[2023] JMSC COMM 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00241

BETWEEN	**MARSH RECOVERY ENTERPRISE LIMITED**	**CLAIMANT**
AND	**HASHEBA DEVELOPMENT COMPANY LIMITED**	**DEFENDANT/ ANCILLARY CLAIMANT**
AND	**PETROLEUM COMPANY OF JAMAICA LIMITED**	**ANCILLARY DEFENDANT**

IN CHAMBERS

Ms. Jaavonne Taylor instructed by Nunes, Scholefield, DeLeon & Co for the Claimant

Mr. Abraham Dabdoub, Mr. Christopher Dunkley and Ms. Tiffany Sinclair instructed by Dabdoub & Dabdoub for the Defendant/Ancillary Claimant

Mr. Garth McBean Q.C. instructed by Garth McBean & Co for the Ancillary Defendant

Dates Heard: May 20, 2021 & February 9, 2023

Civil Practice & Procedure – Striking out statement of case – Abuse of the process of the Court – Civil Procedure Rule 26. 3 (1) (b) & (c) – Issue Estoppel – Henderson v Henderson Estoppel

PALMER HAMILTON, J

BACKGROUND

[1] The Claimant is seeking to recover the sum of **ELEVEN MILLION EIGHT HUNDRED AND FIFTY THOUSAND JAMAICAN DOLLARS ($11,850,000.00)** plus interest, by virtue of a Deed of Assignment, from the Defendant/Ancillary

Claimant. That sum represents a portion of the deposit that was paid to the Defendant/Ancillary Claimant under an Agreement for Sale which was subsequently cancelled and which the Defendant/Ancillary Claimant has failed and/or neglected to return. The Agreement for Sale (hereinafter referred to as 'the 1st Agreement for Sale') was between Epping Oil Company Limited, the Purchaser, and the Defendant/Ancillary Claimant being the Vendor, and was in relation to property known as Curatoe Hill being the Lot numbered Two Hundred and Seven of part of Curatoe Hill called ROYAL OAK ESTATE comprised in the Certificate of Title registered at Volume 1361 Folio 492 of the Register Book of Titles. Epping Oil Company Limited paid the sum of **NINE MILLION TWENTY-NINE THOUSAND THREE HUNDRED AND SEVENTY-FIVE JAMAICAN DOLLARS ($9,029,375.00)** to the Attorneys-at-Law on behalf the Defendant/Ancillary Claimant. That sum represented the initial payment under the Agreement for Sale together with their cost of preparing the said Agreement for Sale. A further sum of **SIX MILLION JAMAICAN DOLLARS ($6,000,000.00)** was requested by the Defendant/Ancillary Claimant and that sum was paid by Epping Oil Company Limited. Due to the Defendant's/Ancillary Claimant's failure to complete and provide good title, the Claimant cancelled the Agreement for Sale and requested repayment of the sums together with interest.

[2] The Defendant/Ancillary Claimant, in its Defence, denied knowledge of the Deed of Assignment and also denied that the Agreement for Sale permits any assignment to a third party to include the Claimant. The Defendant/Ancillary Claimant acknowledged that it is obligated to refund Epping Oil Company the sum being claimed for. However, the Defendant's/Ancillary Claimant's position is that they entered into an Agreement for Sale (hereinafter referred to as 'the 2nd Agreement for Sale') with the Ancillary Defendant as the Purchaser in relation to the same property that was the subject of the 1st Agreement for Sale. One of the terms of the 2nd Agreement for Sale required the Ancillary Defendant to pay the sum of **NINE MILLION JAMAICAN DOLLARS ($9,000,000.00)** to Epping Oil Company Limited to satisfy the withdrawal of a caveat. It was the Ancillary

Defendant who failed to pay the alleged sums to Epping Oil Company Limited to satisfy the withdrawal of the caveat. The Defendant/Ancillary Claimant brought a separate claim, with claim number SU2020CD00095, against the Ancillary Defendant claiming inter alia specific performance and damages for breach of contract. That claim concerned 3 Agreements for Sale, one of which is the 2nd Agreement for Sale in this case. Laing J (as he then was) made an order for specific performance in that claim.

