THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0064

BETWEEN:

TRELDON CONNELL

CLAIMANT

and

GEOFFREY CREESE
of Twenty Hill
(Executor of the Estate of Claribelle Connell, Deceased)

FIRST DEFENDANT

and

MARCELLE ALEXANDER FINDLAY
of 14 Winbourne Road, Tottenham
N17 6HL London, United Kingdom

SECOND DEFENDANT

Appearances:

Mrs. Kay Bacchus- Baptiste for the Claimant
Mr. Sten Sargeant for the Defendants

2017: December 14th

JUDGMENT ON SUBMISSIONS

[1] **BYER, J.:** By fixed date claim form filed the 3rd May 2017 the Claimant herein sought the following relief:

a) An order that the Deceased Selwyn Connell be declared the father of Treldon Everet Connell who was born on the 9th May 1938 pursuant of [sic] S8(1)(6) of the Status of Children Act 2011.

b) An order that the Registrar is authorized to amend the Register of Birth to include the said father's name.

[2] The Defendants in their defence to the claim relied on the doctrine of ***res judicata*** based on a decision of Lanns J in Civil Suit 41/2010 as between ***Treldon Everet Connell and Claribelle Connell (Administratrix of the Estate of Selwyn Connell or her Personal Representative)*** (hereinafter referred to as "the judgment"). Having had this pleaded, this Court determined that this was a preliminary issue which required a determination as to whether the claim could continue or would stand dismissed on that basis.

[3] This Court therefore, issued directions for the filing of submissions on the point and Counsel for the Claimant and the Defendants agreed that a decision could be rendered without oral arguments, and sought to rely on the filed written submissions.

[4] The definition of *res judicata* is well settled. As was recognized by Counsel for the Claimant, it applies to two separate instances firstly what is termed as "cause of action estoppel" and secondly to what is called "issue estoppel". What this in turn means is that, the defence of *res judicata* can apply either to an entire cause of action (cause of action estoppel) in that the whole of the legal rights and obligations of the parties have been concluded by an earlier judgment which may have "involved the determination of questions of law as well as findings of fact"[1] or in it could mean that there was a particular issue which was already litigated and decided (issue estoppel) which is now being raised in a different cause of action "to which the same issue is relevant" and one of the parties seeks to reopen that issue.[2]

[1] Halsbury's Law of England Volume 11 (2015) para 1605
[2] Halsbury's Law of England Volume 11 (2015) para 1603

[5] The essence of *res judicata* is therefore that there must be finality to litigation and more importantly that "no person should be subjected to action at the instance of the same individual more than once in relation to the same issue."[3]

[6] Therefore, in order for *res judicata* to succeed, it is necessary that certain parameters exist which are: 1) that the present complained action have the same parties, as the matter in which determination had been given, 2) that the issue or cause of action that is to be ventilated in the present complained action was dealt with substantively in the previous relied upon matter whether determined or should have been brought to the Court in that previous matter and 3) it was a court of competent jurisdiction that dealt with the matter previously.

Parties

[7] In the judgment of Lanns J, the parties were listed as the Claimant herein and the Administrator of the Estate of Selwyn Connell or their personal representative. At the time of the filing of that action, it was acknowledged that the Administratrix of the Estate of Selwyn Connell was his widow Claribelle Connell who had passed away since 2004, some six years previously. Therefore, the only party who was in a position to be heard for the "defendant", was the First named Defendant herein who in fact gave evidence at that trial. I am therefore satisfied that the attempt by Counsel for the Claimant to submit that these are differently constituted parties is an exercise only in semantics on her part, knowing full well that that it was this First Defendant who in fact appeared before the Court and to which the judgment refers.

Cause or Issue Estoppel

[8] In the present action, the Claimant herein has sought to pray for a declaration of paternity and a rectification of the Register of Birth to add the name of the said Selwyn Connell. In the judgment it was also clear, as cited by Lanns J, that the Claimant sought a determination "…. a) whether on a balance of probabilities the relationship of father and son existed between the late Selwyn Connell deceased and the Petitioner Treldon Everest Connell so as to entitle him to ***a declaration of paternity and to have his certificate of birth rectified accordingly***….[4]" . It is therefore lost on this Court how this cannot amount to a cause estoppel as against the Claimant who in this Court's

[3] Thomas v The Attorney General of Trinidad and Tobago [1990] JCJ No 46 per Lord Jauncey at page 3
[4] Paragraph 1 of the Judgment

mind seeks to re-litigate the very claim that was heard in a full trial before Lanns J and the subject of the judgment. I am therefore satisfied that the circumstances of this claim would fall squarely within the parameters of cause estoppel whereby the "rights and obligations of the part[y] was concluded in an earlier judgment"[5]. I am therefore also satisfied that the rendering of any decision on this claim would require a re-litigation of the exact point that Lanns J considered in her judgment.

