoyment are *res judicata* or caught under the Henderson principle.

(2) Whether the claim for an order setting aside the 2012 judgment should be struck out.

(3) Whether Vision be struck out as a party.

Breach of Implied Covenanfto Ensure a Continuous Supply of Electricity

[20] In the 2012 claim Ms. Samuel alleged that she was entitled to mesne profits. The court found that she was so entitled and awarded mesne profits from 1st June 2011.

[21] In the present claim Mr. Okoro does not directly raise the issue of mesne profits. Rather, he seeks damages for breach of the implied term to ensure a continuous supply of electricity.? However, by Mr. Okoro's own pleadings and submissions the issue of disconnection of the electricity is directly relevant to the issue of whether mesne profits are payable at all or the quantum of it . As put by the claimants " *the disconnection of the electricity ...suspended any liability on the part of the First Claimant to pay rent and no mesne profits were payable by the First Claimant owing to the fact that the market rental for commercial premises with no supply of electricity was and is nil"*

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[7] Paragraph 6 and 7 of statement of claim; paragraph 18 of the claimants' submissions.

[22] While not done by a contested hearing, the court in the 2012 proceedings found, based on the pleadings and evidence before it, that Mrs. Samuel was entitled to mesne profits. The issue has therefore been determined. It appears to me from Mr. Okoro's pleadings and submissions that he is seeking to reopen the issue of Ms. Samuels' entitlement to mesne profits under the guise of a claim for breach of the covenant for a continuous supply of electricity. In my view the issue of mesne profits is *res judicata* and Mr. Okoro should be estopped from seeking to reopen this issue through a claim that there was a breach of am implied term of the covenant for the continuous supply of electricity and I so find.

[23] In the alternative, I go on to consider the Henderson principle *vis* whether the issue of the breach of the implied covenant for a continuous supply of electricity is one which Mr. Okoro could and should have raised in the 2012 possession claim.

[24] In **Johnson v Gore** [8] Lord Bingham stated:

> *"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 obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of*

[8] [2002] 2 AC1

> a *patty.* ***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 abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. (emphasis mine)*

[25] As found, the issue of the breach of the covenant for the continuous supply of electricity was relevant to the issue of whether Ms. Samuel was entitled to mesne profits - an issue raised and determined in the 2012 claim. It clearly formed part of the subject matter in litigation in the 2012 claim and could have been raised in that claim. However, in determining whether raising this issue in the present claim amounts to an abuse of process I will examine all the circumstances.

[26] Mr. Okoro pmvides various reasons for his failure to participate in the 2012 claim. It has not been disputed that Mr. Okoro was served with the 2012 claim form. The 2012 claim form would have clearly set out guidance notes including details of documents to be filed and the timelines for filing them. Mr. Okoro's explanation for his failure to file any documents notwithstanding the information set out in the fixed date claim form is that he took the documents to his lawyer and was advised that the necessary steps would be taken to defend the proceedings and counterclaim. He does not know why an acknowledgment of service or defence was not filed by his attorney-at-law since he gave instructions. I find Mr. Okoro's explanations bereft of details and unreasonable in all the circumstances. Mr. Okoro was aware by the contents of the claim form what steps he was required to take - including the filing of an acknowledgment of service and a defence or an affidavit in answer if he wished to dispute the claim. He alleges that he left the documents with his attorney at-law and gave instructions. Even assuming that evidence is accurate there is no evidence of when he instructed an attorney and of what, if any, steps he took thereafter to follow up the matter with his attorney-at-law. It is not acceptable in my view for Mr. Okoro to simply leave the documents

with his attorney and take no steps whatsoever to follow up on his claim. In any event, litigation remains that of the parties. It is Mr. Okoro's responsibility to ensure that all necessary steps are taken to contest the claim if he wished to do so.

