REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-04835

BETWEEN

PHYLLIS EDWARDS

Claimant

AND

CLAIR HOLDER

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr Lemuel Murphy and Ms Dawn Palackdharry Singh for the Claimant
Ms Deborah Moore-Miggins for the Defendant

DECISION ON PRELIMINARY POINT

I. Background:

[1] This Claim was initially brought as a straightforward case of rent arrears in December, 2014. The matter however, soon became protracted and pleadings did not close until the Claimant's Amended Defence to the Amended Defence and Counterclaim was filed on the 31st July, 2017. At that point, it had become clear that, by virtue of the averments

made in the Defendant's Amended Defence and Counterclaim of the 8th May, 2017, a point *in limine* arose as to whether the Claim was barred by reason of *Res Judicata*.

[2] Phyllis, the Claimant, alleged that she had become a tenant to a parcel of land for a 15 year term from Gloria Morales. She says that she then obtained permission from Gloria to construct a building thereon for commercial use. Such construction ensued for about 4 years until 1998, when she further alleges that she obtained permission from Gloria to sublet the commercial building.

One of the tenancies in the commercial building was awarded to Clair Holder, the Defendant. Phyllis pleads that she contracted with Clair for the rental of part of the commercial building at $1,800 per month.

Things seemed to be operating smoothly until about 2008, when Gloria was found dead in her home. Phyllis claims that, as a result, numerous persons began contacting her claiming a beneficial entitlement to Gloria's estate inclusive of the land and the attendant rental income from Phyllis's commercial building.

Clair, for reasons unknown, then decides to enter, along with another tenant, Errol Stevens, into another, additional tenancy to another part of the commercial building. This new agreement commenced in August, 2009 and the monthly payment was to be $25,000.00.

Phyllis states that she continued to pay the insurance of the commercial building throughout her tenancy and her sub-leases. The sub-lease with Clair and Errol, however, expired in August, 2011, yet Clair purportedly remained in the building holding over on the same terms under the agreement.

On Phyllis's case, the contention arose when Clair ceased to pay her monthly rental of $25,000.00 to Phyllis from the month of August, 2014 onwards. When contacted about the non-payment, Phyllis pleads that Clair simply replied *"arrangements have changed".*

Hence, the Claim was for rent arrears from August, 2014 to December, 2014, when proceedings were filed and continuing. A pre-action letter seeking the sum of **$134,000.00** was sent as a precursor to the institution of these proceedings.

[3] Clair made no admissions on the existence or terms of the Head Lease nor to whether Phyllis indeed got permission to construct and sublet the commercial building. She however admitted that she did enter into a tenancy at first for $1,800 per month.

Unusually enough, Clair also admitted that she stopped paying her $25,000.00 monthly rent in July and not August, 2014 as pleaded in the Claim. However, her reasoning for such non-payment forms the crux of her defence and counterclaim.

[4] Her case is that in early July 2014 she was approached by Eric Modeste at the commercial building who introduced himself as a bailiff sent by one Evans Petamber— the attorney for one Kerel Lashley. Kerel, who was purportedly the Executrix of the estate of Gloria, now deceased. It was agreed that both the power of attorney and the last Will of Gloria were given to Clair.

Eric proceeds to inform Clair that Phyllis was merely a tenant to the lands and not the owner and further, that Phyllis had not paid the rent on the Head Lease for the lands for several years and was now in arrears of $400,000.00. A letter evidencing same was shown to Clair.

Eric's purpose, therefore, was to close down the business and evict all tenants unless Clair agreed to pay all rents to Evans Petamber, Kerel's attorney. Clair, after several unsuccessful attempts to contact Phyllis about this alarming information, pleads that she had no choice but to enter into a tenancy agreement with Evans in August, 2014 whereby a monthly rental in the sum of $18,000.00 would now be paid to him.

Phyllis finally returns Clair's phone calls in September, 2014 and is duly informed of the change in circumstances. Clair pleads that she then received a letter from Phyllis's attorney in November, 2014 to which she, Clair, replies in December of the same year.

