

THE EASTERN CARIBBEAN SUPREME COURT  
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2015/0827

BETWEEN:

MARIE MAKHOUL

Claimant

And

CICELY FOSTER

Defendant

Appearances:

Mr. Hugh Marshall and Ms. Kema Benjamin of Marshall & Co for the Claimant/Respondent  
Ms. Fiona Murphy of Simon Rogers Murdoch for the Defendant/Applicant

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2017: September 22

2018: April 11

2019: January 28  
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DECISION

[1] HENRY J.: By Notice of Application filed herein, the defendant applies under Part 9.7 (1) of the Civil Procedure Rules 2000 (CPR) for:

- (a) A declaration that the court has no jurisdiction to try the claim filed herein by the claimant/respondent;
- (b) In the alternative, a declaration that the court declines to exercise its general jurisdiction to try the Claim filed herein;
- (c) That costs be awarded to the applicant.

[2] The grounds of the application are that the claimant/respondent bases her claim on the judgments of **the court in a previous matter involving the applicant**. **The respondent's claim herein is based on** facts already determined by the court in the previous matter and seeks to re-institute a number of issues already raised before and determined by the court. **The respondent's claim is, in effect, res** judicata and the respondent should be precluded from continuing this action in its entirety.

[3] The application is supported by an Affidavit sworn by Martin Foster, the son and attorney-in-fact of the applicant Cicely Foster.

#### History

[4] In the former matter, Claim No ANUHCV 2003/0138, the respondent herein (Ms. Makhoul) commenced legal proceedings seeking a declaration of title to the buildings located on lands Registration Section: St. Johns; Block 66 1692E Parcel 568, as well as a prohibitory injunction to prevent the applicant (Ms Foster) from executing a notice to quit. In her claim, Ms Makhoul asserted that she was entitled to all the buildings on the land and therefore to rents being collected by Ms Foster. Ms Foster defended the action by asserting entitlement to the buildings thereon and counterclaimed for possession and mesne profits. Judgment was delivered in favour of Ms Foster. **The court dismissed Ms Makhoul's claim against Ms** Foster. In respect of the counterclaim, Judgment was granted in favour of Ms Foster together with prescribed costs. Further, the trial judge found that the original chattel house/store rests on a foundation that is attached to the ground and that the store had become part of the land and affixed to it and was therefore now owned by Ms Foster. The court specifically made the following declarations:

“ . . . that Ms Cicely Foster is the lawful owner of the entire property situated at the corner of Market and South Street. It is further declared that Ms Cicely Foster is entitled to collect all rents due on the property from Mr. Juan Gua Wang. It is further declared that from the date of this order, Ms Marie Makhoul is not entitled to collect any rent from Mr. Juan Gua Wang.”

[5] Ms Makhoul appealed the decision. The Court of Appeal delivered its judgment on 23<sup>rd</sup> February 2015<sup>1</sup>. The Court found that the lease agreement between the Cicely Foster as lessor and Ms Makhoul as lessee, expressly provided that the appellant was required to remove the Building at the end of the term. Further, it was not disputed that the Building had been erected for the purpose of carrying on a trade, namely, the operation of a store. Consequently, although the building became a fixture at the end of the term of the lease, the appellant was entitled to sever and remove the Building from the land. However, so long as the building remained on the land it would retain its character as a fixture and thus form part of the realty owned by Ms Foster. The Court disposed of the appeal as follows:

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<sup>1</sup> Marie Makhoul v Cicely Foster and another ANUHCVP2009/0014

**“The appeal is allowed in part and only to the extent that I have found that the appellant was entitled to remove the original building erected on the property at the end of the tenancy. Otherwise, the appeal is dismissed.”<sup>2</sup>**

[6] Thereafter, on 6<sup>th</sup> November 2015, the Marie Makhoul filed a Fixed Date Claim against Cicely Foster, in her capacity as the Registered Proprietor and holder of the legal interest and title in the lands described as Registration section: St Johns; Block 66 1692E Parcel 569, for:

1. An account of all the income received on the property and in relationship to all the income received in respect of the building situated thereon being the sole property of the claimant;
2. That the account be from the 28<sup>th</sup> day of May 2009 until present;
3. An order that all monies received by the defendant, her agents and her servants in respect of the building of the claimant from 28<sup>th</sup> May 2009 to present be paid forthwith to the claimant together with interest thereon;
4. That the claimant be granted an Order of possession of her building or an order permitting **her to demolish her building situated on the respondent’s land more particularly described** in the Land Registry as Registration Section: St Johns; Block 66 1692E Parcel 568;
5. The claimant be paid the cost of these proceedings;
6. Such further and other relief as this Honourable Court deems fit.

[7] The Fixed Date Claim Form is supported by an affidavit sworn by Marie Makhoul. Under the heading **“The Basis of my Claim”**, she sets out the history of the tenancy agreement of certain lands between herself and Cicely Foster and the fact that she was permitted to place a chattel building on the land; that a dispute arose between them and she commenced proceedings in the High Court and that by a judgment of the court given on 28<sup>th</sup> day of May 2009 she was evicted from the premises. She states that she was denied the opportunity to remove her building and the defendant wrongfully took possession of her building and has been renting it commercially ever since.

