

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV2011-04594

IN THE MATTER OF THE ESTATE OF NARASH RAMLOGAN, DECEASED

Between

DHANMATIE RAMLOGAN

**(Administratrix *ad litem* of the Estate of Narash Ramlogan
pursuant to the Order of the Honourable Mr. Justice Rampersad
made on the 29th day of September, 2011)**

Claimants

And

**RAMESH PERSAD-MAHARAJ
ORANGEFIELD ESTATES LIMITED
SHAZAD KHAN
FARIZA KHAN**

Defendants

APPEARANCES:

Claimant	Mr. Malcolm Johnatty
First Defendant	Mr. Anand Singh instructed by Ms. Patricia Dindyal
Second Defendant	Mr. Phillip Hewlet-Lamont instructed by Mr. Ravin Persad-Maharaj
Third Defendant	Ms. Andre Goddard

DATE OF DELIVERY: 12th June, 2012

Before The Honourable Mr. Justice Devindra Rampersad

JUDGMENT

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1. The defendants in this matter have applied to this court to strike out the statement of case under part 26 of the CPR on the ground that the claim and statement of case are Res Judicata or amount to an abuse of process.
2. On 12th June 2012, this court directed the claimant to file an amended statement of case deleting the allegations of fraud and allowed the matter to proceed on the grounds of trespass and nuisance. The court initially made an order for costs against the defendants but subsequent to the hearing, the court recalled that order for costs and made an order that there be no order as to costs instead.

The Claim

3. The claimant filed a claim on November 25th 2011 and an amended claim on January 13th 2012 as the administratrix of her deceased husband Naresh Ramlogan's estate ("Naresh") for certain reliefs including for the setting aside of this court's judgment in previous proceedings in High Court Action Number 2572 of 2000 and for possession of certain lands described as Lots 6A and 7A claiming that the defendants falsely claimed that those lands were conveyed to them. The claimant said that the defendants were fraudulent as "Orange Field Estates Limited", the purported purchaser, was not an incorporated company as at the date of the deed that purported to convey the land to them. Further the claimant claimed that the said "Orange Field Estates Limited" was in default of filing documents for the period 1998 to 2004 and as a consequence a notice was published in the Trinidad and Tobago Gazette whereby the company was given three months to file documents or face being struck off the Registrar of Companies. The claimant claimed further that the first defendant applied for the second defendant "Orangefield Estates" to be continued under the Companies Act 1995 and the company "Orange Field Estates" has since disappeared from the Companies Registry. The claimant claims that the alleged ownership of the land is tainted by the fraud of the first defendant.
4. The claimant further stated that even if there was no fraud the title conveyed by the deed was defective and did not convey what it purported to convey and gave details of the defects in the deed.
5. The claimant said that by High Court Action Number 2572 of 2000 Naresh sought a number of reliefs relating to a statutory tenancy and prescriptive rights and damages for

trespass but the claim was dismissed by this very court because the plaintiffs in that matter failed to plead adverse possession. The claimant said that *“it was an error on the part of the pleader to draft the pleading as a claim for prescriptive rights which is a claim for a right of way which was not the issue.”* She also claimed that since the fraud in relation to the title was not known to Naresh it was not brought to the attention of the judge and so she claimed that judgment was given against Naresh by the fraud of the first defendant and should therefore be set aside.

6. The claimant by her claim insisted that prior to his death Naresh had, by his continuous exclusive and undisturbed occupation, been in adverse possession of Lots 6A and 7A of the disputed land for over 16 years and therefore holds title.