In the circumstances, Clair's original Counterclaim was for several declarations to the effect that, *inter alia*, (i) Phyllis was in breach of her tenancy agreement with her; (ii) Phyllis falsely represented to her that she was the owner of the land and the commercial building; (iii) Phyllis concealed the fact that she was only a tenant of the lands and that she had discontinued her rental payments under the Head Lease.

[5] Phyllis defended the Counterclaim with averments to the effect that: (i) she never represented to Clair that she was the owner of the parcel of land on which the commercial building was built; (ii) because there had been a challenge to the validity of Gloria's Will by a next of kin, Phyllis was advised by attorneys to withhold payment of rent to the executrix, Kerel, until a grant of probate was obtained; (iii) she has received no documentary proof from Kerel or Evans that the property falls within the estate of Gloria.

[6] Considering the importance of Evans Petamber's role in the pleadings and the outcome of the matter as the attorney for Kerel, the executrix of the estate of Gloria, the Defendant attempted to join Evans to these proceedings firstly, by an application to have him added as an interested party and secondly, as a defendant. However, by subsequent application filed on the 20th November, counsel for the Defendant opted to withdraw the applications for joinder.

[7] After my sister, Pemberton J (as she then was) granted the withdrawal, this matter was re-assigned to me by notice dated the 1st March, 2017. I then scheduled a status hearing on the 6th April, 2017 where I granted permission for the filing of an amended Defence and Counterclaim and for the filing by the Claimant of a Defence to the amended Defence and Counterclaim.

[8] As aforementioned, the amendments made in the amended Defence and Counterclaim were material and changed the colour of these proceedings.

[9] The Defendant, upon realising that the Head Lease, based on the averments in the Claim, had expired on the 1st July, 2009, now pleaded that the Claimant had no locus standi to bring these proceedings for rent arrears against the Defendant. Even more notable was the pleading that a similar matter had been brought by the Claimant in another Court via action **CV 2014-04837** against one **Verlyn Grant** and that the Claimant conceded this very same point in those proceedings and, in the end, withdrew her previous claim. In fact, the Claimant had eventually withdrawn this previous claim shortly before the trial on the basis that, because the Head Lease had expired, there was no basis on which she could found a claim against the Defendant as a sub-tenant. In those circumstances, it was pleaded that the Claimant was estopped from bringing this Claim on identically pleaded facts as it breaches the principles of *Res Judicata*.

The Claimant's response on the issue of issue estoppel in her Defence to the Amended Counterclaim was contained in the following averment: *"…the Claimant through her counsel withdrew her claim No. CV2014-04837 after hearing the court's position with respect to certain issues relevant to that case. The said matter was not tried on its merits and the parties to that action were different from the matter herein."*

[10] Given the importance of this preliminary point to the continuation of these proceedings, I gave directions for written submissions and reply submissions to be filed on the applicability of the doctrine of *Res Judicata* to the case at bar.

[11] The Defendant's submissions came in on the 3rd January, 2018 and the Claimant's, on the 9th February, 2018.

II. Submissions:

[12] Before the Court therefore, is the preliminary point for determination as follows: **Whether this Claim be struck out as an abuse of process and/or by reasons of the principles of issue estoppel**.

[13] Counsel for the Defendant, Ms Deborah Moore-Miggins, submitted that both actions contained similar issues and/or facts. Further, she submits that in that previous action, Phyllis opted to voluntarily withdraw the Claim after a lengthy hearing with Justice Des Vignes, where the deficiencies in her Claim were pointed out to her. Indeed, one of the material questions raised by the Judge was whether Phyllis was entitled to sublet the building after the Head Lease expired. In the Judge's opinion, she did not and upon expiry, he opined that his research suggested that Phyllis had become a mere tenant at sufferance and could not collect nor sue for any rent.

It was noted, however, that while Counsel referred to copies of Justice Des Vignes' (as he then was) emailed questions and Court order, none of these documents were annexed to the submissions.

[14] In rebuttal, counsel for the Claimant agreed, in her submissions in response, that in the previous action CV2014-04837, Justice Des Vignes did email certain points of law for the attorneys to consider but that on the morning of trial, she submits that *"the judge gave*

a strong indication of his analysis of the matter which were significantly different from what was expressed before during the Case Management Conferences." Therefore, counsel submitted that it was not agreed that there had been any concession on the issues as contended by the Defendant. Rather, counsel submits that her client gave a "strategic retreat" and that no finding of fact or law was made against the Claimant.