[8] Ms Makhoul further states in her affidavit that a decision of the Court of Appeal was given on 23<sup>rd</sup> **February 2015 and that the court declared that “the building though now part of the land belongs to me”**. She refers to **paragraph 36 of the judgement in support** of that statement.

[9] In paragraph 6 of her affidavit, Ms Makhoul states that based upon the decision of the Court of Appeal, Ms Foster is under an obligation to allow her to remove her building but has refused, neglected or otherwise failed to allow her to so remove and Ms Foster continues to rent the building without render any account for the benefit received from the building. Ms. Makhoul then asserts that Ms Foster is a trustee of her beneficial interest in the building. Accordingly she honestly believes that she is entitled to an accounting of her interest and wishes the court to compel Ms Foster to render an account.

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<sup>2</sup> At paragraph 49, page 14

- [10] Finally, Ms Makhoul asserts that her attorney has written to Ms Foster's Counsel to seek a voluntary resolution but this has not been successful. She states that she is satisfied that Ms Foster is unwilling to enter into any arrangement with her for the future whereby she would be willing to leave her chattel building on her lands. In these circumstances she desires to remove her building from the premises of Ms Foster and seek an order of the court to that effect.
- [11] In response, Ms Foster filed Acknowledgement of Service and the within application pursuant to Part 9.7 of the CPR.
- [12] Ms Makhoul resists the application. She cites Section 7 (1) of the Eastern Caribbean Supreme Court Act Cap 143 which states that the High Court shall have and exercise within Antigua and Barbuda all such jurisdiction . . . and the same powers and authorities incidental to such jurisdiction as on the first day of January 1994 were vested in the High Court of Justice in England. She submits that there **is nothing in the instant case to raise the issue of the High Court's jurisdiction to hear and determine this matter.** On this basis alone, the application should be dismissed with costs.
- [13] Ms Makhoul further submits that the High court is being asked by her to determine that her right to remove the building flows from her property rights to the building and not to a term in the lease giving her a right to remove it. The building was built by her late husband. The building cannot be owned by Ms Foster and yet be subject to Mrs Makhoul's right to remove it. **One of the parties must be the owner.** If Ms Makhoul is the owner, then it follows that she is entitled to an accounting and to payment **of Damages from Ms Foster's use of the building.** She admits that this matter is not being raised now for the first time as a claim for damages was made in the original High Court action. Her contentions, she submits, relate to parties, property and laws of Antigua and Barbuda and within the jurisdiction of the Court. And the court should not hold that it has no jurisdiction to hear the matter or that it declines to exercise such jurisdiction.

Part 9.7 of the CPR provides:

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

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

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

- [14] Commenting on the above section, the authors of The Caribbean Civil Practice state:

**"The circumstances in which CPR Part 9 and CPR Part 7 will principally be used in relation to the disputing of jurisdiction are:**

- (1) The defendant is resident out of the jurisdiction and he contends that permission to serve was incorrectly obtained;
- (2) (2) (whether proceedings were served within the jurisdiction or outside the jurisdiction), the defendant contends that the court in which the proceedings were issued is not the appropriate place for the matter to be tried;
- (3) Service of the claim form was invalid because it was served outside the period specified by the rules for its service and its validity had expired;
- (4) The claimant does not have a good cause of action; and
- (5) The claim is one which is regulated by an arbitration agreement between the parties and the proceedings should be stayed or struck out.

[15] **Ms Foster's** position is that Ms Makhoul's claim discloses no good cause of action as (a) it seeks to dispute fact already determined by the High Court and confirmed by the Court of Appeal in a previous judgment in a matter between the litigants involving the same property and are thus res judicata; (b) Ms Makhoul's claim has already been determined by the Court of Appeal in a matter involving the litigants in respect of the said property and is therefore res judicata and (c) Ms Makhoul has failed to provide any form of evidence that she was prevented from or denied the right of executing the Court's order in the previous judgments. The applicant submits that for these reasons, the court does not have the jurisdiction or, in the alternative, ought not to exercise its jurisdiction to hear the claim herein.

[16] The applicant refers the court to the case of Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd<sup>3</sup> where Lord Sumption JSC addressed the principles of res judicata. He stated:

**"The first principle is that once a cause of action has** been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is cause of action estoppel. . . . Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages . . . . Third, there is the doctrine of merger, which treats a cause of action **as extinguished once judgment has been given on it, and the claimant's** sole right as being a right on the judgment. Fourth there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties. . . . Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

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<sup>3</sup> [2014] AC 160

[17] Ms Makhoul submits that her claim falls under the exception where further material, not in the form of evidence but in the form of a Court of Appeal judgment which reversed the earlier High Court decision has brought to light the fact that the issue of who is entitled to profit from the building. Though raised earlier in the proceedings, it is still in dispute and has not conclusively been resolved. This, she asserts, is not a matter of re-litigation an issue which has been decided, but rather a matter of determining an unresolved issue which could only be raised at this point in the proceedings as the Court of Appeal found that Mrs. Makhoul **could remove the building from the applicant's land.**

#### Findings and Conclusions

[18] In the previous claim, Ms. Makhoul contended that she was the owner of the entire building on the land and entitled to the rents. She therefore sought a declaration as to title to the buildings and an injunction restraining the applicant from removing her from the land. The issue of ownership of the Buildings was the central issue and it was resolved by the High Court. Blenman J. stated that she was satisfied that the original chattel building rests on a foundation that is attached to the ground. The court declared that Ms. Cicely Foster is the lawful owner of the entire property and that Ms Foster is entitled to collect all rents due on the property from Mr. Wang, the then tenant.

[19] On appeal, the Court of Appeal noted that it has long been established as an exception to the general rule that a tenant may have a right of severance and removal of a fixture which has been affixed by the tenant for the purpose of trade. The court cited the case of *Webb v Fran Bevis Ltd*<sup>4</sup> where it **was held that a shed was a tenant's fixture having been** erected by the tenant for use in his trade and for this reason could be severed from the land and removed by the tenant at the end of his tenancy. The court further observed that the lease agreement between Ms Foster as Lessor and Ms Makhoul as lessee, expressly provided that Ms Makhoul was required to remove the Building at the end of the term. It had not been disputed that the Building had been erected for the purpose of carrying on a trade namely, the operation of a store. The court stated at paragraph 36:

**“It seems to me then that whereas the building has become a fixture, Ms Makhoul at the end of the term would have been entitled to sever and remove the building from the land. However, as stated by Lord Browne-Wilkinson in *Melluish*, whose reasoning I adopt, so long as the building remains on the land it retains its character as a fixture and thus forms part of the realty owned by Ms Foster”.**

[20] The Court therefore allowed the Appeal only to the extent that the Court found that Ms Makhoul was entitled to remove the original building erected on the property at the end of the tenancy. Otherwise the appeal was dismissed.

[21] The issue of ownership of the building has, without question, been decided in the previous matter. **The Court of Appeal affirmed the High Court's determination that the building has become a fixture** and is part of the realty owned by Ms Foster. The Court of Appeal only granted a right to Ms Makhoul

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<sup>4</sup> [1940] 1 All ER 247

to remove the original building erected on the property at the end of the term. There is therefore no outstanding issue of ownership of the building. Ms. Foster has been declare to be the owner by the High Court and confirmed by the Court of Appeal. There can be no outstanding issue of entitlement to the rents. Ms Foster as owner is entitled to the rents and the court has so declared. This **determination was undisturbed by the Court of Appeal's decision.** The only relief granted to Ms Makhoul is the right to remove the building at the end of the term.

- [22] One of the Orders sought by Ms Makhoul in these proceedings is an Order for possession or an order for the demolition of the building. In her Affidavit in support of the Fixed Date Claim, Ms. Makhoul states that she has **through her Counsel written to Ms Foster's** Attorneys to seek a voluntary resolution but this has not been successful. Ms Makhoul states that she is satisfied that Ms Foster is unwilling to enter into any arrangement with her for the future whereby she would be willing to leave her chattel building on her lands. She therefore desires to remove her building from the premises of Ms Foster and seeks an Order of the Court to that effect.
- [23] The letter written by her attorney referred to by Ms Makhoul was attached to her affidavit. The letter indicated that his client wished to realize her interest in the chattel and requested an accounting. It further requested a date to have the Building valued and invited **Ms Foster's consideration to purchase the building. The letter then stated: "In the event your Client decides not to purchase we advise that our Client will remove the building from your Client's lands."** No date was given in the latter for the removal of the building by Ms Makhoul. The letter gave Ms Foster 14 days in which to respond. Ms Foster never responded to the letter. These are the only averments made in respect of the allegations that Ms Foster has refused, neglected or otherwise failed to allow Ms Makhoul to remove the building. The letter, however does not assist Ms Makhoul.
- [24] The court is of the view that in this claim before the court, Ms Makhoul is seeking to re-litigate issues that have been determined by the court in a previous action namely, the ownership of the Buildings **and entitlement to rents. The court therefore accepts Ms Foster's submissions that Ms Makhoul's** claim, on the face of it (a) discloses no good cause of action; (b) is based primarily on facts and issues which are now res judicata, being already determined by the Court; and (c) is an abuse of the process of the court. Ms. Makhoul's rights have already been articulated. However, service of reasonable notice of the date for removal of the original building has not been served.
- [25] **As noted above, one of the grounds on which the Court's jurisdiction may be disputed is that the** claimant does not have a good cause of action. In such a case, the claim may be stayed or struck out. Given the facts and circumstances of this matter, the court declines to exercise its general jurisdiction to try the claim and the claim is hereby struck out.

[26] Accordingly, the application by the defendant Cicely Foster is granted as follows:

1. A declaration that the court declines to exercise its general jurisdiction to try the claim filed herein;  
and
2. The claim is hereby struck out with costs to the defendant/applicant in the sum of \$1,200.00

Clare Henry  
High Court Judge

By the Court

Registrar