The story so far

The previous proceedings – HCA No. 2572 of 2000

7. In the previous action, the plaintiff (Naresh) made a claim for the following reliefs:
 - 7.1. A Declaration that he was a statutory tenant of the subject lands – Lots 6A and 7A - pursuant to the Land Tenants [Security of Tenure] Act 1981;
 - 7.2. A declaration that as the statutory tenant, he is entitled to purchase the said lands or any part thereof in priority to any other person or persons;
 - 7.3. An order setting aside the sale of a portion of the said lands and particularly deed registered as number 25347 of 1999 dated 1 December 1999;
 - 7.4. Alternative to the above reliefs, a declaration that Naresh is entitled in possession to a prescriptive right to the said lands;
 - 7.5. An injunction preventing the defendants from taking possession of the said lands or any part thereof;
 - 7.6. An injunction preventing defendants from taking the possession of the said lands or any part thereof until the hearing and determination of the action.
 - 7.7. Damages for trespass.
 - 7.8. Costs.
 - 7.9. Interest.
 - 7.10. Such further and/or other relief.
8. In those proceedings, this court determined that the plaintiff was not entitled to rely upon a plea of adverse possession since it was not pleaded. This court went on to

consider issues which **were** raised on the pleadings in that matter. This court found that the plaintiff was not a tenant of the land but that there was an existing yearly tenancy in his father's name. This court did not grant any declaration in respect of the plaintiff being entitled to a "prescriptive right to the said lands" as the issue of prescription did not arise although this court expressed a view, of sorts, in respect of the position the court may have been willing to adopt if there had been a claim for adverse possession. Such a claim, however, was not before this court in those proceedings.

9. It must be stated that in those previous proceedings, there was no counterclaim made for possession of the lots in question. This court's decision in that matter was delivered on 7th October 2009 so that, up to that time, there was no determination of any parties' right to title in respect of the subject lands i.e. lots 6A and 7A.

The current proceedings

10. The claim in these proceedings is made by the claimant – Naresh's lawful widow - for the following reliefs:
 - 10.1. An injunction restraining the defendants from carrying out any building works on lots 6A and 7A;
 - 10.2. An order that the judgment of this court in the previous proceedings be set aside;
 - 10.3. An order that the claimant be restored into possession of lots 6A and 7A;
 - 10.4. A declaration that the claimant is the owner and entitled to possession of lots 6A and lot 7A.
 - 10.5. Deed of conveyance number DE 2010 00200539 in favor of the third named defendant be set aside;
 - 10.6. The Registrar of the Supreme Court execute a deed of conveyance vesting lots 6A and 7A in favor of the claimant or her nominees;
 - 10.7. Damages for trespass;
 - 10.8. An order that the first and second defendant demolish two walls erected by them;
 - 10.9. An order that the third and fourth defendants remove their encroachment from lot 6 and abate the nuisance caused by eaves overhanging on lot 7.

11. This claim was inspired by the following incidents:
 - 11.1. In April 2010, according to the claimant, the third and fourth named defendants forcibly and with the assistance of uniformed and armed police officers took possession of lot 6A.
 - 11.2. In September 2011, the claimant filled up lot 7A and spent \$30,000 to do so;
 - 11.3. In September 2011, the first named defendant took possession of lot 7A by force using the assistance of armed police officers. He then began building a wall between lot 7A and lot 7 and, thereafter, built a second wall separating lot 6A from lot 7A.
 - 11.4. The third defendant now claims to be the owner of lot 6A by deed of conveyance DE 2010 00200539.

Second Defendant's Notice of Application dated December 19th 2011

12. The second defendant filed a notice of application on December 19th 2011 for an order that:
 - 12.1. The claimant's claim and statement of case be struck out as being an abuse of process pursuant to Rule 26.2 of the Civil Proceedings Rules 1998 and/or under the inherent jurisdiction of the court.
 - 12.2. That judgment be given in favour of the defendants in this matter pursuant to Rule 15.2 on the grounds that the claimant's claim and statement of case have no reasonable prospect of success.
 - 12.3. Such further or other relief be afforded to the defendants as to the court seem just.
 - 12.4. Costs.
13. The notice of application was filed along with the affidavit of Ramesh Persad-Maharaj who is the first defendant and the managing director of the second defendant. The first defendant, who was admitted to practice as a solicitor of the Supreme Court of Judicature in 1969, started by saying that the claimant's attorney who made allegations of fraud against him failed to give him notice of the serious allegations in accordance with the code of ethics of the Legal Profession Act 1986.
14. On the substantive issue the first defendant stated in the affidavit that the claimant's attorney sought to introduce new issues as fresh evidence in order to circumvent the rule in ***Henderson v Henderson*** (1983) 3 Hare 100 and Res Judicata by concocting a case

of fraud. The second defendant said that all allegations and statements of fraud made were false vexatious, negligent and irrelevant and further stated that the claim had no legal basis.