[3] The Defendant/Ancillary Claimant by way of an Ancillary Claim claims against the Ancillary Defendant the following:

> *(a) Payment to Epping Oil Company Limited or Marsh Recovery Enterprise Limited in liquidation of the sum of Eleven Million Eight Hundred and Fifty Thousand Dollars (JA$11,850,000.00) plus whatever interest this Honourable Court shall deem fit to award and in full and final settlement of its contractual obligation to the Ancillary Claimant to do so pursuant to a term and condition of the said Agreement for Sale.*
>
> *(b) Damages for breach of contract in respect to this agreement for sale.*
>
> *(c) Costs and Attorneys-at-Law costs of both the Claimant and the Ancillary Claimant.*

THE APPLICATION

[4] The Ancillary Defendant is the Applicant in this application and by way of an Amended Notice of Application for Court Orders to Strike Out the Ancillary Claimant's Statement of Case they are seeking the following Orders:

> *(a) That pursuant to rules 26.3 (1) (b) and (c) of the Civil Procedure Rules that the Ancillary Claimant's statement of case be struck out.*
>
> *(b) An order that the Ancillary Claimant pays to the Ancillary Defendant costs.*
>
> *(c) That there be such further and/or other relief as this Honourable Court deems just.*

[5] The grounds upon which the Applicant is seeking the Orders are as follows:

> *(a) The Ancillary Claimant's statement of case discloses no reasonable grounds for bringing a claim.*

(b) The Ancillary Claimant has failed to comply with rule 18.2 of the Supreme Court Civil Procedure Rules.

(c) The ancillary claim filed herein constitutes an abuse of the process of the Court, as the subject of the claim herein is also the subject of separate proceedings which were commenced by the Ancillary Claimant against the Ancillary Defendant in Supreme Court Claim No. SU2020CD00095 and in which his Court had issued Judgment in favour of the Ancillary Claimant. This judgment is also the subject of a pending appeal filed by the Ancillary Defendant in the Court of Appeal.

(d) The said orders will further the overriding objective by ensuring that the case is dealt with expeditiously and fairly.

SUBMISSIONS ON BEHALF OF THE ANCILLARY DEFENDANT

[6] The main basis on which the Application to Strike Out the Ancillary Claimant's Statement of Case is that it constitutes an abuse of the process of the Court. Learned Queen's Counsel Mr. McBean outlined Rules 26.3 (1) (b) and (c) of the Civil Procedure Rules 2002 as amended (hereinafter referred to as 'the CPR'). He also relied on the case of **National Commercial Bank Jamaica Limited v Justin O'Gilvie, Incomparable Enterprises Limited and Bulls Eye Security Service Limited** [2015] JMCA 45, paragraphs 21 and 23. In that case Brooks JA (as he then was), outlined the **Henderson v Henderson** abuse of process.

[7] Learned Queen's Counsel submitted that on the 27th day of July, 2020, judgment was entered in favour of the Defendant/Ancillary Claimant in Claim No. SU2020CD00095 and an order was made for specific performance of the Agreements for Sale by Laing J. This judgment and the order for specific performance was the subject of a pending appeal filed by the Ancillary Defendant. The Court of Appeal granted a stay of execution in the matter until the hearing and determination of the appeal. The Ancillary Claim herein concerns the payment of monies which was owed to Epping Oil Company Limited by the Defendant/Ancillary Claimant. The payment of those monies was also a contract term included in one of the three Agreements for Sale which were the subject of the judgment by Laing J. Learned Queen's Counsel further submitted that his clients position is that the monies being claimed in the Ancillary Claim was paid to

the Defendant/Ancillary Claimant which the Defendant/Ancillary Claimant was obliged to use to discharge its indebtedness to Epping Oil Company Limited and have the caveat discharged. The Defendant/Ancillary Claimant in breach of the 2nd Agreement for Sale failed to do so.

[8] Mr. McBean Q.C. contended that, apart from the above, this Honourable Court made an order for specific performance in Claim No. SU2020CD00095 and that included an order to pay over to Epping Oil Company Limited not less than **NINE MILLION JAMAICAN DOLLARS ($9,000,000.00**). In that said claim, the Claimant, who is the Defendant/Ancillary Claimant in this case, also claimed for damages for breach of contract in respect of all three Agreements for Sale. Mr. McBean Q.C. further contended that the Defendant/Ancillary Claimant brought forward their whole case in respect of monies owed and they are therefore not entitled to 'open the same subject of litigation is respect of a matter.' The same relief being sought in the case at bar is the same relief that was sought in Claim No. SU2020CD00095.