Further, counsel submitted that the plea of issue estoppel is not applicable for three reasons as follows:

(i) **The parties to the previous action are not the same;**

(ii) **The previous matter was not determined on its merits as it was withdrawn; and**

(iii)**The Claimant did not receive a benefit from the previous action.**

III. Law & Analysis:

[15] The principles of law that warn against the multiplicity of proceedings are contained both in statute and case law. Statutorily, we look to **Section 20 of the Supreme Court of Judicature Act, Chap 4:01**, which states:

> *"The High Court…in the exercise of the jurisdiction vested in them by this Act and the Constitution shall in every cause or matter pending before the Court grant, either absolutely or on such terms and conditions as to the Court seems just, all such remedies whatsoever…so that as far as possible, all matters in controversy between the parties may be completely and finally determined,* ***and all multiplicity of legal proceedings concerning any of those matters avoided****."*

[16] At common law, guidance is given by the doctrine of *res judicata*, which effectively seeks to prevent an abuse of process by duplicity of proceedings. Such duplicity can be prevented by way of: (i) the doctrine of cause of action estoppel, which seeks to prevent the same cause of action being litigated separately; (ii) the doctrine of issue estoppel, which seeks to prevent the re-litigation of the same issue in separate matters with a different cause of action; and finally (iii) abuse of process by way of the Rule in

Henderson v Henderson, which, as explained below, seeks to prevent the bringing of a claim that ought to have been brought in earlier proceedings.

Halsbury's Laws of England[1] explains the differences succinctly:

> *"The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter,* ***that same matter cannot be reopened by parties bound by the decision, save on appeal****. It is most closely associated with the legal principle of 'cause of action estoppel', which operates* ***to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their privies), and having involved the same subject matter****. However, res judicata also embraces* ***'issue estoppel'****, a term that is used to describe a defence which may arise where* ***a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue****. For this reason, res judicata has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon which the courts have endeavoured to impose some coherent scheme only in relatively recent times."*

Somervell LJ stated in **Greenhalgh v Mallard [1947] 2 All ER 255 at 257** that issue estoppel may cover—

> ***"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."***

[1] Civil Procedure Vol 12A- Finality of Judgments and of Litigation (2015) at para 1603

[17] Further clarity on the scope and operation of the issue estoppel doctrine is given at paragraph 1623 of **Halsbury's** *ibid*:

> *"**The conditions for the application of issue estoppel require a final decision on the issue by a court of competent jurisdiction and that:***
>
> ***i. the issue raised in both proceedings is the same; and***
>
> ***ii. the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.***
>
> *Deciding if the issue is the 'same' in both cases will depend upon whether the court takes a narrow or a wide view of the extent of the issue determined in the earlier case. **It is now established that the question whether the raising of an issue in subsequent proceedings amounts to an abuse of process is one to be decided in a broad, merits based way in the light of all the circumstances**. Where a matter is held not to fall within the scope of issue estoppel, it may nonetheless be struck out as vexatious or frivolous; to re-litigate a question which in substance has already been determined is an abuse of process…"*

[16] Two things become apparent from the above learning which significantly prejudice the Defendant's defence of estoppel: both cause of action and issue estoppel require that (i) there be the same parties or privies in both actions; and (ii) there be a final decision given in the previous action, to which the current action now wishes to re-litigate. When applied to the facts of the two cases, i.e. **CV2014-04837** and the instant claim **CV2014-04835**, it is clear that neither of these requirements is met. For one, the defendant in the earlier matter is **Verlyn Grant**, whereas it is **Clair Holder** in the instant claim. Both were sub-tenants of Phyllis but they are clearly not the same person.