15. The first defendant denied that Naresh was ever rented the disputed land by the first defendant and further stated that in HCA No. 2572 of 2000 this court ruled that the action must fail as Naresh never became the tenant and so could not claim the reliefs sought. The first defendant said that the claimant made a false statement in her application for letters of administration when she said that the 2 lots of land were rented by Naresh. The first defendant noted that Legal Action No CV 2011-63984 was brought on the 18th October 2011 by the first defendant against the claimant to strike out this false statement and for summary judgment. The first defendant noted that the claimant subsequently amended the inventory stating that Naresh was the owner of the land. The first defendant stated in his affidavit that this was a false statement.
16. This defendant then referenced High Court Action No. 2572 of 2000 whereby Naresh claimed as against the 2nd, 3rd and 4th defendants for a declaration that he was a statutory tenant. He said that the issues raised in the current action are the same issues that were raised or could have been raised in HCA No. 252 of 2000 and as such this current action is Res Judicata and an abuse of process.
17. The first defendant stated that the claimant attempted to raise new issues as fresh evidence to justify this claim and noted certain paragraphs where he claims that the claimant's attorney made false, negligent and vexatious statement against him.
18. He maintained that the central issue in this action is the 2 lots of land and nothing else and the matters of fraud raised by the claimant are irrelevant and have nothing to do with the action. He noted that he was not the owner of the two lots of land but instead the second defendant, in respect of which he is managing director, was. He stated further therefore that the inclusion of his name as 1st defendant was mischievous and vexatious and only served to increase costs.
19. With respect to the alleged defect in title the first defendant annexed four deeds as proof of ownership. He further stated that the claimant's attorney was in breach of rule 16 of Part A of the code of ethics of the Legal Profession Act by his allegation that the title was defective. The first defendant asked that the claim be dismissed.

The First Defendant's Notice of Application of the 22nd December 2011

20. The first defendant filed a notice of application on the 22nd December 2011 on the grounds that on the 16th October 2000 Naresh brought HCA No. 2572 of 2000 against the 2nd, 3rd, and 4th defendants in relation to the same parcels of land that are the subject matter of this action. That said claim was dismissed on the 7th October 2009 and is therefore barred by the principles of Res Judicata. Another ground for relief was that the allegations of fraud at paragraph 17 of the claimant's statement of case were scandalous and the particulars of fact neither supports fraud to set aside the original judgment nor was it sufficiently material to the issues before the court. On this basis the first defendant applied for the matter to be set aside as the claimant had no realistic prospect of success.

Defence of the third defendant

21. The defence of the third defendant was filed on the 30th December 2011 without prejudice to any preliminary points that the third defendant may wish to take. In it the third defendant denied that the two subject lots were not owned by the second defendant. While the third defendant claimed to be a stranger to much of what was pleaded, he said that Ramlogan, Naresh's father, was the tenant of the lands from the first defendant.
22. The third defendant denied that he used any force against the claimant as alleged and instead stated that the first defendant attempted to prevent the third defendant from erecting a fence on Lot 6A. In any event the third defendant said that Lot 6A was rendered unstable by reason of the flooding occasioned by the acts of the claimant.
23. In defence he also said that at no time after judgment was given in CV 2007-00923 did the claimant ever attempt to take possession of Lot 6A.

Third defendant's Notice of Application of 11th January 2012

24. The third defendant filed a notice of application on 11th January 2012 whereby he applied for the claimant's claim form and statement of case to be struck out and for judgment to be granted to the third defendant in accordance with Part 15.2(b) on the basis that the claim had no reasonable prospect of success. This defendant listed as grounds for his application the fact that the claimant failed to set out any grounds for setting aside the disputed Deed of Conveyance; the issue of trespass by the defendants

onto the subject lands was Res Judicata having disposed of this court in the judgment of HCA No. 2572 of 2000.; the issue of a tenancy agreement between the claimant and the second defendant in respect of the subject land is Res Judicata; it is an abuse of process for the claimant to raise the question of adverse possession in circumstances where the claimant had the opportunity so to do in H.C.A No 2572 of 2000; and finally the claimant's fails to set out any of any sufficient particulars to form the basis of a claim for damages of injunctive relief.

25. The affidavit of Shazad Khan supported the notice of application and in it he detailed the reasons for the reliefs sought above.

Second Defendant's submission in support of the application to strike out the claimant's statement of case.

26. The second defendant filed submissions in support of the application to strike out the claimant's statement of case on March 16th 2012. In it he submitted firstly that the claimant failed to plead either in the claim form or in the statement of case, that the title of the defendant or any of them has been extinguished by virtue of the Limitation Acts. He relied on the case of *Ketteman v Hansel* (1987) 2 WLR 312_in support of his submission and went on to say that, in those circumstances, not having pleaded the limitation act, the claimant cannot rely on any claim for adverse possession.
27. This defendant submitted that the claimant's plea of adverse possession is bound to fail for the reason that Ramlogan prior to his death claimed that he has was on the two lots of land for over 16 years. The defendant stated that because Narash Ramlogan was the claimant in a prior action then the claimant's plea of adverse possession in this action is bound to fail for a separate reason. In the prior action Naresh claimed existence of a tenancy and so it was submitted that on this basis time did not run against the fee simple holder. They noted that in that judgment the court specifically found at paragraph 104 that the two lots of land were tenanted to Naresh's father under a year to year tenancy which has never been determined. And so any new claim to adverse possession must fail. In addition they submitted that in this case, when the estate of the tenant, Naresh's father, came to an end, then the freeholder, Orangefield, could have evicted the squatter. Consequently, the squatter, to win this case, must show adverse possession against the fee simple owner not against the tenant, and this he cannot do. The defendant relied on

the case of *Fairweather v St. Marylebone Property Co Ltd* (1962) 2 WLR 1020 in support of submissions.

28. Finally this defendant submitted that the bringing of this case is an abuse of process because it is between the same parties as the previous action (HCA No 2572 of 2000) and it raises matters which were raised in the previous matter, and if these matters were not raised, they could and should have been so raised.

First defendant submissions in support of his application to strike out the claimant claim and statement of case.

29. The first defendant filed submissions on the 20th March 2012. His submission was that the claimant case must fail because:
- 29.1. the claimant is barred from bringing this case by virtue of Res Judicata;
 - 29.2. the claimant lacks any locus standi to bring the claim for the reliefs claimed
 - 29.3. the particulars of fraud do not affect in any way whatsoever the determination that the court had made and that the first defendant is an unnecessary party for the reliefs claimed.
30. The first defendant relied on many cases in support of these submissions.

The claimants submissions of 26th March 2012

31. The claimant filed submissions on the 26th March 2012. The claimants relied on several cases to prove that in order for the claim to be struck out the defendant would have to prove that there is no reasonable prospect of success. The claimant denounced the defendants for stating that there was insufficient evidence in the statement of claim and submitted that a statement of claim does not act as evidence and even submitted that the defendant 'misunderstood the nature of an application to strike out.'
32. The claimant reiterated the nature of the claim and stated that a judgment tainted by fraud can be set aside. He claimed that the alleged fraud was only discovered by legal advisers in late 2011 and that it must be taken that the claimant is going to be able to prove the allegations of fraud at trial. He relied on the cases of *Kuwait Airways Corporation v Iraqi Airways Co (No. 2)* [2001] 1 WLR 429, *Skone v Skone* [1971] 1 WLR 812, *Visham Boodoosingh v Richard Ramnarace* Privy Council Appeal Number 50 of 2003 among others.