[27] Apart from failing to file or take reasonable steps to ensure that the requisite documents were filed in the 2012 claim Mr. Okoro's evidence is that he did not attend the hearing because his attorney-at-law advised him that there was no judge available. Assuming that this is true, Mr. Okoro admits that he was served with a copy of the judgment in the 2012 claim. It must have at that stage become evident to Mr. Okoro that the alleged information received from his attorney-at-law that there was no judge available for the hearing was incorrect since a hearing had clearly taken place and judgment entered.

(28] Further, it is also clearly recorded in the judgment that no acknowledgment of service or defence had been filed. Thus any mistaken belief which Mr. Okoro may have harboured that his attorney-at-law had filed the necessary documents ought at least by that stage to have dissipated.

(29] Notwithstanding, Mr. Okoro states that went back the said attorney-at-law with a copy of the judgment and was informed by the said attorney that he would "fight back". Mr. Okoro provides no explanation of what was meant or understood by "fight back" or what if any specific action was discussed in the face of the judgment. The evidence discloses that the only "fighting back" that appears to have occurred is Mr. Okoro participating in the enforcement proceedings taken by Ms. Samuel over the course of several years during which various interim orders were made including an order for payment of the judgment debt by installments following an oral examination. Mr. Okoro states that he was not advised that he could apply to set aside the judgment and he relied on his previous attorney-at-law.

[30] Mr. Okoro's actions or rather inaction should also be viewed in the context of his evidence that in April 2011 when the electricity was disconnected he consulted and paid his said previous attorney-at-law to take action for him and *"he had done nothing at a/1"*[9]

[9] Paragraph 5 of affidavit filed on 6th September 2016.

[31] I do not find Mr. Okoro's explanation for failing to file an acknowledgment of service, a defence or an affidavit in answer all of which he blames on his previous attorney-at-law to be reasonable. Even when it became or ought to have become evident that no action was taken by his attorney-at-law to file any documents and that the information given by his attorney -at-law that there was no judge to hear the matter was incorrect Mr. Okoro's only action was to leave the judgment with the said previous attorney who, by Mr. Okoro's own evidence, had previously failed to take any action when the electricity was disconnected although instructed to do so. I do not find the alleged lack of competence or error by Mr. Okoro's previous attorney-at-law amounts to circumstances justifying why the issue could not or should not have been raised previously. As stated by Phipson:

> *"Equally, the fact that a litigant was unrepresented and lacked legal skill and experience is not a circumstance that will justify subsequent claims that could and should have been made in the previous claim. Furlher, the fact that the matter was not raised at the time of the first action as a result of an error by a legal advisor is not a special circumstance even if the error was one which would be immune from an action for professional negligence."*

[32] A period of almost four (4) years have elapsed since the 2012 claim. During this period judgment was given in those proceedings and numerous attempts made to execute judgment. Mr. Okoro was not only aware of the 2012 claim and the proceedings therein he participated in the proceedings taken to execute judgment. At no time during this period did Mr. Okoro seek to set aside the judgment entered in his absence[10] or appeal. Mr. Okoro only sought to raise this issue, which arose from the same lease agreement under consideration in the 2012 claim, when faced with the application for a charging order against his shares in Vision.

[33] I find that Mr. Okoro had a clear opportunity to participate in the 2012 claim and raise the issue of the breach of the covenant for a continuous supply of electricity had he exercised due care and diligence and treated the claim with some level of seriousness. There is clearly a public interest in bringing finality to litigation which includes conducting litigation efficiently and making the most efficient use of the court's limited resources.

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[10] **CPR 11.18**

[34] Taking all the circumstances into consideration, I find that the claim for breach of the implied covenant for a continuous supply of electricity is one which could and should have been raised by Mr. Okoro in the 2012 claim and that it amounts to an abuse of the process of the court to permit him to now raise this issue.

