IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA
AD 2018

CLAIM NO. AXAHCV 2018/0009

BETWEEN:

[1] PARAGON HOLDINGS LIMITED
[2] JOHN ERATO

Applicants/Claimants

and

[1] TURTLE'S NEST (CONDOMINIUM) CO. LTD.
[2] BRADFORD HUFFMAN
[3] WESLEY FUHRMAN

Respondents/Defendants

Appearances:
Ms. Tara Carter for the Applicants/Claimants
Ms. Paulette Harrigan for the Respondents/Defendants

2018: February 28;
March 12; 21; 28;
June 29.
Issued July 3.

An interim ex parte injunction obtained by a party who has failed in his duty of candour may be discharged by a court to protect the administration of justice and to ensure that litigants give full and frank disclosure on such applications. The consequence imposed by the court will be informed by a number of factors including the significance of the non-disclosure in the application for the injunction.

To ground the grant of an interim or interlocutory injunction matters which are raised as serious issues must be shown to be sufficiently connected to the protection which is sought by the injunction. There were such serious issues in this case.

DECISION

[1] **RAMDHANI, J.: (Ag.)** Interim injunctive relief was granted to the applicants on an urgent *ex parte* application filed on 28th February 2018. The orders granted were effectively to preserve the status quo of the first applicant's 10 years plus businesses which, as stated by the applicants, is the operation of the Turtle's Nest Beach Resort in Meads Bay, Anguilla, as well as separate private business. Before the return date of the application, the respondents also filed an application to discharge the injunction. Both these applications were heard together on 28th March 2018 and the injunctions made on the original *ex parte* application are now made interlocutory for the reasons set out in this decision. The date for appealing this decision shall begin to run from the date the decision is issued.

Background leading up to the Applications for Injunctive Relief

[2] These proceedings evolved from earlier proceedings, namely Claim No. AXAHCV 2013/0012 ('the 2013 Claim") which included a counterclaim, and which related to a dispute existing between these very parties and related inter alia to the management and the operation of the property and the 30 units of the same condominium project known as the Turtle's Nest Beach Resort located in Meads Bay, Anguilla. It also involved questions as to whether Paragon was entitled to occupy and maintain offices on certain parts of the common property.

[3] The first applicant, Paragon, of whom the second applicant is a director, was the first registered proprietor of all of the units of the condominium project and sold a number of units under a generally standardized Sale and Purchase Agreement. The common features of each SPA obliged each buyer to enter into a Rental Pool Agreement along with a Maintenance Agreement and a 'Home Beautification Agreement'. Paragon now owns 21 units and it appeared that Paragon itself had some agreement with a number of individual owners to manage and maintain their individual units and considered that it was also entitled to manage the Rental Pool. From its inception it appeared that Paragon had its base and its offices in several container buildings which had been placed on certain

portions of the common property. That was the status quo when the 2013 Claim was filed and this was maintained throughout the proceedings by an injunction (the status quo order).

[4] In that first claim and counterclaim, the court was moved to answer questions and make orders relating *inter alia* as to (a) the validity of certain resolutions of the directors of the Strata Corp made on the 23rd February 2013; (b) the appointment of the second and third respondents as directors of the Turtle's Nest Condominium Company Ltd (the Strata Corp) in 2013; (c) who was responsible for the management of the Strata Corp's property, (d) the operation of the Rental Pool; (e) the maintenance of the Strata Corp's common property. The court was also asked to determine whether the offices formed part of the common property and if Paragon had a right to occupy the offices to manage, to maintain the common property, operate the rental pool and conduct their own business dealings. A number of injunctions and declarations were sought. Among these included an injunction to restrain these respondents from seeking to charge any rent as had been resolved. The respondents themselves sought injunctions to restrain Paragon from occupying the common property and maintaining the units on behalf of some unit owners.

[5] The trial judge referred the matter to a referee and a Referee's Report dated the 18th July 2017 was presented to the court for consideration. In that Report the Referee recommended that the learned Judge grant a number of declarations including declarations related to the control of the Strata Corp, and the validity of the appointment of the directors. The Referee also opined that whilst the Strata Corp was entitled to require Paragon to cease maintaining the common property, and to deliver any part of the common property that it occupied, he was not satisfied that the Strata Corp had so required that of Paragon. On 22nd February 2018, the learned Judge 'adopted' several of the 'findings' of the Referee but did not make any orders, nor grant any injunctions or make any declarations. The learned judge instead dismissed the claim refusing to make any of the orders sought by the applicants as well as those sought on the counterclaim.

[6] Adopting the Referee's conclusions, the learned judge held that the 'resolutions made on the 23rd February 2013 were done at a valid meeting of the directors, and the resolutions,

save and except Part (ii) of the first and second resolution were valid decisions of the Strata Corp.