[9] Learned Queen's Counsel contended that for the forgoing reasons the Ancillary Claim herein is an abuse of the process of the Court and their application ought to be granted.

SUBMISSIONS ON BEHALF OF THE DEFENDANT/ANCILLARY CLAIMANT

[10] Learned Counsel Mr. Dabdoub agreed with Learned Queen's Counsel that Laing J made an order for specific performance in the matter of Claim No. SU2020CD00095. However, Learned Counsel's position is that no order was made for damages for breach of contract and the Ancillary Defendant has wrongly asserted that the question of damages for breach of contract was dealt with by Laing

[11] Learned Counsel Mr. Dabdoub submitted that it is wrong to assume that his client is claiming the sum of **NINE MILLION JAMAICAN DOLLARS ($9,000,000.00)** twice. His clients are seeking to have the Ancillary Defendant pay in accordance with its obligations under the Agreement for Sale. Learned Counsel further

submitted that his clients are entitled to seek a remedy from the Ancillary Defendant in accordance with the provisions of the 2nd Agreement for Sale as the Ancillary Defendant agreed and is responsible for payment of the monies to Epping Oil Company Limited.

[12] Learned Counsel Mr. Dabdoub contended that there will no risk of injustice to the Ancillary Defendant or to the Claimant if the Ancillary Claim is allowed to go to trial. To strike out the Ancillary Claim would result in serious injustice to the Defendant/Ancillary Claimant and shut it out of damages for breach of contract as specific performance has already been granted in Claim No. SU2020CD00095. Furthermore, Claim No. SU2020CD00095 has been converted to a Claim Form and there is now no remedy available to the Defendant/Ancillary Claimant to recover damages for breach of contract. Learned Counsel referred this Honourable Court to the case of **Hon Gordon Stewart OJ, Christopher Zacca and Air Jamaica Requisition Group Limited v Independent Radio Company Limited and Wilmot Perkins** [2012] JMCA Civ 2.

ISSUE

[13] The main issue for my determination is whether the Defendant's/Ancillary Claimant's statement of case against the Ancillary Defendant ought to be struck out pursuant to Rules 26.3 (1) (b) and (c) of the CPR.

LAW & ANALYSIS

Striking Out Statement of Case

[14] Rule 26.3 (1) of the CPR gives the Court the power to 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 an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;*

> *(c) that the statement of or the part to be struck out discloses no reasonable grounds for bringing or defending a claim or*
>
> *(d) ...*

[15] The phrase *'statement of case'* is defined in Rule 2.4 of the CPR as -

> *(i) a Claim Form, Particulars of Claim, Defence, Counterclaim, Ancillary Claim Form or Defence and a Reply; and*
>
> *(ii) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court.*

Rule 26.3 (1) (b) – Abuse of the Process of the Court

[16] Kodilinye and Kodilinye in their text Commonwealth Caribbean Civil Procedure, 2nd Edition stated that *"the phrase 'otherwise an abuse of the process of the court' is a catch-all provision which encapsulates the general principle underlying the striking-out rules…"* An attempt to re-litigate decided issues or a claim based on a document disclosed in a previous action have been held to amount to an abuse of the process of the court. (Halsbury's Laws of England, 5th Edition)

[17] In deciding whether the Defendant's/Ancillary Claimants' statement of case should be struck out as an abuse of the process of the Court, I must first examine the current case before me and the decided case in order to make a determination as to whether the remedy being claimed in the case at bar was already determined by Laing J or formed part of the claim in Claim No. SU2020CD00095.

[18] Before analysing the pleadings and submissions before me I think it is necessary to outline the doctrine of res judicata, as it is the basis on which the Ancillary Defendant's contention is grounded.

[19] *Res judicata* is a Latin term meaning "a matter judged" or "a thing decided." It is a common law principle meant to prevent a cause of action between the same parties and regarding the same issues from being re-litigated once it has been judged on its merits. It preserves the binding nature of a court's decision.