Breach of the Covenant of Quiet Enjoyment

[35] The covenant for quiet enjoyment protects the tenant against all disturbance by the landlord whether lawful or not, except under aright of re-entry.[11] The covenant: [12]

> "... *operates according to its terms to secure the tenant, not merely in the possession, but also in the enjoyment of the premises for all usual purposes. Thus, where the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts or omissions[2] of the landlord or those lawfully claiming under him[3], the covenant is broken, even if neither the title to, nor the possession of, the land is otherwise affected[4]. Whether this interference has taken place is, in each case, a question of fact[5]. ...*
>
> *It was once considered that for there to be a breach of covenant there had to be some physical interference with the enjoyment of the demised premises[7]. There is, however, modern authority to the effect that the covenant is not confined to direct physical interference and it may be broken by any conduct of the ,landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as tenant. There must, however, be substantial interference with the tenant's possession (that is, his ability to use the premises in an ordinary lawful way)[8]. Noise or disorderly conduct on adjoining premises, even if it · amounts to a nuisance, may not constitute a breach of the covenant[9] and the landlord is not liable merely for failing to prevent it, although he may have power to do so under an agreement with the tenant of those premises[10].*

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[11] Halsbury's Law of England, Volume 62 (2016) para 408
[12] ibid para 411

[36) The act which is alleged to have constituted a breach of the covenant for quiet enjoyment is that Ms. Samuel caused a member of her staff to stand by the demised premises and inform potential customers that they ought not to buy any goods or use the services because Mr. Okoro was in arrears of rent and there was no electricity. There are no averments as to when this act took place or whether it occurred on a single or more than one occasion. It is alleged that this act affected Mr. Okoro's passing trade and his ability to conduct his trade.

[37) I do not find that the cause of action for breach of covenant of quiet enjoyment is identical to or arose from any of the issues raised in the 2012 claim or that the issues forming a necessary ingredient in the claim for a breach of this covenant have been litigated and decided upon. I therefore do not find that the doctrine of *res judicata* applies to the action for breach of covenant for quiet enjoyment.

[38) *Is the claim for breach of covenant for quiet enjoyment one which Mr. Okoro could and should have raised in the 2012 claim?*

[39) Although the issue of the covenant for quiet enjoyment arose from the same lease forming the basis of the 2012 claim I do not find that the issue of breach of the covenant for quiet enjoyment arose from or was directly related to the issues raised in the 2012 claim. In other words, I do not find that it formed part of the "subject in contest." [13] and thus it was not an issue which could have been raised in the 2012 claim. While in my view it would have been expedient for Mr. Okoro, by way of counterclaim, to raise the issue of the breach of covenant of quiet enjoyment in the 2012 claim to enable all issues related to the lease to be determined at the same time, I am unable to find that this is sufficient to deny him his right to bring this claim. I do not find that it would be manifestly unfair to Ms. Samuel to permit Mr. Okoro to bring this claim.

[40] I therefore find that the claim for breach of the covenant for quiet enjoyment does not fall within the Henderson principle so as to prevent Mr. Okoro from bringing this claim on the basis that it amounts to an abuse of process.

[13] Sir James Wigram V.C in Henderson v Henderson

Gratuitous Bailment • Trespass To Goods

[41] Mr. Okoro and Vision have claimed damages for breach of Ms. Samuel's duty of care as a gratuitous bailee or alternatively, damages for trespass to goods.

[42] The lease agreement was between Ms. Samuel and Mr. Okoro and the goods were seized to satisfy a judgment arising from the lease. The statement of claim avers that the goods in the demised premises which were seized were owned by Mr. Okoro "and/or" Vision. I note that **CPR** 54 provides a procedure for a person who makes a claim to any goods seized under a writ of execution. The person claiming goods must, among other things, give notice to the sheriff. There is no evidence that Vision availed itself of **CPR** 54.

[43] Nonetheless, the claim with respect to seizure and retention of the goods could only have arisen after the 2012 claim and I therefore do not find that the claim for damages for gratuitous bailment or, alternatively, trespass to goods is either *res judicata* or falls within the Henderson principle.

Setting Aside the 2012 Judgment

[44] Mr. Okoro also seeks an order setting aside the judgment in the 2012 proceedings. The 2012 judgment is not a default judgment.[14] The defendants provided no authority for the proposition that the 2012 judgment, a final judgment, can be set aside by way of these fresh proceedings for the reasons set out in the statement of claim or at all. If Mr. Okoro was dissatisfied with the judgment his recourse was by way of seeking to set aside the judgment entered in his absence within 14 days of service of the judgment[15] or by way of appeal.