[17] Lord Denning in the Privy Council decision of **Nana Ofori Atta II & Ors v Nana Abu Bonsra II & Anor 1957 3 All ER 559** provided some clarity on this requirement of having the same parties or privies:

> *"**The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence**; but this general rule admits of two exceptions. One exception is that a person who is in privity with the parties, a privy as he is called, is bound equally with the parties, in which case he is estopped by res judicata; the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct."*

Therefore, as per the general rule, Clair Holder ought not to be adversely affected by the outcome of the action brought against Verlyn Grant. Further, there is nothing before the Court to suggest that Clair, as the Defendant in the instant action, was a privy of Verlyn Grant. More importantly, the Defendant did not opt to make any submissions to suggest that this was the case. Rather, the Defendant sought to rely on the case of **Rampersad v Cooblal CV2010-01850** where it is claimed, that the presiding Judge, Justice Charles, struck out the claimant's case as an abuse of process even though the defendants were not the same.

However, upon reading this case, I am not convinced that it can be used in support of the Defendant's submissions. For one, Justice Charles clearly set out the requirements of issue estoppel which include (i) that there be a final decision in the previous action; and (ii) that the parties or privies are the same. As to point (ii), Justice Charles noted that while the parties were not the same, the latter action was brought against the heirs of the defendant in the first action. Although Charles J did not expressly state it, it is likely that she would have concluded that the heirs of the defendants are considered to be his privies.

Her dicta was as follows:

> *"The Defendants contended that these proceedings are barred by issue estoppel. This doctrine states that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, **has been solemnly and with certainty determined against him**. Even if the objects of the first and second actions are different, the finding on a matter which came directly in issue in the first action, **provided it is***

embodied in a judicial decision that is final is conclusive in a second action between the same parties and their privies.

The conditions necessary for a successful plea of issue estoppel are:

i. The same question was decided in both proceedings;

ii. ***The judicial decision said to create the estoppel was final****; and,*

iii. ***The parties to the judicial decision or their privies were the same persons the parties to the proceedings in which the estoppel is raised or their privies***.

This is the fourth action instituted regarding the said lands and the third action relating to the issue of trespass to same. The previous actions, as highlighted above, indicate that the claimant/plaintiff was the same in the three (3) actions above, i.e. the son of Isaac Cooblal's landlord; ***while the defendant was Isaac Cooblal in two actions and his children in the third. The action now before the Court is once again between the heirs of these two (2) parties.***"

In my opinion, the heirs of the Defendant, if not considered the same party, would certainly be the earlier defendant's privies. In any event, the Defendant herein seems to have conceded that point in his submissions when he states:

> ***"However the Defendant herein concedes that the new Defendants were in fact successors in title to the first. For this reason the case at bar may be distinguishable from the matter before Justice Charles***.[2]"

I am therefore also in agreement that the facts in **Cooblal** *supra* are distinguishable from the instant matter. Further and in any event, the Defendant fails to overcome the second obstacle to issue estoppel, being that no final decision was rendered in **CV2014-04837** as the matter was withdrawn.

[2] Para 16

[18] In those circumstances, neither cause of action estoppel nor issue estoppel can apply to the case at bar.

Abuse of Process:

[19] As was hinted to in **Halsbury's** *ibid*, a broad, merit-based approach must be taken when assessing whether the bringing of an action amounts to an abuse of process as per the **Henderson Rule**.

[20] Indeed, in **Henderson v Henderson 1984 All ER Rep 378, 381**, Wigram V.C. opined that a claimant should be prevented from reopening a new case which should have been brought in earlier proceedings:

> *"…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 a matter which might have been 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.**"*

[21] Further, guidance on how the doctrine is to be applied by this Court was gleaned from the following Text as well as from the dicta of the higher courts in England in the following: **Johnson v Gore Wood & Co**[3], **House of Spring Gardens Ltd v Waite [1990] 2 All ER 990** and **Halsbury's Laws of England.**

[3] [2001] 1 All ER 481

In **Gore & Wood** *supra*, J, acting on behalf of his company, instructed the defendant in 1998, a firm of solicitors, to serve a notice exercising his company's option to purchase certain land. The solicitors duly served the notice, but the vendor disputed the validity of the notice. J's company, through its solicitors, issued proceedings against the vendor for specific performance. Although the court eventually granted the order, it was not until April 1992 that the land was conveyed to the company. By that time, the company had suffered substantial loss because of, *inter alia*, the cost of the proceedings.

Prior to the conveyance of the land, J's company in 1991, brought separate proceedings for professional negligence against the solicitors. J also informed the solicitors that he intended to bring a personal claim against them seeking similar reliefs. However, due in part to his limited financial resources, J had brought no such claim by December, 1992 when his company's proceedings for negligence against the solicitors were settled on payment of a substantial part of the sum claimed.