33. The claimant also submitted that the action was not caught by the Res Judicata rule. The claimant said that Naresh was unaware of the fraud that affected the title claimed by Orangefield Estate limited in the old action. In support of the submissions reliance was placed on the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. The claimant further submitted that the question must be asked whether the court would have still made the determination in favour of the second defendant in the previous case had the present facts been before the court.
34. The claimant further submitted that even if the old judgment is not set aside for fraud the facts disclose a cause of action for trespass that occurred after the judgment. The claimant submitted that the court in the prior case found that a statutory tenancy still existed in favour of the estate of Ramlagan and so the dismissal of the case simply meant that Naresh was not a tenant and there was no order requiring Naresh or his family to vacate the lots. No notice to quit was given and no ejectment proceedings were pursued. Further they claimed that a paper title owner must recover on the strength of his own title and not on the weakness of the occupier's title and they relied on the case of *Randolph B Murray v Hendrickson Biggart* in support of his submissions.
35. The claimant therefore asked the court to dismiss the applications with costs.

Second defendant's reply in support of the application to strike out

36. The second defendant filed submissions in reply on the 25th April 2012. The second defendant's first submission reiterated that the claim was an abuse of process and that 'the estate of Naresh ought not to have two bites at the cherry.'
37. On the issue of fraud the second defendant submitted that the claimant was tainted and confused by the two Orange Field companies and that it was this confusion which the affidavit of the first defendant sought to clarify. He said that Orange Field Estates Limited was duly incorporated at the time of the Gobin conveyance as it was incorporated on 20th December 1972. He said that it was this company who has always owned the lands. This defendant submitted that although this company was struck off in 1995 Mr. Justice Ventour made an order to restore the company on 9th January 2004. He said the other company which was incorporated on 29th July 1997 was not the owner of the lands and was not the second defendant. He said that this company has been struck off the record.
38. The defendant referred to the claimant's submission that the trial judge found that there was a yearly tenancy in Ramlagan, Naresh's father which has not been terminated. The

defendant admits this is a good point but states that the claimant did not bring the claim in the estate of Ramlagan but rather brought the claim in the estate of Naresh. The defendant further submitted that the tenancy had in fact been terminated and annexed copies of notices to quit that were sent to the administrator general and to the claimant.

The claimants supplemental submissions of 3rd May 2012

39. The claimant reiterated that the two companies of the defendant were separate and that the defendant sought to defraud the claimant. The claimant submitted that the company that is today pretending to own land was never in existence in 1973 but is relying on ownership by a 1973 deed.
40. With regard to the notice to quit the defendant submitted that the letter was returned. The claimant submitted that she should have the opportunity at trial to show that the practice in this jurisdiction is to serve a Notice to Quit personally and if the occupants cannot be found, to nail a copy of it in some prominent position, e.g. on a post on the land. The claimant further submitted that even if a Notice to Quit had been served, it is not without more a licence to remove occupants by force. It is only the first step and the way to proceed is by an application for ejectment or for summary possession and therefore submitted that they were not validly served.

Issues

41. The issues for determination, therefore, are as follows:
 - 41.1. Whether the issue of fraud is relevant in these proceedings to give a basis to set aside the court's previous judgment in High Court Action Number 2572 of 2000;
 - 41.2. Whether the present case before the court is an abuse of process;
 - 41.3. Whether the present case should be struck out on the grounds of it being Res Judicata.
 - 41.4. Whether the claimant has no realistic prospect of success on any part of her claim and the claimant statement of case should be struck out.

The fraud issue

42. It is necessary, at this stage, for this court to make some comments on the claimant's allegations of fraud which comprise a substantial part of the statement of case.
43. The claimant provided submissions that a judgment tainted by fraud can be set aside. The claimants claim that the company purporting to be the title owner to the disputed lands was not in existence at the time that the deed was executed. The claimant further claims that the second company was formed to essentially defraud the Board of Inland Revenue, the Companies Registry and the court. These are serious allegations made by the claimant.
44. In the case of *Taylor and another v Lawrence and another* [2002] EWCA Civ 90, the court referenced the fact that one of the ways in which an original judgment may be considered to set aside would be if the court found **that the original judgment was based on fraudulent facts.**
45. In *Flower v Lloyd* (1877) 6 Ch.D. 297 James L.J. made an important point by stating “*you cannot go to your adversary and say you obtained the judgment by fraud and I will have a rehearing of the whole case until that fraud is established. **The thing must be tried as a distinct and positive issue.***” The court found that unless the fraud had been established the original judgment should not be set aside.
46. The claimant provided many cases in support of their submissions that a judgment based on fraud should be set aside. In the case of *Hip Foong Hong v Neotia and Co* [1918] AC 888 the court did indeed state that a judgment affected by fraud should be set aside and the court went on further to state that in such a circumstance an independent action to set aside the judgment is a more convenient mode than a motion for a new trial supported by affidavits. That case like in the *Flower* case further stated that “*the fraud must be both alleged and proved and the better course in such a case is to take independent proceeding to set aside the judgment upon the ground of fraud when the whole issue can be properly defined, fought out and determined.*”
47. In *Noble v Owens* [2010] 1 W.L.R. 2491, the court relied on both *Flower* and *Hip Foong Kong* among other cases to show that while a judgment can be set aside for fraud a party should bring fresh proceeding on the basis of fraud. In that case the case was remitted to the lower court to be tried on the fraud allegation. I agree with this proposition.

48. The claimant's allegation that the first named defendant has perpetrated a fraud on this court which induced, in some way, the judgment in the previous proceedings is, to my mind, quite misconceived.
49. The previous proceedings were commenced by the claimant's husband for recourse against the same parties in these proceedings. There was never any counterclaim made for possession so that the court had no interest in those previous proceedings in the title of the defendants and, in particular, of the first and/or second named defendant. Had there been a claim for possession, then the defendants' title may have been put in issue and any fraud perpetrated in relation to the establishment of that title would have been relevant in those proceedings. In such a situation, it would then have been validly suggested that the original judgment was based on an alleged fraud. However, that is not the case.
50. In the previous proceedings, Naresh acknowledged the second named defendant's title as landlord and sort initially to impress upon this court that he was entitled to a statutory tenancy. In such an event, a tenant would be estopped from denying the title of the landlord. However, the claim for the statutory tenancy was jettisoned at the last moment and a claim for adverse possession instead was sought even though not pleaded.
51. In those circumstances, the allegations of fraud in relation to the second named defendants' title in these proceedings are wholly irrelevant to the issues which were raised in the previous proceedings and which fell for determination in those proceedings. To repeat, the defendants' title in the previous proceedings did not have an influence upon this court as the court was not called upon to establish or pronounce upon that title.
52. Consequently, this court is of the view that the allegations made in these proceedings, which on the face of it seem quite scurrilous and which may have to be struck out at the appropriate time, are not relevant to the issue for determination by this court at this time and therefore does not justify any attempt to set aside this court's judgment in the previous action.

Is the claim Res Judicata because of the judgment in HCA 2572 of 2000

53. The general rule is that the outcome of litigation should be final. The landmark decision of **Henderson v Henderson** (1983) 3 Hare 100 clearly outlines the principle that where a matter was the subject of adjudication by a court of competent jurisdiction, the parties to

that litigation would not be permitted to open the same litigation in respect of matters which were or ought to have been brought forward.

54. ***Halsburys Laws of England*** Fourth Edition reissue volume 16(2) at paragraph 977 described Res Judicata as a “*fundamental doctrine of all courts that there must be an end to all litigation*” and further stated that “*it amounts to an allegation that the whole legal rights and obligations of the parties are concluded in an earlier judgment*”. The court then is mandated to look at the previous judgments and make a determination as to whether the whole of the legal rights of the parties were considered and judgment was made in the determination of these rights.
55. This principle of Res Judicata has also been well considered in the appeal courts. In the Jamaican case ***Patrick v Beverly Gardens Development Co*** [1979] A.C. 547, in an appeal for possession of certain lands, the respondents argued that the case had been heard before a resident magistrate and was Res Judicata. Counsel for the appellants argued that “*to form a basis for estoppel per rem judicatem there has to be a final determination of the issue by a court of competent jurisdiction. A judgment on an interlocutory aspect is not sufficient and it is open to a plaintiff to bring further proceedings on the same factual basis... To constitute Res Judicata on an issue as to title a judgment must purport to determine that issue... if there has been no decision on the merits there is no Res Judicata.*” The Privy Council agreed with the appellants and found that the order for possession made by the resident magistrate did not constitute a basis for Res Judicata since “*the merits of the title issue were not considered.*”
56. In the decision of ***Thomas v Attorney General of Trinidad and Tobago*** (1981) 32 WIR 375, the Privy Council found that it was in the public interest that there should be *finality* (emphasis mine) to litigation and that no person should be subjected to action at the instance of the same individual more than once in the same issue. Their Lordships in outlining the principles of Res Judicata found that a cause of action must have been validly determined or could and should have been validly determined in the first proceeding. This they found was “unexceptionable”.
57. Mohammed J in ***Ralph Bissoon v The Attorney General of Trinidad and Tobago*** HCA S1872 of 2002 described the two relevant issues when determining Res Judicata as firstly whether the same parties were involved in both actions and whether the matters were dealing with the same substantive issue. Pemberton J echoed the sentiments of

Mohammed J in *Ronald Daniel v The Attorney General of Trinidad and Tobago* CV 2009-00398.

58. The case law and learning is clear. A court must consider whether the substantive issue in a claim brought by the same parties has already been determined by a court.
59. The court must now consider whether what was determined in the prior case was substantially the same issue considered in this case.
60. The court finds that the principal issue in this new case is not substantially the same as the previous case since that case dealt with the existence or the possibility of the confirmation by the court of the statutory tenancy (which was abandoned at the trial) and a claim for prescriptive rights. This new claim in these proceedings cannot, to my mind, amount to a rehearing of the same issues and therefore this court finds that the case as pleaded does not lend itself to the principle of Res Judicata.

Is this case an abuse of process?

61. Bearing in mind what was said by the House of Lords in *Johnson v Gorewood*, which built on the *Henderson* principle, the question for determination by this court is whether or not these proceedings amount to an abuse of process and, very importantly, whether the issues raised in these proceedings could have and should have been raised in the previous proceedings in such a manner as to prevent the claimant from raising them now as she has done.
62. There are two aspects of the case at present:
 - 62.1. The first and more substantial aspect is the aspect in relation to the alleged unlawful disturbance of the claimant's possession of lots 6A and 7A in 2010 and 2011. These acts must be borne in mind against the backdrop of there being no order for possession having being sought or granted in the previous proceedings. The issue therefore for this court to determine is whether or not, in 2010 and 2011, as alleged in the statement of case, the defendants unlawfully dispossessed the claimant of lots 6A and 7A which she was in possession of. To my mind, this is a new allegation which does not amount to an abuse of process. This question really centers around the right of the defendants to take possession of lands which are in the claimant's occupation in 2010 and 2011 (after the delivery of this court's decision in 2009) without an order of the court, in a forceful manner. Of course, this is dependent upon the claimant establishing that she was in

possession of those parcels of land and that is an issue of fact to be determined by evidence. If the claimant was not in possession, then the defendants would have been quite within their rights to enter onto the lands and do as they saw fit without any order from this Court. Otherwise, other considerations may come into play.

62.2. The second named defendant has argued persuasively that, this court having found the existence of a tenancy, then the second named defendant's right to possession does not arise until that tenancy comes to an end. That fact has not yet been pleaded since there is not yet any defence filed by the second named defendant so this court has no statement on the pleadings which refers to any determination of the tenancy. Even if there were, this court is of the view that other legal issues may arise under section 3 of the Real Property Limitation Act Ch 56:03. Consequently, once the claimant has been in continuous possession, certain issues may arise for determination by this court which do not amount to an abuse of process.

62.3. The second aspect is the issue of the flooding alleged by the claimant in respect of the third and fourth named defendant's house on lots six which creates a nuisance by flooding the claimant's adjacent land. To my mind, this aspect is a new allegation which ought to be allowed to proceed to trial as a result of a continuing unlawful act.

63. The court is of the view that this is not an abuse of process as the acts complained of have occurred in 2010 and 2011. The validity of these acts need to be determined in relation to the issue of the claimant's possession at that time and which can only be done at trial after hearing of evidence.

The Order

64. In those circumstances the respective applications for the striking out of the claim are dismissed save that all allegations of fraud made in the statement of case shall be struck out and the claim for the setting aside of the previous judgment based on that allegation of fraud is also struck out.

Costs

65. Initially, this court announced the following order for costs:
- 65.1. The first and second named defendants shall pay to the claimant 25% of the costs of their respective applications to strike out the statement of case;
 - 65.2. The third named defendant shall pay to the claimant 50% of the costs of his application to strike out the statement of case;
 - 65.3. The claimant shall file and serve a statement of costs by 26th July 2012;
 - 65.4. Permission granted to the respective defendants to file and serve their objections if any to the statement of costs by the 20th of September 2012. Further hearing on the statement of costs would be dealt with on the act the first CMC.
66. The following order was also announced in court:
- 66.1. The court notes that the claimant will file and serve a re-amended statement of case striking out the allegations of fraud by 17th of September 2012 so that the time for the filing of the defences will run towards the end of October.
67. Prior to the drawing up and perfection of the order, this court reflected on the order for costs because the court was of the view that both sides had benefited from the ruling. The major part of the claimant's claim, which was founded on fraud for the setting aside of this court's previous judgment, was struck out but a portion of the claim remained for determination by the court in relation to the allegations of trespass and nuisance. It cannot be denied, however, that the claimant's trump card was the elaborate allegation of fraud, in respect of which much time and effort seemed to have been spent. Any allegation of fraud is a serious allegation and it quite obviously would have sparked uneasiness in relation to the validity of this court's previous order, which was now being sought to be set aside. The parties would obviously have arranged their affairs in contemplation of this court's previous order's validity. Therefore, to a large extent, the defendants were successful in excising the major thrust of the claim. On the other hand, the claimant has the benefit of proceeding with her factual situation post-2009 and the benefit of validly questioning the actions of the defendants' post 2009.
68. In those circumstances, bearing in mind the fact that the defendants' applications had the effect of whittling away the claim to one of trespass and nuisance and thereby, potentially, saving valuable time and resources for the court and for the parties, this court was of the view that the fairest order to make in the circumstances was no order for costs.

69. That position was suggested by the defendants at the hearing on the 19th July 2012. In fact, all parties voiced their views on the appropriate order for costs at that hearing.
70. There is no doubt in this court's mind that it had the jurisdiction and the discretion to have reconsidered its order for costs prior to the perfection of the order. In **Hession v Jones** [1914] 2 KB 421 the court determined that "*All courts would have power to make a necessary correction if the order as drawn up did not express the intention of the Court.*" In **Hall v Meyrick** [1957] 2 Q.B. 455_it was held that "*Even if the judge had intended to give a final ruling, it was always open to him, until the order was drawn up, to change his mind.*" This has become settled law and this is what the court relied upon to do what it thought was the fairest outcome in all of the circumstances.
71. Consequently, the previous order for costs was recalled and an order that there be no order for costs made instead.

Devindra Rampersad
Judge