[45] I find that the statement of claim does not disclose any grounds for seeking an order setting aside the 2012 judgment and amounts to an abuse of the court's process. I therefore strike out this claim.

[14] CPR 12.2 states a default judgment cannot be obtained if the claim is a fixed date claim. The 2012 proceedings were commenced by a fixed date claim form and the judgment entered is not stated to be in default.

[15] CPR 11.18

Striking out Vision as a Party

[46] Ms. Samuel also seeks an order striking out Vision as a party. It is contended that the lease agreement was between Ms. Samuel and Mr. Okoro and there is therefore no privity of contract between Ms. Samuel and Vision to enable it to found a claim based on the contract. Further, at the time of entering into the lease Ms. Samuel was not aware that the goods which Mr. Okoro intended to carry on business belonged to Vision.

[47] It is trite law that the court has the power to strike out a statement of case or any part thereof where the statement of case discloses no reasonable ground for bringing an action. It is well established that this power should be used in clear and obvious cases where it can be seen from the face of the pleadings that the claim is clearly unsustainable cannot succeed or is an abuse of process.[16]

[48] The statement of case is not clearly drafted. After much careful scrutiny of the pleadings it was discerned that Vision is not in fact seeking damages for breach of the covenants of quiet enjoyment and a continuous supply of electricity. Rather it is only Mr. Okoro who seeks this relief. Vision's claim is limited to damages for breach of Ms. Samuel's duty of care as a gratuitous bailee or alternatively, damages for trespass to goods. This was confirmed by counsel for Mr. Okoro and Vision at the hearing.

[49] The statement of claim avers that the goods seized belonged to Mr. Okoro *and* Vision. Some of the goods were sold but others were retained by the legal practitioners for Ms. Samuel on her behalf. It is averred further that Mr. Okoro and Vision demanded the return of the goods but they were retained for approximately three years. Upon the return of the goods it was discovered that they were damaged.

[50] At this juncture the court is only required to be satisfied that the pleadings disclose a basis for bringing a claim. Whether Vision can in fact prove its case is another issue. I do not find that the statement of claim, which is taken to be true, is untenable in law. I therefore find that the statement of case establishes a reasonable ground for bringing of a claim by Vision for damages for breach of

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[16] Sir Byron JA in Baldwin Spencer v The Attorney General of Antigua and Barbuda et al Civil Appeal No 20A of 1997

Ms. Samuel's duty of care as a gratuitous bailee or alternatively, damages for trespass to goods. I therefore refuse the application to strike out Vision as a party.

Costs

[51] This is not an application decided at a case management conference. On determining any application except at a case management conference the court must decide which party, if any, should be liable for costs.[17] Generally the unsuccessful party is liable to pay the costs of the successful party.

[52] Ms. Samuels' application has been partly successful in that she has succeeded in striking out parts of the claim. Notwithstanding that Ms. Samuels' application was not wholly successful I find that she is overall the successful party. Taking all the circumstances into consideration, including **CPR** 64.6 (6) I find no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party with a discount to take into consideration that Ms. Samuel did not succeed on all issues.

[53] I therefore award costs of $1000.00 to Ms. Samuel. The costs shall be paid within 21 days.

Summary

[54] It is therefore ordered that:

1. The claim for damages for breach of the implied term to ensure a continuous supply of electricity and the parts of the statement of claim related thereto are struck out.
2. The claim for an order setting aside the judgment in Claim No. NUHCV2012/0334 is struck out.
3. The application for Vision Holdings Ltd. to be struck out as a party is refused.
4. Pursuant to this decision the claimants shall file and serve an amended claim and statement of claim within 14 days of delivery of this decision.

[17] **CPR 65.11**

5. Costs of $1000.00 are awarded to Ms. Samuel. The costs shall be paid within 21 days.

Fidela Corbin Lincoln

Master