In 1993, after obtaining full legal aid, J finally brought his personal action against the solicitors for breach of duty, which sought several reliefs in addition to negligence for: (i) the manner in which they had exercised the option; and (ii) the advice given to him personally on the likely outcome and duration of the proceedings against the vendor.

In December 1997, the solicitors applied to strike out J's personal action as an abuse of the process of the court, contending that the action could and should have been brought at the same time as the company's first action. On the hearing of that application, the judge held that the solicitors were estopped by convention from contending that the action was an abuse.

On the solicitors' appeal, the Court of Appeal reversed the judge's finding on estoppel by convention and concluded that the proceedings were an abuse of process, holding that J could have brought his action at the same time as the company's proceedings and that he should therefore, have done so. J then appealed to the House of Lords.

The House of Lords reversed the Court of Appeal's decision primarily on the basis that, in the House's opinion, they took too much of a mechanical and narrow view of the doctrine of issue estoppel and failed to conduct the required broad merit-based assessment

of whether J, by bringing the second personal action, was misusing or abusing the processes of the Court. In particular, the House viewed that the question to be asked is whether in all the circumstances J's conduct was an abuse rather than narrowly looking at the personal claim as being duplicitous. Their ruling was as follows:

> *"Although the bringing of a claim or the raising of a defence in later proceedings might, without more, amount to abuse* ***if the court was satisfied that the claim or defence should have been raised in earlier proceedings****,* ***it was wrong to hold that a matter should have been raised in such proceedings merely because it could have been****. A conclusion to the contrary would involve the adoption of too dogmatic an approach to what should be* ***a broad, merits based judgment which took account of the public and private interests involved and the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party was misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before****.*
>
> *It was not possible to formulate any hard and fast rule to determine whether, on given facts, abuse was to be found or not. Thus, while lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, it was not necessarily irrelevant, particularly if it appeared that the lack of funds had been caused by the party against whom it was sought to claim. While the result might often be the same,* ***it was preferable to ask whether in all the circumstances a party's conduct was an abuse than to ask whether the conduct was an abuse and then, if it was, to ask whether the abuse was excused or justified by special circumstances****.*
>
> *In the instant case, the Court of Appeal had applied* ***too mechanical an approach, giving little or no weight to the factors which had led J to act as he had done, and failing to weigh the overall balance of justice****. His action was not an abuse of process and, in any event, it would be*

unconscionable in the circumstances to allow the solicitors to seek to strike out the claim. It followed that J's appeal would be allowed."

Thus, the House of Lords warns against applying the doctrine of abuse of process too strictly. Instead, I must ask, having accounted for the public and private interests, whether Phyllis was misusing or abusing the process of the Court by bringing this Claim.

[30] The Court of Appeal in **House of Spring Gardens Ltd v Waite [1990] 2 All ER 990**, adopted a similar approach to the issue of issue estoppel. In that case, the plaintiffs sued three defendants in England to enforce a judgment which they had obtained against those defendants in Ireland. The defendants pleaded in defence that the Irish judgment had been obtained by fraud. That was a contention which two of the defendants, but not the third (a Mr McLeod), had raised in the Irish proceedings to set aside the judgment, but the allegation had been dismissed by Egan J.

Summary judgment was given against the three defendants in England but Mr McLeod appealed against that judgment. The Court of Appeal held that Mr McLeod, like the other defendants, was estopped from mounting what was in effect a collateral challenge to the decision of Egan J. It also held that Mr McLeod's defence was an abuse of process. Stuart-Smith LJ said:

"The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court**, **it having been tried and determined by Egan J in Ireland.** In my judgment it would not; indeed, I think it would be a travesty of justice**. Not only would the plaintiffs be required to re-litigate matters which have twice been extensively investigated and decided in their favour** in the natural forum, **but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves.** The Waites have not appealed Sir Peter Pain's judgment, and they were quite right not to do so. The plaintiffs will no doubt proceed to execute their judgment against them. What could be a greater source of injustice, if in years to come, when the issue is finally decided, a different decision is reached in Mr Macleod's case? **Public

policy requires that there should be an end to litigation and that a litigant should not be vexed more than once in the same cause."

Guided by the above dicta, we have clarification as to what amounts to the 'interests of public policy'. The English Court of Appeal asks us to consider that there should be finality in litigation. It requires me to ask whether the re-litigation of the issues in CV2014-04837 in the instant case would serve the interests of justice. Finally, it asks this Court to account for the fact that, should it choose to dismiss the Defendant's submissions on abuse of process, there remains a significant risk that inconsistent verdicts could be rendered on the same issues.

[31] However, in similar fashion to my assessment on cause of action and issue estoppel, the applicability of the doctrine of abuse of process under the **Henderson Rule** seems to usually involve, based on the factual matrix of the above authorities, instances where the previous matter was decided by judgment. Indeed, **House of Spring Gardens** *supra*, which was a matter in which the principles of abuse of process were successfully applied, there had been a final judgment rendered in the previous action.

The learning submitted by the Defendant, however, seems to say that it is not a requirement that a final decision be handed down in the previous action before there be any finding that the latter claim be considered an abuse of the court's processes.

[32] Indeed, **Halsbury's Laws of England**[4] seems to agree with the Defendant:

> *Where a case does not fall within the rules relating to res judicata, the court may still exercise its discretion under its general inherent jurisdiction to prevent litigation that amounts to abuse of process so as to stop a party from raising an issue which was or could have been determined in earlier proceedings. The rule in Henderson v Henderson has been described as being essentially part of the court's wider jurisdiction for striking claims out as an abuse of process (or, alternatively, as an extension of res judicata). Although the rule is now understood to be separate and distinct from cause of action estoppel and issue estoppel, it has much in common with those doctrines, and the underlying public interest or policy is the*

[4] Civil Procedure Vol 11 (2015) at para 1652

same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.

The rule provides that a claimant is barred from litigating a claim that has already been adjudicated upon or which could and should have been brought before the court in earlier proceedings arising out of the same facts. Parties are expected to bring their whole case to the court and will in general not be permitted to re-open the same litigation in respect of a matter which they might have brought forward but did not, whether from negligence, inadvertence or even accident. The abuse in question need not involve the re-opening of a matter already decided in proceedings between the same parties, but may cover 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 new proceedings to be started in respect of them*. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive;* ***the question is whether in all the circumstances a party's conduct is an abuse****.*

The scope of the rule has been extended to claims where the earlier proceedings resulted in a compromise agreement between the parties and were not concluded by a judgment or order made by the court.

Again, the guidance given is that courts should restrain from too narrow an approach and must instead, look at all the circumstances of the case and ask whether the instant action is an abuse. But more importantly, it is now clear that the principles of abuse of process can apply to situations where there was no judgment or Court Order given in the earlier proceedings.

It follows, therefore, that the approach which I must adopt in deciding this preliminary point of law raised by the Defendant is made clear. The predominant question that I must ask is, after looking at the matter holistically, whether Phyllis's instant Claim amounts to an abuse of process considering the similarity of the facts and issues raised in the previous action of **CV2014-04837**. Further, the fact that the action against Verlyn Grant was withdrawn does not remove this case from the ambit of the abuse of process doctrine.

[22] It is therefore crucial that I avail myself of the audio transcript of the hearing of the **24th January, 2017** when the Order granting permission for Phyllis to withdraw her claim in the previous action was given by Des Vignes J (as he then was).

[23] On that day[5], Justice Des Vignes began by setting out the material undisputed facts in the matter as follows: **(i) that Phyllis held a 15 year lease with Gloria; (ii) that that lease expired in 2009; (iii) that Phyllis sought rent after the expiry of the Head Lease; (iv) that Phyllis did not pay any rent under the Head Lease after its expiry; (iv) that Gloria died in 2008 but her Head Lease agreement continued until 2009**.

Each of these facts is identical to the agreed facts pleaded in the instant Claim.

Justice Des Vignes then asked, upon the expiration of the 15 year Lease in 2009, on what basis was Phyllis collecting rent from 2009 to 2014? Phyllis's attorney submitted that her client was a "tenant holding over". Justice Des Vignes, however, corrected her on the law and informed her that her client, Phyllis, was really a *"tenant at sufferance"*.

He stated that, as a *tenant at sufferance*, Phyllis' position was precarious as she was prevented from creating another sub-tenancy, in which circumstances, the defendant would've been her licensee at best. Thus, Justice Des Vignes informed Phyllis that Mr Petamber was fully within his powers to enter and seize possession of the building at any time without notice. He noted, however, that had Phyllis still paid rent after expiration of the Head Lease, then she could have become a year to year tenant. But this was not done.

Justice Des Vignes further pointed out that (i) there was no evidence from Phyllis stating that anyone acknowledged her as a tenant of the premises after both the death of Gloria Morales and the expiration of the Head Lease; and (ii) that there is no evidence from Phyllis that she ever got written consent from the Lessor under the Head Lease to sub-let the premises. Both of these points would also apply to the case at bar.

Phyllis responded that she was not able to exercise the option to renew the Head Lease because Gloria had died. In those circumstances, the Judge informed both Phyllis and her

[5] See recording for the 24th January, 2017 in TG02 from 9:49 am to 12:10 pm

attorney that given the assessment above, their chances of success on the Claim were adversely affected.

The Judge then turned to the defendant and her attorney, Ms Moore-Miggins, informing them that they too had some challenges to their defence. The main one being that Gloria's Will has not been adduced and therefore, to justify that Mr Petamber had authority to act for Kerel Lashley, the Will proving Lashley's executorship of Gloria's estate must be produced. As it stands, Justice Des Vignes pointed out to the defendant that all that was before the Court was a Court Order entitling Lashley to apply for probate. Without the Will, Justice Des Vignes stated that there is a gap in the defendant's chain of evidence as Kerel Lashley's power of executorship over Gloria's estate is not properly proven.

The matter was then briefly stood down for further discussions in light of the Judge's assessment above.

Upon resumption, Ms Palackdharry Singh informed the Court that she received instructions from her client, Phyllis, the claimant, to withdraw the matter and that the parties agreed that there be no Order as to Costs.

[33] In my opinion, it is clear that the material facts and issues are the same in both matters. In those circumstances, the law applied by Justice Des Vignes in his discussion would be the same in the instant Claim. Further, the deficiencies in Phyllis's previous claim would also be present in the case at bar and thus, should I opt to point them out in similar fashion to Phyllis at any stage of these proceedings, there would be no basis on which Phyllis should achieve a different outcome. Moreover, it is my considered opinion that Phyllis' withdrawal of the previous action in the circumstances in which it was made, amounted to a concession that her Claim had no realistic prospect of success.

[34] Given my analysis above, I see no reason why the instant Claim should continue. Phyllis has not introduced any new facts, evidence or law in the instant Claim that changes the colour of the proceedings from that of **CV2014-04837**. I too agree, that upon expiry of the Head Lease, in circumstances where it is undisputed on the pleadings that Phyllis neither sought nor obtained a renewal, Phyllis was demoted in law to a tenant at sufferance and therefore, had no legal right to the property and by extension, no legal

right to collect or sue for outstanding rent. Thus, Mr Petamber was fully entitled to evict her and demand that the Defendant pay the rent to him instead.

To permit this matter to proceed would therefore offend the public policy arguments for finality in litigation and lead to an inconsistency in the outcome of the proceedings.

[35] I therefore move to strike out the instant Claim under **Part 26.1 (1) (k)** and **Part 26.2 (1) (b) of the CPR 1998**.

IV. Disposition:

[36] Accordingly, in light of the foregoing analyses, the order of the Court is follows:

ORDER:

1. **That pursuant to Parts 26.1 (1) (k) and 26.2 (1) (b) of the CPR 1998 the Claimant's Claim be struck out as an abuse of process of the Court.**
2. **That the Claimant pay to the Defendant her costs of the Claim to be quantified on the Prescribed Scale of Costs under CPR Part 67, in default of agreement.**
3. **The quantification of costs as ordered herein and the question as to whether the Counterclaim is still being pursued are adjourned to the 25th June, 2018 at 11:15 am in courtroom TGO 02.**

Dated this 26th day of June, 2018

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Robin N. Mohammed
Judge