Competent Jurisdiction

[9] The final criterion is that the previous judgment had to have been issued by a court of competent jurisdiction. There is no doubt that the Court that rendered the judgment was one of competent concomitant jurisdiction and therefore I find that this criterion has also been fulfilled.

[10] Having so determined that the circumstances of the present claim would offend the principles of *res judicata* if it proceeds, I am however mindful that Counsel for the Claimant asked me to consider two further points that in her submission would circumvent the application of this doctrine and allow the matter to proceed.

Additional Considerations

[11] These were the effect on this matter of the decision of the House of Lords in *Arnold and ors v National Westminster Bank PLC*[6]. In that case, the House of Lords considered whether there were ever any circumstances that could circumvent the doctrine of *res judicata*. In considering this point, they found that if the parties sought to rely on fresh or further material that it had to be shown that it was only now available and that that information, could not have been by reasonable diligence been adduced in the first proceedings. Additionally, it was also stated that where there was a change in the law that had the result of rendering the first decision incorrect, that a party would be permitted to reopen the issues determined in earlier proceedings.

[12] To her credit, Counsel for the Claimant did not seek to advance in her written or brief oral submissions that the facts upon which her client would rely on in these proceedings were not available in the first proceedings; therefore, it was not grounded on this limb of **Arnold**. In fact, the

[5] Per Halsbury's Law of England Op Cit.
[6] [1991]3 ALL ER 41

Claimant has sought in this present application to rely on the evidence of parties who appeared in the matter before Lanns J at trial and three newer additions whose evidence is clear could have been available and relied upon before Lanns J.

[13] However, in relation to the second limb or aspect of **Arnold,** Counsel for the Claimant stated that the change in the law from the CAP 243 Status of Children Act to the Act 21 of 2011 was a change that augured in favour of her client and upon which this Court should rely in allowing her client, "another bite of the cherry". At the time of the judgment, Lanns J referred to and relied on The Status of Children Act CAP 243("the Act") as that was the legislation under which that application had been filed. In 2011, the law changed and produced Act 21 of 2011 ("the new legislation") in which the issue of the section 7 application under the Act no longer existed. Under the former action to which the judgment relates, the Claimant, in addition to the seeking of a declaration of paternity, (in like terms as it exists under the new legislation) had also made it clear at trial that he believed that he was entitled to ownership of the properties of the late Selwyn Connell.[7] This additional claim added a dimension to the judgment which does not now apply. The former section 7 of the Act related to the requirement of recognizing paternity in order to deal with issues of succession. It was this provision in the law that Lanns J in her judgment found that the Claimant had not satisfied. In fact, she stated at paragraph 35 of the judgment that "…… ***I do not find that the evidence sufficiently supports the assertion that Selwyn Connell during his lifetime acknowledged Treldon as his son so as to be recognized for succession purposes."*** The judgment, however, did find that the Claimant was entitled to his declaration of paternity *simpliciter* but he could not be recognized for the purposes of sharing in the estate of Selwyn Connell. Even though it is without doubt that the legislature recognized that this may have resulted in the most bizarre decisions, and removed it in the new legislation, in this Court's opinion, the **Arnold** case did not determine that without more, the advent of a change in legislation gave rise "automatically" to a "special circumstance" to allow for the re-litigation of identical issues in subsequent proceedings. What instead it did in this Court's mind, was to limit the circumstances that could be considered "special" by asking the question "***whether given subsequent change in the law indicating that the earlier decision was wrong, the injustice of holding the plaintiff in the second action bound by the erroneous decision in law in the first action outweighs the hardship to the***