[20] The doctrine of *res judicata* has been affirmed by the Court of Appeal in numerous cases. One such case is the case of **Hon Gordon Stewart OJ, Christopher Zacca and Air Jamaica Requisition Group Limited v Independent Radio Company Limited and Wilmot Perkins** *(supra)*, where it was said that *"the doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between the parties…"*

[21] Pusey J. in **Matheson v Watts** [2018] JMSC Civ 144 noted at paragraph 30 that, once a final judgement has been reached in a case and that decision is not appealed, subsequent judges who are presented with a case that is identical to or substantially the same as the earlier one will apply the doctrine of *res judicata* to uphold the effect of the first judgement.

[22] McDonald-Bishop, J. in **Fletcher & Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** analysed the doctrine of res judicata and stated at paragraph 27 that,

> *"Usually res judicata is pleaded by way of estoppels and so the trend has been to treat res judicata as arising on the plea of three forms of estoppels: the two traditional ones being **"cause of action estoppels"** and **"issue estoppels"** and the third being an extension of the doctrine of estoppel as enunciated by Vice-Chancellor Sir James Wigram in **Henderson v Henderson** (1843) 3 Hare 100.*

[23] The **Henderson v Henderson** estoppel is what the Ancillary Defendant is seeking to rely on to have the Defendant's/Ancillary Claimant's statement of case struck out. Learned Queen's Counsel relied on paragraphs 21 and 23 of **National Commercial Bank Jamaica Limited v Justin O'Gilvie, Incomparable Enterprises Limited and Bulls Eye Security Service Limited** where Brooks JA stated:

> *"[21] Although it is **Henderson v Henderson** abuse with which this appeal is primarily concerned, it is important to understand its generic relationship to cause of action estoppel and issue estoppel.*

These two were explained by Diplock LJ (as he then was) in ***Thoday v Thoday*** *[1964] P 181 at pages 197-198:*

> *"...'Estoppel' merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action...*
>
> *...[Estoppel per rem judicatam] is a generic term which in modern law includes two species.* ***The first species, which I will call 'cause of action estoppel,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties.*** *If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam...****The second species, which I will call 'issue estoppel,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled.... If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was...."*** *(Emphasis supplied)*

"[23] The principle of ***Henderson v Henderson*** *abuse of process is extracted from the following quote from Sir James Wigram VC in* ***Henderson v Henderson****. The learned Vice-Chancellor said at pages 381-382 of the All England Law Report:*

> *"...In trying this question, I believe I state the rule of the court correctly, when I say, that 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 case [sic], 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..."*** *(Emphasis supplied)"*

[24] It is my view that cause of action and issue estoppel do not apply to the present case before me. A crucial requirement of those 2 types of estoppel require that the first claim be concluded. To my knowledge, at the time of this judgment, the first claim has not been concluded.

HENDERSON V HENDERSON

[25] This type of estoppel is a wider conception of the *res judicata* doctrine. McDonald Bishop J (as she then was) said in **Fletcher & Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** at paragraph 81 that,

> *"The principle, succinctly stated, is that a party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one: Halsbury's Laws of England, 4th Edition, Vol. 16, paragraph 1533."*

[26] The principle was applied by the Privy Council in **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd.** [1975] AC 581,591 where it was said that,

> *"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. The locus classicus of that aspect of res judicata is the judgement of Wigram V.C. in Henderson v Henderson..."*

[27] Hibbert JA (Ag) in the case of **Hon Gordon Stewart OJ, Christopher Zacca and Air Jamaica Requisition Group Limited v Independent Radio Company**

Limited and Wilmot Perkins at paragraphs 26 and 27 while dealing with the Henderson v Henderson estoppel stated that:

> *"26" The Henderson v Henderson form of abuse of process was pronounced by Wigram V C in **Henderson v Henderson** (1843-60) All ER Rep 378 at 381-382 as follows:*
>
> > *"In trying this question, I believe I state the rule of the court correctly, when I say, that 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."*
>
> *[27] The Vice-Chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in **Greenhalgh v Mallard** [1947] 2 All ER 255 by Somerwell LJ who at page 257 stated:*
>
> > *"… res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … 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."*

[28] In explaining the goal of the rule in **Henderson v Henderson**, Lord Bingham said at page 32H: "…An important purpose of the rule [in Henderson v Henderson] is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter.…"

[29] Lord Bingham stated in **Johnson v Gore Wood & Co**, after examining and analysing several cases dealing with the **Henderson v Henderson** estoppel, that-

> *"It may very well be, as has been convincingly argued (Watt "The danger and Deceit of the Rule in Henderson v Henderson: A new approach to successive civil actions arising from the same factual matter (2000) 19 CJQ 287), that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram VC made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them.* ***The underlying public interest is the same; that there should be finality in litigation and that a party should not be twice vexed in the same matter. The public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.*** *The bringing of a claim or the raising of a defence in later proceedings may, without more amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regard as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."* ***[my emphasis]***

[30] Claim No. SU2020CD00095 included a claim for damages for breach of contract. It appears that the Defendant/Ancillary Claimant is seeking now to claim again for damages for breach of contract in relation to the same subject matter, that is, the 2nd Agreement for Sale. The case law is clear that it is an abuse of the process of the Court to bring an action in respect of the same cause of action.

[31] It is clear from the case law that is an abuse of the process of the Court to raise in subsequent proceedings the same cause of action. Harris JA in **S & T Distributors**

Limited and Another v CIBC Jamaica Limited and Another SCCA No 112/2004 stated at paragraph 48 that-

> *"…Where a party seeks to pursue a claim already brought in a previous suit which clearly seeks to unjustly expose the defendant to litigation, then, the court must view the later proceedings as abusive.*

[32] I agree with Learned Counsel Mr. Dabdoub that the judgment of Laing J in Claim No. SU2020CD00095 did not deal with the issue of damages. Paragraphs 102 and 2013 of that judgment states that-

> *"On the evidence before the Court as presented by the Claimant and having regard to the absence of properly filed evidence of the 1st Defendant, the Court having found that a defence with merit has not been shown the Court will grant the claim for specific performance pursuant to CPR 27.2(8). I will also make consequential orders to effect the remedy of specific performance and I will hear further submissions from the parties as to the precise terms of those orders.*
>
> *I will also order that the claims for reliefs other than specific performance proceed as if begun by claim form and I will likewise give additional direction to the parties after hearing from them further on appropriate deadlines."*

[33] However, to allow the Defendant/Ancillary Claimant to pursue this Ancillary Claim that was already brought in a previous suit would, in my view, seek to unjustly expose the Ancillary Defendant to litigation.

[34] There are cases where it was held that it was necessary to take the drastic steps to strike out the claim if a more appropriate remedy exists. In the case of **Hon Gordon Stewart OJ** *(supra)*, the Court of Appeal held that the 2 claims that were brought could be consolidated and tried together as the second claim was filed to cure a defect in the pleadings of the original claim. The said defect may have been cured by amendment, however a consolidation with the second suit or the ordering of the two to be tried together would be the appropriate remedy.

[35] After examining the pleadings of the Ancillary Claim and the Claim in SU2020CD00095, it is my view that the former is a repetition of the latter. Both

claims concern the same subject matter. The Defendant/Ancillary Claimant is seeking to get damages for breach of contract for the same Agreement of Sale. It is clear from the Fixed Date Claim Form in that case that the Claimant, who in this case is the Defendant/Ancillary Claimant, was seeking damages for breach of contract. It is not in dispute that the 2nd Agreement for Sale in the case before me is one of the same Agreements in Claim No. SU2020CD00095.

[36] I agree with Queen's Counsel Mr. McBean that the Defendant/Ancillary Claimant is not entitled to open the same subject of litigation in respect of a matter. After analysing both claims it is my view that the same relief that is being sought in this present case is the same as the relief that was being sought in SU2020CD00095.

[37] Respectfully I find no merit in Learned Counsel Mr. Dabdoub's submissions. His position is that his client is entitled to seek a remedy from the Ancillary Defendant by an enforcement of the Ancillary Claim against the Ancillary Defendant at the trial of the Ancillary Claim. The Defendant/Ancillary Claimant has already sought a remedy against the Ancillary Defendant in Claim No. SU2020CD00095. The Defendant/Ancillary Claimant put forward his claim for damages for breach of contract in Claim No. SU2020CD00095 and the Learned Judge ordered that it will proceed as if begun by Claim Form. That is the avenue that the Defendant/Ancillary Defendant ought to remain on.

[38] In the cases relied on by this Honourable Court, this type of estoppel was applied where the first claim had already been concluded. However, in the case of **Buckland v Palmer** [1984] 3 All ER 554, a stay was in place in respect of the first claim when the second claim was filed. Brooks JA analysed this case in **National Commercial Bank Jamaica Limited v Justin O'Gilvie, Incomparable Enterprises Limited and Bulls Eye Security Service Limited** *(supra),* where he stated that:

> *"Although **Henderson v Henderson** was not mentioned by name, it was with that principle with which the court wrestled. It found that the prospect of two claims proceeding between the same parties in respect of the same motor vehicle collision was undesirable. The spectre of having different*

> *results from the two claims was anathema for the court. It therefore ruled that the second claim should be struck out, but was heartened, in the interests of justice, by the fact that it was open to the claimant to apply to remove the stay in the first claim and amend the pleadings so as to accommodate the matters raised by the second claim."*

[39] The Defendant/Ancillary Claimant will suffer no risk of injustice if its statement of case is struck out. The Defendant/Ancillary Claimant would not be shut out of damages for breach of contract as, in my view, that option is still open to it in Claim No. SU2020CD00095. However, the Ancillary Claimant will suffer prejudice if the Ancillary Claim is allowed to proceed on the same subject matter that is before the Court in Claim No. SU2020CD00095.

[40] Striking out a statement of case is a draconian measure. However, given the circumstances before me it cannot be avoided. It would amount to an abuse of the process of the Court if the Defendant/Ancillary Claimant is allowed to pursue the Ancillary Claim given the pleadings in Claim No. SU2020CD00095. Perhaps, it would be appropriate for the Defendant/Ancillary Claimant to seek a stay of proceedings of the parent claim in the present case until the Court makes a final determination regarding its claim for damages for breach of contract in SU2020CD00095.

[41] It is my view that the Defendant/Ancillary Claimant is seeking to abuse the process of this Honourable Court by putting before it an issue which has already been brought forward for adjudication in Claim No. SU2020CD00095. Allowing the Defendant/Ancillary Claimant to pursue the Ancillary Claim is a waste of judicial time and the Court's resources. It does not help in the furthering of the overriding objective. It is therefore my judgment that the Ancillary Claim ought to be struck out.

[42] Having found that the Ancillary Claim ought to be struck out as an abuse of the process of the Court, it is unnecessary for me to consider whether the statement of case discloses no reasonable ground for bringing the claim. However, for the sake of completeness, I will briefly consider that issue.

Rule 26.3 (1) (c) – No Reasonable Grounds

[43] The learned authors of Blackstone's, Civil Practice 2002, 3rd Edition, at paragraph 33.6 opined that *"a statement of case ought to be struck out if the facts set out do not constitute the cause of action or defence alleged."*

[44] It is clear from the rule that if the cause of action discloses no reasonable ground for bringing the claim, the Court should have the matter struck out. I find the view expressed by Batts J in **City Properties Limited v New Era Finance Limited** [2013] JMSC Civ 23 to be instructive where he stated-

> *"On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*

[45] No submissions were made by either side in relation to this issue. However, after a careful analysis of the pleadings I am of the view that the Ancillary Claim does in fact disclose reasonable grounds for bringing the claim. The Defendant/Ancillary Claimant's contention is that the Ancillary Defendant has failed to fulfil its contractual obligations in relation to the 2nd Agreement for Sale. The Defendant/Ancillary Claimant is seeking to have the Ancillary Defendant pay the sums as set out in the terms of the 2nd Agreement for Sale, which would allow them to fulfil the terms of the 1st Agreement for Sale. It is clear from the pleadings that reasonable grounds for bringing the claim does exist. Therefore, it is my view that the Ancillary Claim could not be struck out for no reasonable grounds exist for bringing this claim.

[46] However, my judgment remains the same. The administration of justice requires that the Ancillary Claim be struck out for abuse of the process of the Court.

ORDERS & DISPOSITION

[47] Having regard to the forgoing these are my Orders:

(1) The Ancillary Defendant's Amended Notice of Application for Court Orders to Strike Out the Ancillary Claimant's Statement of Case dated and filed on the 26th day of April, 2021 is granted.

(2) The Amended Ancillary Claim dated and filed the 21st day of April, 2021 is hereby struck out.

(3) Costs awarded to the Ancillary Defendant against the Ancillary Claimant, to be taxed if not agreed.

(4) The Ancillary Defendant's Attorneys-at-Law to prepare, file and serve Orders made herein.

(5) Leave to appeal is refused.