[7] By adoption of those conclusions, the learned judge held that 'responsibility for the management of the Turtle's Nest Beach Resort was vested in the directors of the Strata Corp. The learned judge stated that the current directors of the Strata Corp are the second and third respondents.

[8] By the same process, the learned judge also found that Paragon 'did not have any right or obligation to maintain or occupy the common property for the purpose of maintenance or operation of a rental pool and Paragon was doing so because of the status quo injunction issued by the court.'

[9] That the court concluded 'that there was no evidence of any agreement or permission between Strata Corp and Paragon permitting, requiring or authorizing Paragon to maintain the common property for the purpose of such maintenance or for the purpose of operating the rental pool.'

[10] It was further concluded that the containers from which the first applicant operated the rental pool and a car rental were classified as buildings attached to the land and formed part of the common property, and that Paragon had no right to any part of the common property.

[11] It was further concluded that the unit owners are competent to determine who manages any rental pool, but they are not competent on behalf of the Strata Corp to authorize Paragon to maintain the common property or occupy any part of the common property.

[12] It was also found that there were oral agreements between Paragon and the unit owners for maintenance in accordance with the Sale and Purchase Agreement and for the operation of the rental pool. It was stated that the applicants were entitled to induce the unit owners to lawfully terminate these oral agreements.

[13] The respondents pointed this Court to other conclusions of the Referee as findings which must have been adopted by Justice Mathurin. The first of these is at paragraph 67 and 68 of the Referee's Report where it was stated that:

> *"67. The ability of Paragon to continue to maintain the common property, and thus charge the unit holders for its services, appears to be dependent upon the goodwill and/or acquiescence of the Strata Corp to undertake the maintenance. Whilst Paragon has benefitted from the interlocutory injunction which operates to allow it to continue to maintain the common property, it will have no right to do so once these proceedings have been concluded. Paragon does not, on the evidence before me have any right to a continuing injunction against Strata Corp allowing it to maintain the common property. I would expect and indeed hope that following the conclusion of these proceedings the directors of the Strata Corporation will ensure that the proper procedures are followed, that budgets are adopted, the common property is maintained (either by the Strata Corp or by its managing agent) and that all unit owners, including Paragon are charged for their respective share of the budget.'*
>
> *68…the ability of Paragon to continue to manage the rental pool depends upon the continuation of the rental pool agreement. If the majority, or indeed all, of the unit owners do not wish Paragon to continue to manage the rental pool then it is likely that such an agreement will be terminated in accordance with its provisions. In addition, it is possible that … the Strata Corp will require Paragon to give up the container buildings from which it operates.*

[14] In dismissing both the 2013 Claim and Counterclaim, the court ordered that 'no party having been substantially successful in the claim and counterclaim, each party is to bear their own costs'.

[15] What next happened first came from the applicants in this claim from evidence presented on their application for the new interim *ex-parte* injunctions.

The Application for Injunctive Relief made on 28th February 2018

[16] The applicants filed an urgent *ex parte* application on 28th February 2018 seeking a number of orders including orders that the respondents take no steps to interfere with their occupation of the offices located on the common property. This application was filed under the 2013 claim but following oral arguments and the court's own consideration, it was ordered during that hearing that the application would be treated as an application made in a new claim to be filed and that the claim number would reflect this.

[17] In support of this application, the applicants relied on the affidavit evidence of the second applicant, Mr. John Erato, sworn to on that same day. He outlined a brief narrative related to the matter and attached the Referee's Report and the earlier judgment of Justice Mathurin.

[18] He deposed that following the judgment of Justice Mathurin on 22nd February 2018, Paragon 'issued a notice to the two directors requesting that a unit-owners meeting be convened which by the bylaws was required to be called once a year and that none had been called since 2013.

[19] It was alleged that sometime in the morning the second applicant was called to Paragon's offices to see that police officers were there. The directors, seemingly with the police supporting the actions, then 'removed' all of Paragon's staff from the offices. They prevented the staff from accessing any of Paragon's 'business property'. The directors then made a report to the police.

[20] The evidence on the application stated that Paragon has in its offices private business records, client information and the keys to all of Paragon's 21 units and that since the eviction Paragon is unable to and would be unable to access its property.

[21] It is further stated that Paragon expects the arrival of its first guests on 1st March 2018. Mr. Erato stated that: "This shut down of our offices is detrimental to our business and staff. Damages are not an adequate remedy as we have staff that can no longer work. Damages are not an adequate remedy as the respondents have access and destroy files. The court will see from the Referee's Report that the respondents claimed access to our records and this was declined by the Referee (see Paragraph 146). The respondents are only entitled to records of the strata lot and not Paragon's which is clear in the referee's recommendations.

[22] Having regards to the affidavit evidence and the documents presented, the court was satisfied that new issues had arisen which had not been addressed in the 2013 Claim. The court was satisfied that there was a new and serious issue to be tried between the parties, namely, as to whether the directors were obliged to convene an AGM to elect new

directors which in turn might inform the question as to whether Paragon should be required to vacate the property. The court also considered the balance of convenience and decided that damages would not be an adequate remedy. The interim relief sought was granted. The return date of the application was set for 12th March 2018.

The Application to Set Aside/Discharge the Interim Orders dated the 7th March 2018

[23] The respondents did not wait until the 12th March 2018. An application was filed on the 7th March 2018 to discharge the injunctions. It was the respondents' case *inter alia* that the application should be heard urgently and that the applicants were abusing the process of the courts and were guilty of material non-disclosure. These were particularized in the grounds as follows:

1. *The Applicants require that the matter be heard as quickly as possible because it is crucial for the Applicants to regain possession of the 1st Applicant's property trading as Turtle's Nest Beach Resort so that they can effect necessary repairs following Hurricane Irma and operate the property in accordance with the Condominium Act, By-Laws and Declaration and stop the Respondents from their unlawful use if common property and operation of the 1st Applicant. Time is of the essence to repair the property following Hurricane Irma and the Respondents are obstructing the Applicants every efforts and exposing the unit owners to potential negligence liability by bringing guests on to the property when the property is still under repairs despite repeated requests from the Applicants not to do so.*

2. *The Respondents are abusing the process of the court and are seeking to relitigate issues which have been determined by a court of competent jurisdiction which said issues are res judicata.*

3. *The Respondents having applied to the court for injunctive relief without notice breached their duty to give full and frank disclosure to the Court.*

4. *The Respondents misled the court with regard to the Order of Her Ladyship The Honourable Justice Cheryl Mathurin dated the 22nd day of February 2018.*

5. *The Respondents did not set out grounds in the Notice of Application which merited the granting of mandatory and prohibitive injunctive relief.*

6. *The court did not have jurisdiction to exercise its discretion to grant injunctive relief because the legal or equitable rights of the Respondents had not been*

invaded or threatened and the Applicants had not behaved or threatened to behave in an unreasonable manner.

7. *The Respondents did not have serious issues to be tried because the trial had been concluded.*

8. *The Application made by the Respondents in obtaining the Order dated the 28th day of February 2018 was frivolous and vexatious.*

9. *The Respondents did not give evidence to justify why notice was not given.*

[24] An affidavit of Mr. Wesley Fuhrman sworn to on the 5th March 2018 and filed on 7th March 2018, supported the application.

[25] The applications came on for hearing on the 12th day of March 2018 but was adjourned on an oral application being made, grounded on the ill health of one of the attorneys.

[26] The matter was then adjourned to and heard on 21st March 2018. Following the hearing the court ordered that further written submissions be filed on the question of the serious issue to be tried. These were filed on 28th March 2018.

The Issues for the Court

[27] The applicants have asserted that there are serious issues to be tried in this matter. They say that the Learned Justice Mathurin did not make any final orders disposing of issues which existed between the parties in the 2013 claim. They say that the referee could not have gone on to decide issues of law. They say that Justice Mathurin in dismissing the 2013 claim and counterclaim, made no declaration related to the validity of the appointment of the second and third respondent as directors in 2013, and that issue is alive for resolution. They also say that apart from the issues which were before the court in the 2013 claim, there are new issues before this Court. They say that those issues include the question as to whether a third director appointed by virtue of resolution dated 25th February 2018 was properly appointed; they contend this appointment is void. They contend that the respondents' failure to call for an annual general meeting when called to do so by Paragon was an act of bad faith and an act of misfeasance by Strata Corp. They

appear to be effectively saying that if such a meeting is called Paragon would be able to vote on matters such as the election of directors and that depending on the outcome this would directly impact their right to continue to occupy the common property. They effectively say it is also a serious issue to be tried as to whether Paragon owning 21 of the 30 units of Strata Corp Company (59.65 percent of the voting power of the unit owners) should be entitled to a determinative say in the appointment of the third director and consequently Paragon's continued use of the common property to run their business. They say on these bases that the Respondent has committed acts of trespass by their actions in seeking to evict the applicants from the common property.

[28] The respondents vigorously oppose each of the contentions raised by the applicants. First, they say that the applicants have failed in their duty to give full and frank disclosure, and that the matters not disclosed are material as to whether the injunction should have been granted in the first place and it should ground its discharge. The respondents pointed to a number of findings contained in the Referee's Report and stated that these had not been brought to the court's attention.[1]

[29] The respondents also pointed out as matters of non-disclosure, several letters dated 27th February which they say were sent to the applicants before any steps were taken to evict them. These letters gave notice to the applicants that the maintenance and rental pool agreement were terminated with immediate effect and that Paragon was no longer authorized to enter the units of Strata Corp. The second letter gave notice that having regards to the judgment of the court in the 2013 claim, the respondents have appointed a Mr. Michael Bianco as a third director of the Strata Corp, and that Strata Corp would exercise its powers and duties under the Condominium documents to manage and control its property and business, and that Paragon was to 'cease the maintenance of the common property, the operation of the rental pool and the management of the property'.

[30] As far as serious issues to be tried which could justify the grant of injunctive relief, the respondents contended that there were none. Ms. Harrigan submitted that all the issues had been dealt with and ruled on in the earlier 2013 Claim, and that it was an abuse of the

[1] Paragraphs 12 et seq of Wesley Fuhrman's affidavit dated 7th March 2018.

process of the court for the applicants to seek to relitigate the matter. Any challenge to the 'findings' in the 2013 claim that the applicant had no lawful right to occupy the common property of Strata Corp should have been brought by way of an appeal.

[31] In further written submissions, Ms. Harrigan for the respondents contended that the applicants could not properly point to any legal or equitable right to occupy the common property of Strata Corp. Further, Ms. Harrigan contended that Mr. Bianco had been properly appointed in accordance with the bylaws of the company and that the applicants, and in any event this issue was not connected to any right of the applicant to remain on the common property so that it could not ground any injunction to protect the Applicant's occupation of the common property.

[32] The issues for the court therefore are:

(a) Whether the applicants failed in their duty of frank and full disclosure of all relevant matters, and if they have so failed, what consequences should result?

(b) Whether, there are serious issues to be tried? Whether these issues are connected to the injunctions granted? In this regard, the question of whether these matters have already been dealt with in the 2013 Claim will be addressed, as well as the abuse of process contentions.

[33] I turn to address these matters.

The Court Analysis and Conclusions

Whether the Applicants failed in their duty of frank and full disclosure of all relevant matters, and if they have so failed, what consequences should result?

[34] The court agrees with the general principles which were pointed out by Ms. Harrigan relating to non-disclosure. In this regard, the court considered the cases of **Independent Asset Management Company Limited v Swiss Forfaiting Ltd.** BVIHC (Com) 44 of 2015 which contained references to and discussed portions of **The Arena Corporation Limited**

v Peter Schroder [2003] EWHC 1089; **Commercial Bank-Cameroun v Nixon Financial Group Ltd** HCVAP 2011/005.

[35] Except for certain specific matters, there was no merit in many of the respondents' contentions. At the *ex-parte* stage the court was presented with the Referees Report and the Judgment of Justice Mathurin in the 2013 Claim. The applicants were met frontally with queries from the court as to whether the court was at all entitled to revisit any of the matters which engaged the attention and conclusions of Justice Mathurin in the 2013 Claim. At that stage, the court formed the view that it could not entertain any attempt to re-engage the court on those matters which had been litigated already. The court also considered that the 2013 Claim had been dismissed. There was no application to re-instate that claim. It was on these bases that the court ruled that the applicants could not seek to come under the 2013 Claim to make any application but had to institute a new claim; the court deemed the *ex-parte* application of 28th February 2018 as being a pre-action application in a new claim.

[36] These considerations were foremost in the court's mind, as the court had apprised itself of the Referee's Report. The fact that the applicants had not spelt out many specific parts of that Report did not mean that the court was not seized of the contents of that Report. Whilst the applicants did not set out all parts of the Report, in the court's own view, there was sufficient matters set out to alert the court to the important matters contained in that Report. The same applies to the judgment of Justice Mathurin.

[37] One of the alleged failures to make full and frank disclosure which was identified by the Respondents, related to the statements made by the second applicant that the Report spoke to a demand for 'rent' when in fact the Report speaks to a demand for money for 'use' of the common property. The point being made here by the respondent was the applicants tried to create the impression that some 'tenancy' was in issue. In my view, this difference in language was really not a material particular in the grant of the interim orders, as it was made clear by the applicant that the Referee[2] and the learned Judge had

[2] Paragraph 87 of the Report

concluded the demand for payment, in any event, did not create a lease agreement between the applicant and Strata Corp.

[38] Similarly, this court does not consider that the applicants' statements that the status quo order had 'fallen away' on judgment by Justice Mathurin as grounding the contention that the applicants had failed in their duty to be full and frank. It seemed to this Court that this was an expression of the applicants' understanding of the effect of the learned judge's order; even today they continue to maintain that this is the legal effect of the judge's disposal of the 2013 Claim. For my part, it did not matter whether that status quo order 'fell away' or was 'discharged'. The point being made by the applicants was that when the status quo order came to an end (whether discharged or 'falling away') the directors were then obliged to operate only in accordance with the rules governing the company – the by-laws and the Act. The question for the court was whether they are so operating.

[39] The respondents also pointed several other matters identified in paragraphs 27 and 28 of Mr. Fuhrman's affidavit filed on 7th March 2018. The first of these was a letter dated 20th February 2018 from the respondents to the applicants advising them not to advertise the reopening of the condo because the site was hazardous from ongoing repairs. The second of these was an allegation that the applicants had caused a delay in repairs by failing to comply with a court order to pay over US$200,000.00 from insurance proceeds collected by the applicant. I do not consider that these were relevant to the question of the grant of the interim orders.

[40] The respondents have also alleged that there has been non-disclosure of a number of letters, including letters dated 27th February 2018 from the unit owners stating that they had terminated their individual maintenance and rental pool agreements with immediate effect and advised the first applicant that it was no longer authorized to enter their respective units for maintenance and housekeeping services. There was a second letter also dated 27th February 2018, from the respondents which informed the applicants *inter alia* that since the 2013 status quo order had been discharged the respondents would be (a) exercising their power under the Condominium documents; (b) that a third director had been appointed by the directors; (c) that the directors would 'continue to repair and restore'

the property of the Strata Corp. Significantly this letter also stated that a general meeting was in the discretion of the directors and once one was set, seven days' notice would be given.

[41] There was no mention of the letters dated the 27th February 2018 by the applicants in their *ex-parte* Application or in any of the affidavits in support. There was no evidence on the application denying these assertions of non-disclosure.

[42] That being said, I have looked at the Statement of Claim. It is pleaded that some letters were received by the second applicant at 6.55 a.m. on 28th February 2018. The first of these appears to relate to the letter set out at paragraph 21 of Mr. Fuhrman's affidavit. The second was a letter from the second respondent and his wife purporting to terminate their rental pool agreement with Paragon. The third letter was from the first respondent to Paragon purporting to terminate Paragon's operation of the rental pool and management of the property.

[43] I find that these letters were relevant to the exercise of the court's discretion. These documents spoke to the intention of the respondents to manage the property and exercising powers and duties under the condominium documents.

[44] The court is not at all happy about the applicants' breach of their duty to be full and frank with the court. Litigants who move the court *ex parte* have a duty to be candid with the court. The court has a duty to protect the administration of justice and uphold the public interest in requiring full and fair disclosure'[3].

[45] I am reminded that in considering consequences for the non-disclosure, 'a balance must be maintained between marking the court's displeasure at the non-disclosure and doing justice between the parties[4].' The court must have regard to the fact that a discharge of an injunction, in some cases, may result in a new application which may in turn have adverse

[3] See The Arena Corporation Limited v Peter Schroder [2003] EWHC 1089 at paragraph 213 quoted with approval by the BVI commercial court in Independent Asset Management Company Limited v Swiss Forfaiting Ltd. BVIHC (Com) 44 of 2015

[4] Per Bennett JA at para. 34 in Commercial Bank-Cameroun v Nixon Financial Group Ltd HCVAP 2011/005 cited with approval in Independent Asset Management Company Limited v Swiss Forfaiting Ltd. BVIHC (Com) 44 of 2015

costs consequences for the other party. At the end of it, the court must seek to do justice to the case and any punishment which is imposed for the failure to be full and frank must be proportionate to the significance of the non-disclosure.

[46] The non-disclosure in this case will not result in the discharge of the injunction. As the court has considered below, there are serious issues to be tried and the balance of justice requires that the court protect the status quo until the hearing and determination of the substantive claim. In arriving at this conclusion, the court has considered the significance of the non-disclosure. The documents themselves did not amount to any notice to quit nor did they indicate in any way that the respondents would be moving to evict Paragon instead of convening the requested AGM. Further the service of the letters was effected mere hours before the second and third respondents secured the assistance of the police department and evicted Paragon and all its staff from the offices which they had occupied. This was eight days after the respondents had been requested to convene an AGM; the letter to respond to that request stated *inter alia* that the Strata Corp would be exercising its powers to manage the property and that Paragon should cease all forms of management. The referee had also recognized that there were documents belonging to the applicants with regards to which an order should not be made to turn them over to the respondent. There is also the question as to whether Paragon was still obliged under the Rental Pool Agreements. All of this, coupled with the haste and seemingly high-handed approach to seek to lock out Paragon within hours after service depriving them of even access to their own documents, lessens the significance of the offence of non-disclosure.

[47] The appropriate punishment therefore in the balance is not the discharge of the injunction, but it is an order that the applicants pay some of the costs of the respondents on the respondents' application to discharge the injunction. The court will fix those costs in the sum of EC$1,000.00 to each of the respondents.

Issue No. 2 - Whether, there are serious issues to be tried? Whether these issues are connected to the injunctions granted? In this regard, the question of whether these matters

have already been dealt with in the 2013 Claim will be addressed, as well as the abuse of process contentions.

[48] The arguments of the parties have been stated in brief above. Several questions are raised here. First, there is the question as to whether this application and claim constitute an abuse of the process of the court, in that it treats with matters which are res judicata and requires the court to rule upon matters which have already been ruled on by the court. Second, even if new issues have been raised, whether these are those types of serious issues which are connected to the protection that is being sought on the injunction application, in the sense if those issues are ultimately resolved in favour of the applicants they are sufficiently connected to the protection given by the injunctions. In this regard, I have noted the further written submissions and authorities filed by each side.

[49] Every court should ensure that the process of the court is not abused. The court must guard against any attempts to relitigate matters which had previously engaged the court's attention in breach of the res judicata principle. Any such attempt may also amount to an abuse of the court's process. As is stated in **Halsbury Laws** Volume 25 at paragraph 1603:

> *"The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, 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 that issue. For this reason, res judicata has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon which the courts have endeavoured to impose some coherent scheme only in relatively recent times.*
>
> *"Cause of action estoppel is absolute only in relation to points actually decided on the earlier occasion and there is no justification for the principle applying in*

circumstances where there has been no actual adjudication of any issue and no action by a party which would justify treating them as having consented, either expressly or by implication, to having conceded the issue by choosing not to have the matter formally determined. Equally, an exception to issue estoppel arises in the special circumstance where there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings.

The purpose of the principle of res judicata is to support the good administration of justice in the interests of the public and the parties by preventing abusive and duplicative litigation, and its twin principles are often expressed as being the public interest that the courts should not be clogged by re-determinations of the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter. A distinction is often made between the doctrine of res judicata and the wider rule (alternatively seen as an extension of res judicata) that precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised, in the earlier ones for the purpose of establishing or negativing the existence of a cause of action ('abuse of process'), although the policy underlying both principles is essentially the same."

[50] The learning in Halsbury is grounded in a number of authorities a leading one of which is the decision of the Privy Council in **Thomas v The Attorney General of Trinidad and Tobago No. 2** [1991] LRC (Const) 1001 at 1005, where the Board stated that: 'The classic statement on the subject is contained in the following passage from the judgment of Wigram V-C in **Henderson v Henderson** [1843-60] All ER Rep 378 at 381-382:

> *"… 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.'*

[51] Their Lordships stated in **Thomas** that: "The principles enunciated in that dictum have been restated on numerous occasions of which it is sufficient to mention only three. In **Hoystead v Commissioner of Taxation** [1925] All ER Rep 56 Lord Shaw of Dunfermline, at 62, in delivering the opinion of the Board said:

> *'Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted*.'

In **Greenhalgh v Mallard** [1947] 2 All ER 255 Somervell LJ at 257 said:

> *'I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually 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 that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'*

In **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581 Lord Kilbrandon, at 590, in delivering the opinion of the Board referred to the above quoted passage in the judgment of Wigram V-C and continued:

> *'The shutting out of a "subject of litigation" – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.'*

[52] As the Privy Council stated in **Thomas:** "[i]t is clear from these authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules.'

[53] From all the above, it seems to me that the court does not have to decide a point, for that point to be later barred under principles of res judicata. It is sufficient that it ought to have been a point raised. If I am right about this, then it would probably mean, and I am prepared to accept that the fact that a court dismisses a claim matters not, as far as the

issues raised were concerned. A *fortiorari*, where the court makes findings on issues, those issues and points would be caught by the principles. Even if I am wrong about this, it would, at the very least, seem an abuse of the process of the court for a party to raise the same issues in a second action simply because there were no declarations made but that court only made 'findings'. Special or changed circumstances would have to be shown to allow such points.

[54] For these reasons, this Court is not prepared to agree with Ms. Carter's contentions that the Court is entitled to revisit any of the matters which have been ruled on by Justice Mathurin. Ms. Carter also appears to be saying Justice Mathurin did not grant any relief sought on any of the matters which were contained in the 2013 Claim, but in fact adopted findings of the Referee making them her own and used those findings as **reasons** to dismiss the 2013 claim and counterclaim, refusing to make any orders sought. Ms. Carter appears to be saying that the 'reasoning' of a judge of concurrent jurisdiction does not bind another judge and does not engage the res judicata principle. I would prefer to conclude, as I noted above, that the principle is engaged where the earlier court addressed issues and made findings. If I am wrong, having regards to the circumstances of this matter and the time it has spent in the courts already, it would at least be an abuse of the process of the courts to relitigate the same points again, unless there were changed circumstances which make the issues different.

[55] One of the matters which must be considered in the context of the res judicata principles is the applicants' contentions that there is a serious issue to be tried as regards the validity of the appointment of the second and third respondents as directors in 2013. The applicants state that the learned judge made no finding. The respondent submits that this was decided by the learned judge.

[56] I note that at the second bullet point under paragraph 4 of the judgment, Justice Mathurin states that, "The current directors of the Strata Corp are the second and third defendants, Mr. Huffman and Mr. Fuhrman." The learned judge had earlier noted that this was among

findings of the referee which the learned judge was adopting. I also note that the point was dealt with at length by the referee.

[57] I agree with the applicant that the referee was limited to finding facts and was not entitled to address matters of law. Notwithstanding the many of the 'findings' of the Referee were adopted by the learned judge, it must be taken that the learned judge equally addressed her mind to the matter and that any findings which were adopted became findings of the court. This Court considered Ms. Carter's concerns about the fact that no declarations were made and that all of the 'findings' adopted could fall to be considered the reasoning of the court towards an ultimate dismissal of the matter. In my view, however, it clear to this Court that the 'points' had been 'decided' by a court of concurrent jurisdiction. As stated above the principle does not appear to call for a declaration for every point decided being made though, now with hindsight, such declarations would have avoided these arguments. For my part, I am prepared to find that Justice Mathurin decided the points as to whether the second and third respondents were validly appointed directors of the Strata Corp in 2013 and whether they continued to be lawful directors at the date of the judgment. This is so despite the fact that the 2013 claim was dismissed without any of the substantive relief being granted.

[58] That being said, the court must also examine the additional relief which is being sought in the context of the pleaded case to determine whether serious issues exist for trial.

[59] The applicants have raised several new and separate issues. These are the bases of two reliefs which are being sought on the claim, namely:

> *"A declaration that the 2nd and 3rd Defendants' failure to call an annual owner's meeting were acts and/or omissions in bad faith and misfeasance and the 2nd and 3rd Defendants are personally liable for any damages or losses suffered as a result of such acts and/or omissions."*
>
> *"A declaration that on the construction of the by laws as a whole, the interpretation should be that the election of directors requires a majority vote; or in the alternate, an order pursuant to the inherent jurisdiction of the court that the Bylaws of the 1st Defendant be amended to permit the election of directors by the vote of owners with 51% collective unit entitlement."*

[60] These issues as framed constituted an evolution and refinement of the issues as framed at the *ex-parte* stage. The events since the delivery of Justice Mathurin's judgment takes these matters outside of the res judicata principle. Their litigation in this new claim would not constitute an abuse of the process of the courts.

[61] I would agree that on the affidavit evidence presented, especially as relates to the history of the matter and the request made by the applicants that an AGM should be convened, that an AGM not yet being held gives rise to a serious question to be tried as to whether the respondents were acting in good faith and whether they were compliant with the bylaws which require an Annual General Meeting to be held. It may be that having regards to the fact that no AGMs were held for the almost five years, the bylaws, the relevant statutory provisions and commercial good faith would require that such a meeting be called forthwith. At such a meeting, the question of the removal, continuation of and election of directors would have to be considered. That in turn might give Paragon the right to affect the outcome of such voting and consequently the control of Strata Corp. These are all serious issues to be tried, and the court is in no position on these applications to decide any of them. Further, the court is not able to nor should it attempt to predict the outcome of any elections to be held.

[62] The other questions raised by the applicants do also present serious issues to be tried. Here it is that the applicants are saying that it is a serious question as to whether the bylaws should be read to allow the election of directors by a simple majority vote instead of requiring 75 percent of all persons entitled to vote. Justice Mathurin did not decide the point as to how directors are to be elected, but the referee offered his own view of it having examined the bylaws in some detail.

[63] The bylaws state that directors are appointed by 75% of the unit owners voting in favour. Their appointments continue as long as they are not voted out. In my view, no ambiguity arises because other provisions of the bylaws state that a quorum may comprise of 50% of the unit owners.[5] Here the applicants are complaining that Paragon owns 21 units or 59.65

[5] Written submissions dated 27th March 2018 made by Ms. Carter for the Applicant.

percent of the voting power, and where all the other unit owners are not in favour of their choice, they may never be able to elect any director of their choice, the incumbents may remain indefinitely and Paragon would be effectively left without a voice in the management of the project. The applicants are effectively arguing that this could not have been the intent of the Act, and it does not make for commercial good sense. This Court is not prepared to find that this issue of law is as straightforward as the respondents would claim. I remind myself of the caution given by Lord Diplock in **American Cynamid Co. v Ethicon Ltd** [1975] 1 All ER 504 at page 511 when he said:

> *"It is not part of the court's function at this stage of the litigation to try to resolve conflicts on evidence on affidavit as to facts on which the claims of either party may depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that it aided the court in doing what was its great object, viz abstaining from expressing any opinion, upon the merits of the case until the hearing. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."*

[64] On the basis of the above, the court considers that the resolution of these questions is to be left for the trial. They are also sufficiently connected to the question as to whether Strata Corp would require that Paragon vacate the common property. It provides a basis upon which the injunction may be continued.

[65] I have considered the balance of convenience. I have noted that the status quo is what is sought to be protected. Paragon has an ongoing business and may yet be obliged to carry out duties under the Rental Pool Agreements. On a balance of justice, I do think this status quo should be preserved until these crucial questions as to the control and management of Strata Corp is determined. (It might be that the court could, with the agreement of the parties treat summarily with these issues as to whether an AGM should be ordered by the court, and whether the elections of directors could be by a simple majority vote.)

[66] For all these reasons, the court considers that the injunctions granted should be made interlocutory. The Court hereby orders that:

(a) The applicants abide by any order that the court may make as to damages caused to the respondents by the granting of the orders which the applicants ought to pay.

(b) The respondents shall remove all obstruction and locks from all offices currently occupied by Paragon Holdings Limited forthwith.

(c) The respondents cease and desist from interfering, threatening, harassing or otherwise obstructing any, operations, guest activity, or the staff, agents and employees of Paragon Holdings Limited while executing their duties on the property.

(d) Costs on the applicants' application for injunctive relief shall be in the cause.

(e) *As a consequence of the applicants' failure to give full and frank disclosure, costs in the sum of EC$1,000.00 shall be awarded to each of the respondents. The applicants shall be jointly and severally liable for these costs*.

[67] The court wishes to express its gratitude to the parties for their patience, their written submissions and willingness to re-send documents by email. That did assist this Court in completing this decision.

Darshan Ramdhani
High Court Judge (Ag.)

BY THE COURT

Registrar

Postscript

There is a matter related to the conduct of the Respondent's attorney, Ms. Harrigan which must be mentioned as a necessary part of the court's duty to control its officers. It was raised with counsel on 12th March 2018.

The *ex-parte* application for injunctive relief was commenced under the 2013 Claim, but during that initial hearing on 28th February 2018 the court considered that it could not be sustained under that claim. Having regards to the court's views on the merit of the application, the court deemed that the application as being brought in a new claim which was to be filed. The order made that day requiring a substantive claim to be filed reflected this.

On 5th March 2018, these very parties and their counsel appeared before this Court on a contempt application related to the 2013 claim. By this time, the court had seen that the ex parte application, the supporting affidavit and the interim order presented for settling were still referencing the 2013 claim number. The court raised the matter in open court on the record and reminded Ms. Carter that the ex parte application had been deemed on the first hearing as being brought in a new claim and that the documents should have been given a new claim number by the Registry. It was clearly explained to Ms. Harrigan what the court had done.

The court then was surprised by statements which were set out in the affidavit sworn to by one of the respondents in which he attributes the statements to Ms. Harrigan. Those statements were effectively repeated by Ms. Harrigan in her written submissions where she stated:

> *19. On the 5th day of March 2018 the [Respondents] appeared before His Lordship The Honourable Justice Darshan Ramdhani in Claim No. 2013/0012 Paragon Holdings Ltd et al v Turtle's Nest (Condominium) Co. et al for a committal hearing application. That at the end of the proceedings Justice Ramdhani made reference to the hearing which took place without notice on the 28th day of February 2018 and instructed Counsel for the [Applicants] to contact the Registrar and get a new Claim number for the matter which was heard on the 28th day of February 2018. The court instructed Counsel for the [Applicants] to amend all the documents which had been served with the new Claim number and to reserve the said documents.*
>
> *20. That upon being advised by Counsel on behalf of the [Respondents] that an Application for Discharge of the Order was being made in Claim No 2013/0012 Paragon Holdings Ltd et al v Turtle's Nest (Condominium) Co. et al the learned Judge instructed Counsel that unless the documents had already been filed they should be endorsed with the new Claim number.*
>
> *21. On the 5th day of March 2018 the [Applicants] served on Paulette Harrigan's Chambers the Application without Notice, Certificate of Urgency, Affidavit in Support and Order which had been filed on the 28th day of February with Claim No. 2013/0012 crossed out and a new number endorsed thereon namely 2018/009.*

> *22. The [Respondents] have filed a Notice of Application with supporting Affidavit and Skeleton Arguments to Discharge and/or set aside the Order granted on the 28th day of February 2018 in Claim No. 2018/009 in accordance with the instructions of the learned Judge but the [Respondents] in so doing do not concur with the action."*

This is not a full and fair account and misrepresents what the court had said on 5th March. It gives the clear impression that nothing had been said by the court, that the act of deeming that the application was made in the new claim had been made on 28th February 2018. The submissions of counsel inferred that the court was **now** on the 5th of March 2018 making a new order as though it were an afterthought.

Read this way, it may be considered that counsel was imputing some improper conduct on the part of the court, that the court had some afterthought about the need for a new claim when the court spoke to the parties on 5th March, and even if the court mentioned that the deeming took place on 28th February, the court was not being truthful. On 5th March, the court had made it very clear as to what had happened and there ought to have been no doubt about this. For counsel to have given this account to her client was not proper. Any attorney about to make any statements to their clients which may imply that the court may have acted improperly or inappropriately has a duty to get it right or run the risk herself of acting improperly. It may do that attorney well to confirm from the transcripts what in fact was said by the judge. It brings disrepute to the administration of justice when such inaccurate and irresponsible statements are made. The court hopes that counsel is guided accordingly.