[7] See Paragraph 12 of the judgment

other party in having to re-litigate the matter and the public interest in the finality of legal proceedings.'[8] I do not find that the Claimant in these proceedings can fit themselves in these limited circumstances as enunciated in the **Arnold** case. As far as this Court is concerned, there is NO indication that the change in law would render the judgment incorrect and the Claimant having not appealed the decision is bound by it for its contents and purport. Unfortunately, the end result is that the Claimant may now find himself unable to proceed much further than his declaration. However, unlike the **Arnold** case where if the House of Lords had not agreed to the re-litigation on the construction of the rent review clause it was understood that there would have been pervasive and continuous litigation on that specific point, I do not find that **this** Claimant has come anywhere close to those considerations that applied in that case. The Claimant ultimately obtained what he had applied for, even if not in the terms sought, therefore he cannot by this means, having not appealed the judgment, seek to have another declaration made(or not made as the case may be) in his favour. I am satisfied that the circumstances that do exist do not reach the threshold to warrant the extraordinary circumvention of the doctrine of *res judicata.*

[14] I therefore accept the submissions of Counsel for the Defendants that the determination of this application as before me will result in me re-litigating exactly the same considerations on the declaration of paternity already made in the judgment. In this Court's mind this cannot be allowed.

[15] Additionally, although it was not raised by Counsel in their arguments, it would appear to this Court that the Claimant has the added problem of who are and can be the correct parties before the Court. In this application, the Claimant has brought the executor of Claribelle Connell as the Defendant and the person to whom Claribelle conveyed the property (under her entitlement to the estate of Selwyn Connell) by Deed of Gift, as the Second Defendant. It is entirely unclear to the Court how either of these parties can be parties to an action in which the subject matter and/or cause of action is and has to be the Estate of Selwyn Connell. This may have occurred due to the practical difficulty facing the Claimant that since the passing of Claribelle Connell, no one has been appointed to the Estate of Selwyn Connell and he has not made an application to have someone so constituted. As was recognized by the Learned Authors in the practitioner's text, Tristram and Cootes[9], the present First named Defendant could only have been ascribed the executorship of

[8] Per Sir Nicholas Browne- Wilkinson VC in the first instance decision of Arnold case.
[9] 32nd ed. Para 4.68

Selwyn Connell if he had in fact left a will naming Claribelle his executor. He did not. Claribelle applied for letters of administration of an intestate estate and therefore nothing could pass to the First Defendant as the executor of Claribelle. In other words, the chain of representation could only pass from one executor to another not from intestacy to testacy. This appears to be an insurmountable hurdle, which in any event if I am wrong regarding the issue of *res judicata* would prevent the Claimant from proceeding in this action.

Conclusion

[16] I agree with Counsel for the Claimant that indeed there may be a moral high ground that can justify the actions of the Claimant however, this being solely a court of law, I must be guided by that law as I find applicable.

[17] Just for the sake of completeness, Counsel also for the Claimant submitted that the issue of the applicability of Section 61 of the Administration of Estates Act was never determined in the judgment and as such, the same could now be addressed. I disagree with Counsel for the Claimant in this regard and find that although there was no finding on the issue before Lanns J in the judgment, she recognized that the argument had been made. In that regard, I wish to remind Counsel that the principle of *res judicata* applies not "only to points upon which the Court was actually required by the parties to form an opinion and pronounce 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] and also that "*res judicata* is not confined to the issues which the court is asked to decide but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised…"[11] . Counsel raised the issue of section 61 before Lanns J, she herself said so, and for whatever reason she made no finding. I, therefore, decline now to allow this to be argued before me on this application.

[18] On the basis of the foregoing, I dismiss the claim on the basis of *res judicata* the judgment having already determined the issues of this claim.

[19] The Claimant may wish to examine and advise himself of what he may do with the declaration he has already obtained from this Court. Therefore, he may wish to consider if and what claim maybe

[10] Henderson v Henderson [1843]3 Hare 100 at 114-115
[11] Greenhalgh v Mallard [1947] 2 All ER 255 at 257

brought under Part 67 or 68 of the CPR 2000. Let me make it clear, I issue no opinion on that avenue, as that is a matter for the Claimant and his counsel. In relation to the Counterclaim, it still being a live issue, I will issue directions for the hearing of the same in due course.

IT IS HEREBY ORDERED AS FOLLOWS:

ORDER

[1] The fixed date claim form filed on the 3rd May 2017 stands dismissed on the basis of the doctrine of *res judicata*.

[2] Costs to the Defendants, on a prescribed basis on an unvalued claim at 45% therefore pursuant to Appendix C of Part 65.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar