[2012] JMSC Civ 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 06249

BETWEEN	KEN'S SALES & MARKETING LTD	CLAIMANT
AND	EARL LEVY	1ST DEFENDANT
AND	TRIDENT VILLAS & HOTEL LTD	2ND DEFENDANT
AND	CASTLEWOOD CORP INC.	INTERESTED PARTY
AND	DEHRING BUNTING & GOLDING LTD	GARNISHEE
AND	PELICAN SECURITIES LTD	3RD DEFENDANT
AND	BEVERLEY LEVY	4TH DEFENDANT
AND	PERCY JUNOR LTD	5TH DEFENDANT

Mr. Glenroy Mellish for the Claimant

Mr. Maurice Manning for the 1st and 2nd Defendants

Dr. Lloyd Barnett and Mr. Weiden Daley for the 3rd and 4th Defendants

Ms. Elizabeth Salmon for the 5th Defendant

Heard: November 21, 2011 and March 14, 2012

Application to Strike out Claim – Res Judicata – Abuse of Process

Straw J

[1] The applications before me are by the 1st, 2nd, 3rd, 4th and 5th defendants to strike out Claim HCV6249/2009 filed by the claimant on the 25th November 2009. The claimant is seeking, *inter alia*, declarations against equitable charges obtained by the 3rd, 4th and 5th defendants in relation to six (6) parcels of land owned by the 1st defendant, Mr. Earl Levy.

[2] The history of litigation between the claimant and various defendants has been long and fierce. I will attempt therefore to summarize only those facts that are strictly relevant to a determination of the issues before me. The claimant, Ken's Sales, obtained judgment against the 1st defendant, Mr. Earl Levy on the 24th July 2002 for a debt owed in Suit No.CL/K-009/2001. The debt now stands at approximately $230 million. Ken's Sales has been unable to obtain satisfaction of this debt.

[3] The 3rd defendant, Pelican Securities Limited, the 4th defendant, Mrs. Beverly Levy, wife of Mr. Levy, and the 5th defendant, Percy Junor Limited have obtained equitable charges in relation to the said six (6) parcels of land.

[4] The parcels of land were subsequently sold by an order of the court and the proceeds are being held in a joint account in the names of the respective attorneys. This fund is in the amount of US$3 million. Suffice it to say, that as a result of various interlocutory applications and decisions by the Court of Appeal and Privy Council, the claimant who had an equitable charge over the lands, is now an unsecured creditor.

[5] Ken's Sales had previously filed Suit No. HCV 243/2004 against Beverly Levy and Pelican Securities, for declarations that its equitable charge ranked in priority to any equitable interest claimed by these defendants. Lord Scott of Foscote who delivered the judgment of the Privy Council on the 24th January 2008 [Appeal No 87 of 2006] placed the issues of the parties in perspective [paragraph 15]:

> *"The pot of gold, so to speak, now consists of the purchase money in the joint account. There are disputed claims to the money by Ken's Sales on the one hand and by Mrs. Levy, and Pelican, and presumably by Percy Junor Ltd., on the other. The resolution of these claims will depend on who can establish proprietary claims and whose proprietary claims are entitled to priority.*
> *Subject to possible claims by Percy Junor Ltd., a company not so far as their Lordships are aware, party to any proceedings yet instituted, the issues that arise all fall within the scope of the priority proceedings brought by Ken's Sales against Mrs. Levy and Pelican which led to the default order made by Dukharan J on 27 July 2004. The order of that date, while it stands, binds Mrs. Levy and Pelican. The order is still under appeal but, if it stands, Ken's Sales can claim an equitable interest in the proceeds of sale in priority to any equitable interest that Mrs. Levy or Pelican can claim. If it does not stand, the proprietary and priority issues raised by Ken's Sales application in Action 243 must be tried in the High Court with evidence and argument in the usual way."*

[6] On the 11th February 2008, the Court of Appeal allowed the appeal of Mrs. Levy and Pelican, thereby setting aside the default judgment of Dukharan J, obtained by Ken's Sales in Action 243 and remitted Action 243 to the Supreme Court for hearing.

These statements having been made by both superior courts, one would have thought that Ken's Sales would have pressed full speed ahead to have Action 243 adjudicated in the High Court. However, on the 15th February 2008, Ken's Sales applied ex parte for a provisional order of attachment in relation to the lands, albeit that, with the knowledge of all the parties and the approval of the court, the lands had been sold and the funds in escrow. The provisional order was obtained on the 20th February and the date of the 2nd April 2008, set for the consideration of the making of a final order of attachment.

[7] Mrs. Levy and Pelican were served (with the order) as interested parties in the lands. As a result, applications were filed on their behalf to have the provisional

attachment order discharged. That application awaits my determination of the applications before me. My sister, Mangatal J, summarises the history of the litigation between the parties to a certain extent in her judgment in Suit No. CL/K009/2001 (in relation to the Final Attachment Order) [delivered on the 15th September 2008]. I wish to express my gratitude to my sister as it has aided my understanding of what transpired after the Court of Appeal decision in February 2008.

[8] Mangatal J (paragraph 18) stated that one of the bases cited by Mrs. Levy and Pelican for setting aside the provisional attachment order was material non disclosure, in particular the alleged failure by Ken's Sales to point out a number of matters, including the fact of the existence of Action 243 in which the claims regarding the priorities were raised.

[9] On the 14th March 2008, Ken's Sales unilaterally discontinued Action 243. Subsequently, applications were filed by Mrs. Levy, Pelican and Percy Junor for payments to be made of monies due and owing to them by Mr. Levy out of the funds in escrow. (These applications are also pending my determination in this matter). A date was also set for the hearing of the Final Attachment Order.

[10] On 10th September 2008, Mangatal J began the hearing in the Final Attachment Order. However, during the course of the proceedings, she requested that the attorneys make submissions on the appropriateness of the issues that she was being asked to adjudicate upon. At the end of these submissions, she terminated the hearing, having reached the decision that the proceedings before her were indeed inappropriate. She stated as follows [para 28, 29]:

> *"It appears to me that what Ken's Sales is really trying to do by way of these execution proceedings, is to have the court determine complex issues of priorities, which ------ may involve the court in not only resolving disputes between parties as to their rights to the funds as is, but would require the court to pronounce upon the validity of admitted debts ------.*

> *Not only is the Claimant --- trying to say it's claim is in priority to others, but without any pleadings or any ground being expressly set out in the application, Ken's sales is impliedly asking the court to make findings and declarations, which if they are to succeed, would perhaps involve very serious allegations of bad faith, illegality, fraud and conspiracy to defraud creditors."*

The present claim was subsequently filed about 14 months later.

The Applications

[11] The defendants seek a declaration that this court should not exercise jurisdiction in this claim pursuant to the CPR [2002] 9.6 [1] [b]. They are also seeking orders that the proceedings be struck out pursuant to the CPR 26.3 [1] b and 26.3 [1] [c]. The relevant sections read as follows:

> "*Rule 9.6 (1) A defendant who –*
>
> *(a) …; or*
>
> (b) *argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect."*
>
> *"Rules 26.3* [1] *In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-*
>
> *(a) …;*
>
> *(b) that the statement of case or the part to be struck out is a abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim."*

[12] It is the contention of the defendants that the present claim is an abuse of process of the court and additionally, there are no reasonable grounds for bringing the claim.

No Reasonable Grounds for bringing the Claim

[13] I will examine this issue first merely for the sake of convenience. A statement of case may be struck out on the ground that it fails on its face to disclose a claim or defence which is sustainable in law [Rule 26.3 [1] [b].

Ken's Sales filed an Amended Fixed Date Claim Form on 26th January 2011. It is seeking several declarations, *inter alia*, in relation to the equitable charges of Mrs. Levy, Pelican and Percy Junor. The essence of the attack surrounds the circumstances under which the charges were created and allegations of bad faith and fraud. There are also allegations of illegality in relation to the loan documents of Mrs. Levy, Pelican and Percy Junor. A declaration is also being sought to the effect that the 2nd, 3rd 4th and 5th defendants are to all extents and purposes agents of Mr. Levy and that it is just to treat the transactions between the defendants as transactions of the 1st defendant.

There is also a request for specific disclosure to be made by Pelican as to the identity of the beneficial holders of its shares at the material time.

Submissions of Defendants

[14] Dr. Barnett, counsel for Pelican and Mrs. Levy made submissions in relation to the above issue. Mr. Manning, counsel for Mr. Levy and Trident, also made submissions and adopted the submissions of Dr Barnett. Ms. Salmon, counsel for Percy Junor, also relied on the submissions of Dr. Barnett who submitted that the charges/mortgages of Pelican and Mrs. Levy are not illegal or in breach of Section 22A [A] and [3] of The Bank of Jamaica Act as alleged in the said Fixed Date Claim Form. He has stated that the Supreme Court and the Court of Appeal have decided this issue completely in Pelican's favour in respect of Pelicans two (2) loans in a related Suit No. HCV1978/2004. Whilst Mrs. Levy's loans were not raised in those proceedings, the result ought to be the same.

[15] I will deal with this submission subsequently as it is best considered in relation to abuse of process.

He has also submitted that is not open to the claimant to allege bad faith or any conduct in the nature of fraud without clear and unequivocal particulars and sound supporting evidence.

[16] I have already summarized the allegations in the Amended Fixed Date Claim Form. In my opinion, the allegations of bad faith and fraudulent misrepresentation have been pleaded clearly and distinctly. Whether or not the claimant can establish fraud in a trial is another matter completely. See **Mullarkey and others v Broad** [2007] EWHC 3400. It is not my function at this time to conduct a protracted examination of documents in order to make this determination.

[17] In **Blackstone's Civil Practice** 2008 [paragraph 33.11, page 416], the authors make the point that where a claim is arguably so speculative that it discloses no reasonable cause of action or amounts to an abuse of process, the court may be prepared to allow the claim to proceed to enable the claimant to obtain disclosure from the defendant to see whether there is evidence substantiating the claim. If it does not, the defendant would be allowed to reapply for striking out [**Arsenal Football Club plc v Elite Sports Distribution Ltd**., 2002 EWHC 3057 Ch]. The authors also state [paragraph 33.10, pg 416] that where there is a real possibility that, on a full investigation of the factual background, any uncertainty on the merits might be remedied, striking out should be refused [**Kyrris v Oldham** [2003] EWCA Civ 1506].

[18] The other issues raised in relation to the mortgage transferred to Pelican from Half Moon and whether or not Mrs. Levy repaid a loan to Mr. Levy from Capital and Credit Bank must similarly be determined on an examination of documents as well as *viva voce* evidence. It is generally improper to conduct what is in effect a mini-trial involving protracted examination of the documents and facts as disclosed in the written evidence on a striking out application [**Wenlock v Moloney** [1965]1 WLR 1238]. The same argument holds true for the allegations against Percy Junor. The court's jurisdiction to dismiss actions as frivolous and

vexatious or an abuse of process 'should be exercised with great care and only in cases where the court is absolutely satisfied that no good can come of the action' [Cross J in a Trinidadian case, **Sookdeo v Barclays Bank of Trinidad and Tobago Ltd**, 1996. High Court, Trinidad and Tobago, No 2323 of 1976 [unreported].

I am therefore of the opinion that the submissions that there are no reasonable grounds for bringing the action is unsustainable.

Abuse of Process

[19] Dr. Barnett has submitted that certain allegations in the present claim raise similar issues made by the claimant in Claim No. 2004 HCV 1978. In 2004/1978, the claimant had alleged that **Pelican** acted in breach of Section 22A [A] and [3] of The Bank of Jamaica Act. My brother, Jones J, found that the claimant's case was without merit and his decision on the point was upheld by the Court of Appeal [**Ken's Sales v Earl Levy et al** SCCA 131 of 2008 delivered 19th March 2010] [unreported]. Dr. Barnett therefore argues that the claimant is bound in respect of that issue by the principles of *res judicata* and issue estoppel. He also submits that the claimant is bound also in relation to similar allegations regarding Mrs. Levy's loans so the result ought to be the same.

[20] Dr. Barnett referred the court to the case of **Henderson v Henderson** [1843-60] All ER Rep. 378, where Wigram VC made the frequently cited statement concerning *res judicata* [pages 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 in 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 judicator applies, except in special cases, not only to points on*

> *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."*

[21] In **Thomas v AG** [No. 2][1988] 39 WIR 383, Lord Jauncey [delivering the opinion of the Board] stated that the principle of *res judicata* applies not only where the remedy sought and the grounds are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action, matters of fact or law directly related to the subject matter which could have been but were not raised in the first [page 385 d-f].

[22] It is important to note that in Action 1978/2004, neither Mrs. Levy nor Percy Junor were parties to that suit.

Res Judicata and issue Estoppel.

The principle of *res judicata* is founded upon the twin principles that there should be an end to litigation [public policy] and justice demands that the same party shall not be harassed twice for the same cause [private justice] [per Lord Upjohn in **Carl Zeiss Stiftung v Raynor and Keeler Ltd** [No. 2]1967 1 AC 853, 946, 947]. Lord Upjohn stated that *res judicata* has two branches:

> "[1] *Cause of action estoppel-that is where the cause of action in the second case has already been determined in the first ---- [2] Issue estoppel----."*

[23] In relation to issue estoppel, Lord Guest [**Carl Zeiss**, pg 934] defined the term as follows:

> *"---where in a judicial decision between the same parties, some issue which was in controversy between the parties and was incidental to the main decision has been decided, then that may create an estoppel per rem judicatam."*
>
> .

[24] A distinction is to be made between *res judicata* and abuse of process not qualifying as *res judicata*. Auld LJ explained the distinction in **Bradford and Bingley Building Society v Seddon** 1999 1 WLR 1482 1490-1491]:

> *"---- the former, in it's cause of action estoppel form is an absolute bar to relitigation and it's issue estoppel form also, save in 'special cases' or 'special circumstances' see Thoday v Thoday [1964] P 181,197-198 per Diplock, LJ and Arnold v National Westminster Bank plc 1991 2 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter …."*
>
> *"Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings."*

[25] The court's first task is to examine whether there are any issues raised in the present claim that should be absolutely barred as a result of *res judicata* and issue estoppel.

I therefore turn to the issue of the breach of The Bank of Jamaica Act as mentioned above.

Mr. Mellish submits that the conclusion of Jones J about the legality of a foreign exchange transaction in breach of The Bank of Jamaica Act was based exclusively on his construction of a mortgage deed registered on land which is not in dispute in this claim. The Pelican mortgage at issue in this claim is an equitable mortgage and there are no written terms *before* the court to be construed in the manner Jones J did, therefore the question of the **'prohibition against payment in local currency'** [Section 22A[3]] is not barred from consideration by this court. On the issue of 'dealing,' however, he concedes that

the claimant is bound by the decision of Jones J, that Pelican was not in the business of dealing in foreign exchange [Section 22A [2]].

Is Res Judicata and Issue Estoppel sustained in the present case?

[26] Firstly, in relation to Pelican's mortgage, having perused the judgment of my brother, Jones J, I do agree with the submissions of Mr. Mellish on the point for the reasons advanced. While it may also be possible to argue that the issue of the "prohibition against payment in local currency 'ought to have been raised in Action 1978, I cannot reach such a conclusion as the previous action concerned a written mortgage agreement. The present claim is concerned with an equitable mortgage. I am therefore of the opinion that the defendants have not made out a case for *res judicata* in any of its forms in relation to the allegations against Pelican.

I am also in agreement with Mr. Mellish's submissions in relation to similar claims of breaches by Mrs. Levy and Percy Junor. Issue estoppel would not arise as they were never parties to Action 1978 [See **Carl Zeiss**; **Mulkerrins v PricewaterhouseCoopers** [2003]1 WLR 1937, per Lord Millet, pg 941a-c.]

[27] The major issue for determination is whether the Fixed Date Claim Form should be struck out as an abuse of process. In considering this issue, I am aware of the duty upon me not to deny a litigant his right to bring a genuine subject of litigation before the court 'without scrupulous examination of all the circumstances,' [**Yat Tung Investment Co Ltd v DAO Heng Bank Ltd**., [1975] AC 581, 590 per Lord Kilbrandon, giving the advice of the Privy Council]. However, the court has inherent power to strike out a valid claim if there is abuse of process [Lord Diplock in **Hunter v Chief Constable of the West Midlands** [1982] AC 529 at 536].

[28] Dr. Barnett has asked the court to find that the claimant's history in litigation is abusive:

1. The claimant vigorously pursued Action 243 up to the point of obtaining a default judgment at the first hearing of the fixed date claim form.

2. The claimant defended the judgment until it was set aside as many as four years later by the Court of Appeal.

3. The Privy Council expressly stated that it expected the priorities to be determined in Action 243.

4. The Court of Appeal specifically ordered the Hearing of Action 243.

5. McIntosh J adjourned to a specific date the applications in Action 243 by Pelican and Mrs. Levy for payment out.

6. The claimant unilaterally discontinued Action 243.

7. The Claimant is chastised by Mangatal J for obtaining the ex parte provisional attachment order.

8. Having discontinued Action 243, the claimant sought and obtained several comprehensive orders and directions from the court over the course of 18 months in relation to the application for payment out.

9. On 25th November 2009, 5 days before the applications for payment out, the claimant filed this present action as well as an application for a stay of the suit with the applications for payment out [Action 009].

[29] Dr. Barnett made the following analysis of the claimant's conduct:

> *"The claimant's calculation was plainly that since it had no priority to Pelican and Mrs. Levy, it would abandon Action 243 [which was to determine priority] and [improperly] seek to obtain priority by attaching the funds in escrow. Having been scathingly criticized by this court [Mangatal J] for obtaining the ex parte provisional attachment order, which clearly is liable to be set aside, the claimant has sought to reopen the issue of priorities by bringing this new suit."*

He contends that the claim is a transparent colourable device designed to prevent or delay the hearing of the said applications for payment out of the escrow funds.

[30] Mr. Mellish, on the other hand, has submitted that there has been no adjudication by the court of the issues in the present claim and there were no proceedings in

which judgment was given thus barring the raising of any issue that could have been earlier decided. The ground of the applications, which is based on the principle of the finality of litigation, should therefore not succeed. The litigation has not yet started.

[31] He also submitted that the issues represent a substantive claim which the Privy Council and the Court of Appeal have said should be litigated. The claimant has obtained a valid judgment against the 1st defendant. Parties closely connected with the 1st defendant and with knowledge of the claimant's dealings with the 1st defendant have managed to obtain judgments and to lodge interests which are said to defeat the claimant's right to the fruits of its judgments. In these circumstances, the claimant asks the court to hear and determine the issues it raises as to the validity of these claims by these persons. Justice, declares counsel, requires that the matter be heard.

[32] Mr. Mellish submitted further that the important issue to be considered in relation to abuse of process is the reasons for discontinuance as the CPR [Rule 37.7] recognizes the right of a claimant to discontinue one claim and make a subsequent claim against the same defendant arising from substantially the same facts. He referred the court to several authorities including **Castanho v Brown and Root** [1981] AC 557, **Gilham v Browning** [1998] 1 WLR 682, **Coffee Industry Board et al v Financial Services Commission** HCV 1657/2004, **Ernst and Young v Butte Mines** 1996,1 WLR 1605 and **Gardner v Southwark** LBC 1996 1 WLR 561.

Counsel examined each of these cases and summarized the motives of the party discontinuing the claims as:

> Misleading the defendants.
>
> Circumventing the ruling of the court.
>
> Escaping from the consequences of a disadvantageous contest initiated by the same party.

[33] He argued that the claimant's behaviour in the present case is not reflective of any of the above. He also referred to the affidavit of Mr. Kenneth Biersay, Ken's Sales' representative, who stated that he was not aware that Action 243 was discontinued until eight (8) months later when there was a change of the claimant's attorney.

[34] The category of cases in relation to abuse of process, however, is not closed and appears to be wider than suggested by Mr. Mellish. Abuse of process is a concept 'which defies precise definition in the abstract' and the issue for decision is whether sufficiently serious abuse exists to shut the door on the offending litigant, [per May J, **Mansoon v Vooght** [1999] BPIR 376 at 388-389].

[35] In **Barrow v Bankside Members Agency Ltd** 1996 1 All ER 981, Sir Thomas Bingham MR examined the principle of abuse of process that emerged in **Henderson**. He summarized the rule as one requiring the parties to bring their whole case before the court so that all aspects may be finally decided [subject to an appeal] once and for all:

> *"In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decisions on the first occasion, but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even an any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not* ***be oppressed by successive suits when one would do." [Emphasis added]***

[36] In **Johnson v GoreWood and Co**, [2002] 2 AC 149 Lord Bingham of Cornhill, (who delivered the judgment of the court) stated that the approach to be adopted in assessing abuse of process should be a broad merits - based judgment which takes into account the public and private interests involved as well as the facts of the case. Attention should be focused on the crucial question,' whether in all the

circumstances, a party is misusing or abusing the process --- by seeking to raise - the issue which could have been raised before.'

He further elucidated on the point as follows (pg 49):

> *"--- later proceedings may, without more, amount to abuse if the court is satisfied ---- that the claim --- should have been raised in earlier proceedings if it was to be raised at all".*

[37] Lord Bingham also stated that it is not necessary before abuse is found, to identify any additional element, such as a collateral attack on a previous decision or dishonesty. However, the presence of these elements will make the later proceedings more 'obviously abusive.'

He stated that there will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party. There is no automatic assumption, however, that because a matter could have been raised in earlier proceedings, it should have been so as to render the later proceedings as necessarily abusive [**Gore**, pg 49].

[38] It is clear that the two major planks in considering abuse of process is the conduct of the claimant as well as the issues to be tried. There must of necessity, be 'a scrupulous examination of all the circumstances' before a litigant is denied the right to bring his legitimate claim before the court.

[39] In balancing all the relevant considerations, I also bear in mind the observations of my brother, Sykes J in J**amaica Beach Park Ltd et al v Jamaica Redevelopment Foundation Inc et al** [HCV 01319/2005 delivered on 17th June 2005 when examining abuse based upon persistent and habitual litigation [par 48, pg 18]. He referred to the case of **Attorney General v Blake** [unreported, delivered February 16, 2000 Divisional Court, Queen's Bench Division of the High Court and stated as follows]:

> *"If the abuse is based upon habitual litigation, I believe that the Lord Chief Justice has captured the essence of this conduct when he said at paragraph 22 of his judgment that the hallmark of persistent and*

> *habitual litigious activity is the claimant repeatedly suing the same party in reliance on essentially the same cause of action with minor variations after it has been ruled upon, the effect of which is to impose the burden of defending claim after claim. The key phrase to me is* ***after it has been ruled upon."***

[40] The court is being asked, however, to scrutinize the conduct of the claimant by the defendants while the claimant is asking the court to consider that the issues have not been litigated.

Reasons for Judgment

[41] Can Ken's Sales litigious activity and conduct be described as 'unjust harassment?'

Based on the history of the litigation, Action 243 could have been set down for trial after the ruling of the Court of Appeal in February 2008. Instead the claimant adopted a questionable method of gaining an advantage by the ex parte application for provisional attachment order. On the face of it, there was material non disclosure. However, once the interested parties were served in accordance with the rules, any advantage hoped for would have been drastically reduced. The decision to discontinue Action 243 and proceed full speed ahead with the hearing for the final attachment order can only be compared to the effort to turn the Titanic around before it struck the iceberg.

[42] Mr. Biersay has deponed that he did not know that the claimant's attorney had discontinued Action 243 for several months. However, this alleged inference of negligence against previous counsel, is not sufficient basis for the court to disregard the pattern of activity that has resulted in a multiplicity of applications by all parties since the application for attachment and discontinuance of Action 243.

[43] In balancing the public and private interests, I bear in mind that the failure by Ken's Sales to litigate Action 243, the attempt to use attachment proceedings as was done, as well as the presentation of this new claim has lead to a duplication

of the case, the use of court time and the prolongation of the time before the matter is resolved. In the **Yat Tung** case, abuse was found where a claimant who had unsuccessfully sued a bank on one ground brought a further action against the same bank and another party on a different ground. Lord Kilbrandon, (in delivering the judgment of the Privy Council), said at pg 589 – 590:

> *"The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullen J that the true doctrine in the narrowest sense cannot be discerned in the present series of actions, since there has not been in the decisions in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no.534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings* matters which could and therefore should have been litigated in earlier proceedings."

[44] The behaviour of Ken's Sales in withdrawing Action 243, continuing with the attachment proceedings, then filing this new claim after failing to achieve what was a desirable outcome could be described as harassment. Is it, however, unjust harassment to present this new claim?

Key Considerations

[45] I do consider it important that the issues were never raised in a trial [except in the aborted attachment hearing] and judgment determined.

During the hearing for the Final Attachment Order, an attempt was made to cross examine the witnesses for the defendant on the basis of allegations of fraud and impropriety. The learned judge, [correctly in my opinion] brought a halt to those proceedings for the reasons as outlined above.

I also consider that Ken's Sales has a valid judgment against Mr. Levy for a considerable amount of money. The claimant is not litigating an action to determine liability. That has already been obtained. It is apparent also that the only hope of satisfying this judgment at this time is if Ken's Sales is entitled to eat out of this 'pot of gold' as aptly described by the Privy Council. The fund stands

at approximately US$3 million. If the claimant cannot establish the invalidity of the claims of the defendants, the cause is without hope as the claimant would be merely an unsecured creditor and the applications for payment out by the defendants would result in the funds being virtually depleted.

[46] The fact that Action 243 was discontinued in spite of the observations of both the Court of Appeal and the Privy Council cannot be described as "contumacious disobedience to a pre-emptory order of the court" so as to justify the dismissal of a 2nd action as being abuse of process on that basis [**Gardner**, per Sir Thomas Bingham at pg 25].

[47] I also consider that the discontinuance was filed at a time when the parties were already before the court in relation to the provisional attachment proceedings and making submissions in relation to its impropriety.

In **Gilham v Browning**, a defendant who had counterclaimed, tried to introduce evidence very late in the proceedings. This was disallowed by the court. In an effort to nullify the court's ruling, the counterclaim was discontinued and fresh proceedings instituted. The Court of Appeal found that the action was abusive as the notice of discontinuance was an effort to escape from an action which was evidently hopeless in order to start a new action where the evidential problems would not arise, especially when a long overdue date for trial was imminent. May LJ referred with approval to the dissenting judgment of Lord Denning MR (upheld by the House of Lords in **Castanho**) where he stated as follows in relation to abuse of process [pg 855]:

> "I summarized the cases on 'abuse of process' in **Goldsmith and Sperrings Ltd** [1977] WLR 478, 489-490. I said:
>
> > *'On the face of it, in any particular case, the legal process may appear to be entirely proper and correct.' So here the notice of discontinuance, on the face of it, is in time and correctly done without leave. 'What makes it wrongful ---- is the purpose for which it is used.' If it is used for the purpose of the party obtaining some collateral advantage for himself, and*

> *not for the purpose for which such proceedings are properly designed and exist, he will be held guilty of abuse of the process of the court."*

[48] In a careful consideration of these circumstances, it appears that Ken's Sales, having embarked upon this questionable conduct, made a decision to continue the course of litigation through proceedings that were inappropriate. Ken's Sales is now attempting to move forward in the only way that is left open, since it was always the intention, (if all other avenues failed), to contest the validity of the defendants claims.

I am therefore of the opinion that, while I would describe the claimant's conduct as 'harassing,' I would be hesitant to describe it as 'unjust harassment.'

The authors of **Blackstone**, [par 33.12, pg 417] state that striking out should be the last option if the abuse can be addressed in some less draconian way [**Reckitt Benckisser [UK] Ltd v Home Pairfum Ltd** [2004] EWHC 302 [Pat].

[49] The claimant ought to be punished by way of an appropriate sanction, but it is in the interests of justice that the validity of the present claim be determined. I conclude with the words of my brother, Sykes J in **Jamaica Beach** (at para 48, pg 18) that the court should be slow to turn a litigant away, even if he is annoying, without at least letting him know whether his cause of action has merit.

This then ought to be the final battle ground for all the parties.

Stay of Defendants' applications for payment out of the fund

[50] I am prepared to have these proceedings stayed in order that my decision to allow the Fixed Date Claim Form to proceed will not be merely a meaningless gesture.

The Fixed Date Claim Form

[51] There is a final issue that I must address. Dr. Barnett has submitted that the claimant has brought this action by way of a Fixed Date Claim Form in spite of clear references by Mangatal J in her judgment that allegations of bad faith ought to be properly pleaded and brought by way of a claim form.

This is not a matter, however, that should detain the court as the appropriate applications can be made to rectify any procedural deficiency. ‘Dealing with cases justly’ is exemplified by the principle that a litigant should not be prevented from pursuing his claim because he is technically in breach of a procedural rule (Kodilinye and Kodilinye, **Commonwealth Caribbean, Civil Procedure** (2nd edition) pg 246).

The applications to strike out the Fixed Date Claim Form are refused.